

TYING *KABLE* DOWN: THE UNCERTAINTY ABOUT THE INDEPENDENCE AND IMPARTIALITY OF STATE COURTS FOLLOWING *KABLE V DPP (NSW)* AND WHY IT MATTERS

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I INTRODUCTION

Impartiality and independence of the judiciary have long been recognised as fundamental principles underpinning the administration of justice and ‘essential condition[s] for maintaining the rule of law’.¹ Yet despite a widespread conceptual and philosophical acceptance of the necessity of judicial impartiality and independence, these principles are often undermined in practice, especially through legislative and executive interference in the judicial branch.

At a Commonwealth level, the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp) was clearly drafted to ensure ‘the guarantee of liberty and, to that end, the independence of Ch III judges’.² Perplexingly however, the High Court refused to decisively describe the scope and limits of judicial courts wielding federal judicial power, which include State courts. Whilst this position has been justified on the grounds that it provides the courts with much needed flexibility, we argue that it also allows attrition of their powers, at least at the State level.

It was therefore a turning point in judicial history in Australia when the High Court formally recognised the requirement that all Australian courts must satisfy minimum criteria of judicial independence in the decision of *North Australian Aboriginal Legal Aid Service v Bradley*.³ In that decision, six judges found that to be a ‘court capable of exercising the judicial power of the Commonwealth’, a decision-making body must be constituted in such a way that it ‘be and appear to be an independent and impartial tribunal’.⁴ Beyond this however, the High Court

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1 The Hon C S C Sheller, ‘Judicial Independence’, (Speech delivered at the Annual Conference of the Industrial Relations Commission of New South Wales, Sydney, 3 May 2002) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_sheller_030502> at 12 December 2008.

2 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

3 (2004) 218 CLR 146 (‘*Bradley*’).

4 *Ibid* 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

has been reluctant to define exactly how these aspirational terms actually apply to State courts, instead leaving the difficult task to lower appellate courts.

In this article we examine the High Court's equivocal position on what exactly undermines the impartiality and independence of State courts and the problems that arise from such a stance. This includes the ability of parties to exploit the current uncertainty on technical and not substantive grounds. For instance, we will discuss the case of *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*⁵ in which Kenny J posited that a terminally ill pensioner would be unable to have his discrimination complaint heard, because of the lack of 'institutional arrangements and safeguards'⁶ by the decision-making body entrusted power to hear complaints of that sort. Apart from the obvious problems for litigants in such situations, it is apparent that State legislatures must be increasingly attentive as to whether the bodies that now exist at State level are capable of wielding federal judicial power.

We argue that the current position is becoming increasingly precarious: for litigants, for courts and indeed for legislatures who will need to react decisively to strengthen State decision-making bodies against jurisdictional attacks. However it is also submitted that it is incumbent on the High Court, sitting at the 'apex' of the judicial system, to provide the necessary demarcation as to what will constitute judicial independence and impartiality.

II A SHORT HISTORY OF JUDICIAL INDEPENDENCE AND IMPARTIALITY

Judicial independence and impartiality are, nowadays, treated as intrinsically linked concepts. This was not always the case; whilst rules on judicial impartiality extend to the very foundations of the common law, judicial independence came with the rise of Parliament and representative government.

Under the common law system, judges provided oaths to the Monarch that they would act impartially as early as the 13th century,⁷ something strengthened by statute in the following century.⁸ Such statutes evidenced the Monarch's commitment to fair and effective justice; indeed, they were evidence of their capacity to control their judicial subordinates and the judicial system generally. They were also meant to encourage public trust in, and therefore willing involvement in, the legal system. Whilst the rule of law is no longer a royal

5 (2008) 169 FCR 85 ('Nichols').

6 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 68 (Gleeson CJ).

7 From the 13th century, English Regents took oaths to 'do justice impartially and mercifully': Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (2001) 221. Such oaths were repeated by judicial officers who acted as the Regent's representatives in the day-to-day administration of the common law. See Enid Campbell, 'Oaths and Affirmations of Public Office under English Law: An Historical Retrospective' (2000) 21(3) *Journal of Legal History* 1.

8 *Statute of 7 Richard II: For the Improvement of Justice 1384*.

concern, the principles underlying judicial impartiality in the early common law remain relevant today.⁹

Despite public declarations about judicial impartiality – statutory or otherwise – public disaffection with the judicial system grew over time. Revolts against royal justice were common and Parliament became increasingly vocal about the failure of the judicial system to actually act in an impartial manner.¹⁰ So long as judges owed their allegiance to a sole individual, and not to the administration of justice generally, laws about judicial independence were meaningless, especially as such laws were created and controlled by the very person promulgating them. Perceived failures of the judicial system and the ‘tyrannical’ control over it contributed to the English Civil War and, following it, the imposition by the victorious Parliament of the *Act of Settlement 1701* (Imp) (*‘Act of Settlement’*) upon the Crown. The operation of that Act was simple but extremely effective. Judges were given tenure and security of remuneration, effectively removing them from royal and executive influence.¹¹

Thus, the intermeshing of independence and impartiality arose with the move towards popular sovereignty, quickly cementing themselves within the very foundations of the common law, and ‘jealously’ maintained by the judiciary.¹² In his *Commentaries on the Laws of England*, Blackstone summarised the common law position as follows:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative.¹³

9 Namely: to ensure fair access to justice to citizens subject to legal disputes; to ensure public trust and confidence in the administration of justice is maintained; and, as a consequence, to ensure people willingly participate in the judicial system as the forum to resolve their disputes.

10 See, eg, Musson, above n 7, 63.

11 ‘That after the said limitation shall take effect as aforesaid, judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them’: *Act of Settlement* c 3. This ensured that judges could only be dismissed by a successful address as to the misconduct of a judge to both Houses of Parliament. It is worth noting however, that judicial tenure was mentioned in Parliamentary petitions as early as 1641: see Joseph Smith, ‘An Independent Judiciary: The Colonial Background’ (1976) 124 *University of Pennsylvania Law Review* 1104.

12 As Eve J eloquently observed in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276, 289:

If [a judicial officer] has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person’s impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists.

13 William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 1996) vol 2, 269.

III INDEPENDENCE AND IMPARTIALITY INTERNATIONALLY

The principles of judicial independence and impartiality were also adopted outside of the British common law tradition and, over time, have become canonical aspects of most legal and constitutional systems throughout the world.¹⁴ The near universal acceptance of these principles has translated into a wide range of international instruments relating to the rule of law. These include the *Universal Declaration of Human Rights*,¹⁵ the *International Convention on Civil and Political Rights*,¹⁶ a wide range of United Nations (UN) resolutions,¹⁷ and specific statements relating to international standards of judicial practice.¹⁸

Of particular note are the *Basic Principles on the Independence of the Judiciary* ('*Basic Principles*') and the *Bangalore Principles on Judicial Conduct*

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- 14 The Preamble to the *Bangalore Principles on Judicial Conduct*, eg, states 'the recognition of the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions'. See also Jessica Conser, 'Achievement of Judicial Effectiveness through Limits on Judicial Independence: A Comparative Approach' (2005) 31 *North Carolina Journal of International Law and Commercial Regulation* 255; Mads Andenas, 'A European Perspective on Judicial Independence and Accountability' (2007) 41 *The International Lawyer* 1.
- 15 *Universal Declaration of Human Rights*, GA Res 217, UN GAOR, 3rd sess, art 10, UN Doc A/810 (1948).
- 16 UN Economic and Social Council, *Strengthening Basic Principles of Judicial Conduct*, Res 2007/22, opened for signature 26 July 2007, 999 UNTS 171, arts 6, 14 (entered into force 23 March 1976). See also *African Charter on Human and Peoples' Rights* (1986) art 7; *American Convention on Human Rights* (1969) art 8; *Inter-American Democratic Charter* (2001) art 3.
- 17 Eg, *Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders*, GA Res 40/32, UN, 40th sess, 96th plen mtg, UN Doc A/Res/40/32 (29 December 1985); *Human Rights in the Administration of Justice*, GA Res 40/146, UN, 40th sess, 116th plen mtg, UN Doc A/Res/40/146 (13 December 1985); Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Situation of Human Rights in Myanmar*, E/CN.4/2004/33 (5 January 2004); Commission on Human Rights, *Sub-Commission on the Promotion and Protection of Human Rights: Situation of Human Rights in Myanmar, Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-fifth Session*, E/CN.4/Sub.2/2003/43 (5 January 2004); Commission on Human Rights, *Report of the Situation of Human Rights in Afghanistan*, UN E/CN.4/2002/43 (2002); Commission on Human Rights, *Independence of Judges and Lawyers: Submitted in Accordance with Commission on Human Rights Resolution*, E/CN.4/2002/72/Add.2 (21 December 2001); Commission on Human Rights, *Report on the Situation of Human Rights in the Democratic Republic of Congo*, E/CN.4/2000/42 (18 January 2000).
- 18 *Beijing Basic Principles on the Independence of the Judiciary* (1985); *International Bar Association's Minimum Standards of Judicial Independence* (1982); *UN Basic Principles on the Role of Lawyers* (1990); *Bangalore Principles*; *Cairo Declaration on Judicial Independence* (2003); *Suva Statement on the Principles of Judicial Independence and Access to Justice* (2004).

(‘*Bangalore Principles*’), both of which have been endorsed by the UN¹⁹ and set out key standards for the maintenance of a free, independent and impartial judiciary and the mechanisms by which they are achieved.²⁰

Article 1 of the *Basic Principles* specifies that

[t]he independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the Judiciary.

Article 2 of the *Basic Principles* requires the judiciary to act impartially and without any ‘improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason’.

The values of independence and impartiality are also given primacy in the *Bangalore Principles*.²¹ These values are based upon a number of premises,²² most relevant of which are:

- That full equality and fair public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charge are a fundamental human right recognised under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*;
- The implementation of all other rights ultimately depends upon the proper administration of justice by an independent and impartial judiciary;
- A competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law; and
- Trust and confidence in the integrity of the judiciary is of the utmost importance in a modern democratic society.

Whilst not all international laws and rules bind domestic legislatures, they do reflect Australia’s commitments and obligations as a member of the international

19 The *Basic Principles on the Independence of the Judiciary* (‘*Basic Principles*’) were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 26 August to 6 September 1985, Milan, Italy and endorsed by the United Nations General Assembly Res 40/32 (29 November 1985) and 40/146 (13 December 1985): *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, GA Res 40/32, UN, 40th sess, 96th plen mtg, UN Doc A/Res/40/32 (29 December 1985). The *Bangalore Principles* were drafted by an international group of Chief Justices and Superior Court Judges from around the world as an ‘expression to the highest traditions relating to the judicial function as visualised in all the world’s cultures and legal systems’ and have subsequently been endorsed by the United Nations Social and Economic Council resolutions 2006/23 and 2007/22, which encourages their adoption by member States in the development of rules of conduct for the Judiciary: UN Economic and Social Council, *Strengthening Basic Principles of Judicial Conduct*, Res 2006/23 (27 July 2006). See Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct*, 5th Meeting of the Judicial Integrity Group (28 February 2007, Vienna), 2007.

20 Judicial Integrity Group, above n 19.

21 Value 1, eg, states that ‘Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial’ whilst value 2 states that ‘[i]mpartiality is essential to the proper discharge of the judicial office [and] ... applies not only to the decision itself but also to the process by which the decision is made’.

22 See Preamble to the *Bangalore Principles*.

community.²³ They also reflect the basis and the status of the principles as fundamental and arguably normative legal principles.

IV HARD WON BUT RARELY SHARED

Regardless of the universal acceptance of judicial independence and impartiality as fundamental components of a healthy legal system, their implementation into law and practice has proved challenging. So much is recognised in the preamble of the *Basic Principles*, which states, ‘frequently there still exists a gap between the vision underlying those principles and the actual situation’.

In part this is because decision-makers remain cautious about losing the authority to make final decisions, and the executive has often expressed frustration about what they view as intervention in the exercise of sovereign power.²⁴ As Gleeson CJ has noted extra-judicially:

It is self-evident that the exercise of [judicial review] such as this will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action. ... This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.²⁵

It is also interesting to note that, even where judicial independence is won, those who have gained it are often reluctant to pass on the rewards to their subordinates, at least to the same level enjoyed at superior levels. Certainly this is the case with the British, who refused to extend the spoils of the English Civil War – namely judicial independence under the *Act of Settlement* – beyond its shores to its colonies.²⁶ This double standard meant that judicial independence was something only to be maintained at the very heart of the empire, and not at its peripheries, where a greater level of control over disobedient populations, and indeed their colonial masters (of whom judges formed a part) was required.²⁷

23 See Justice Kirby’s discussion as to the use of international laws relating to judicial impartiality on domestic law in *Smits v Roach* (2006) 227 CLR 423, 459–65.

24 See the Hon Michael McHugh, ‘Tensions Between the Executive and the Judiciary’ (2002) 76 *Australian Law Journal* 567; the Hon Murray Gleeson, ‘Legal Oil and Political Vinegar’ (1999) 10 *Public Law Review* 108.

25 Gleeson, above n 24, 111.

26 Leonard Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (1930) 383. McLaren describes the British position vis-à-vis the colonies as follows:

[The] imperial authorities wanted to exercise a power, if it proved necessary, to discipline colonial judges who became an embarrassment, not only because of personality and tendencies towards corruption, but also, and perhaps more importantly, because they were politically suspect and unduly sympathetic to local interests. In this matter the provision in section 3 of the Act of Settlement relating to judicial independence in England was considered by the imperial authorities as having no application in the colonies: John McLaren, *British Colonial Judges on Trial, 1800–1900* (unpublished, copy on file with author) ch 3.

27 Conversely, the retention of control over judges was justified on the grounds that judges might ‘succumb to the temptation of favouring ruling cliques’ that tended to dominate small communities. See Paul Knaplund, *James Stephen and the British Colonial System* (1953), cited in Alex Castles, *An Australian Legal History* (1982) 150.

Some colonies, such as those that were to become the United States of America ('US'), rejected the British position and, in their own battle against what they saw as tyrannical intervention in the administration of justice, made a declaration of independence from Britain. That declaration specifically sought to address grievances about external interference with the judiciary in a constitution establishing the newly independent country.²⁸ This was achieved by creating a separation of powers between the three branches of government. Being a constitutionally entrenched doctrine, judicial power was placed at arm's length of the legislative as well as executive branches, ensuring that its boundaries were clearly demarcated and free from governmental interference and popular bias.²⁹

V THE AUSTRALIAN POSITION

The Australian colonies were established after the American War of Independence, yet the attitude of the British remained one of intransigence with respect to judicial independence in Australia. Hence, the *Act of Settlement* was taken not to apply to the new Australian colonies,³⁰ something sanctioned by the English commons.³¹ Instead, judges held office at the pleasure of the executive.³²

Whilst many early colonial judges did act under the assumption of judicial independence,³³ executive, and later legislative, interference in the judiciary was common in the early Australian colonies.³⁴ Judges who irritated local authorities

28 In the List of Grievances in the Declaration of Independence they complain that the King 'has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries': Frederic Stimson, *The Law of the Federal and State Constitutions of the United States* (2004) 80.

29 When Madison introduced his 12 amendments to the *Constitution of the United States of America* he stated: 'independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive': United States Library of Congress, *Annals of Congress*, vol 1, 439.

30 *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482 (Goddard CJ). See generally, Geoffrey Lindell, 'Applicability in Australia of Section 3 of the *Act of Settlement 1701*' (1980) 54 *Australian Law Journal* 628.

31 In 1848 the United Kingdom Government put to the Commons that 'relations ... between the governments of the colonies and the judges was essentially different from those which existed ... at home, for the independence of the judges did not exist in the colonies'. This position seems to have been accepted. See United Kingdom, *Parliamentary Debates*, House of Commons, 12 July 1848, 256.

32 David Neal, *The Rule of Law in a Penal Colony: The Rule of Law in a Penal Colony* (1991) 88. Further, the *Australian Courts Act 1828* (Imp) 9 Geo 4 provided colonial authorities with the discretion to remove Supreme Court judges 'as the occasion may require'; although, it should be noted that a right of appeal was available under the *Colonial Leave of Absence Act 1782* (Imp) 22 Geo 3, c 75.

33 Sometimes to their detriment. For instance, the early 'harmonious' relationship between Governor Macquarie and Judge Advocate Bent in New South Wales broke down in 1814 after the Judge asserted that his position was independent and not subordinate to the military rule of the Governor. Governor Macquarie reacted by refusing to allocate sufficient resources to the court and complaining to London that the Judge did not observe the formality of standing when the Governor arrived at the church for service. After further clashes and frenzied correspondence to London, Governor Macquarie succeeded in having Bent, and his brother, also a Judge Advocate, dismissed from office. See Neal, above n 32, 95.

34 Neal, eg, describes early New South Wales litigation as 'politics carried on under another name' with governors having few qualms about directing judges (whom, as colonial servants, they outranked) to act in a manner they believed to be the best interests of the colony: Neal, above n 32, 88.

risked loss of income or other privileges and in some cases outright dismissal as colonial servants under the *Colonial Leave of Absence Act 1782* (Imp) ('*Burke's Act*').³⁵ Although Britain eventually bowed to pressure and introduced measures designed to ensure greater judicial independence from the executive branch,³⁶ 'imperial power decided the direction and pace of change'.³⁷

VI THE AUSTRALIAN POSITION AT A STATE LEVEL

The State Constitution Acts, along with their modern equivalents, effectively apply the British system of tenure, whereby judicial officers are appointed until the age of 70 and can only be removed following a successful motion to both Houses³⁸ of Parliament.³⁹ However, the majority of States are silent as to the cause for dismissal, with only NSW and Queensland limiting the grounds to 'proved misbehaviour' or 'incapacity';⁴⁰ in other States these grounds are accepted as forming constitutional practice.⁴¹

States also limit financial influence by protecting judicial salaries from diminution in remuneration, or by utilising independent statutory authorities to determine pay scales.⁴² Judges are also protected by common law – and, in Queensland, statutory – immunity from suit for acts done in pursuance of judicial

35 A number of judges were 'removed' during the course of the 19th century, including three Supreme Court Judges by the Colonial Office at the request of local governors in New South Wales (Willis J), Van Diemen's Land (Tasmania) (Montague J) and South Australia (Boothby J): Castles, above n 27, 241.

36 Chief amongst these was the 'Memorandum of the Lords of the Council on The Removal of Colonial Judges' (1870) 6 Moo PC, New Series, Appendix, pp xi–xii], which set out clear, transparent procedures for the dismissal of a judge as follows:

When a Judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the Colony of his guilt, it would be extremely improper that he should continue in the exercise of judicial functions during the whole time required for a reference to England, or a protracted investigation before the Privy Council. Immediate suspension is in such cases a necessity, if much greater evils are to be avoided. But it must be borne in mind, that a Governor who resorts to such a measure, takes it at his own peril, and is bound to make out a complete case in justification of it.

37 Neal, above n 32, 91.

38 Or, in the case of Queensland, the Lower House only as its Upper House was abolished in 1922.

39 *Supreme Court (Judges' Independence) Act 1857* (Tas) s 1; *Constitution Act 1889* (WA) s 55; *Constitution Act 1902* (NSW) s 53; *Constitution Act 1975* (Vic) s 77; *Constitution Act 1934* (SA) s 75; *Constitution of Queensland 2001* (Qld) s 61. The territories have similar provisions: see *Supreme Court Act 1978* (NT) s 40; *Judicial Commissions Act 1994* (ACT) s 5.

40 *Constitution Act 1902* (NSW) s 53(2); *Constitution of Queensland 2001* (Qld) s 61(2). The territories have similar provisions: *Supreme Court Act 1978* (NT) s 40; *Judicial Commissions Act 1994* (ACT) s 5(1).

41 David Clark, *Principles of Australian Public Law* (2nd ed, 2007) 257–9.

42 Victoria, Queensland and South Australia all expressly provide that the salary of a Supreme Court judge cannot be reduced. See *Constitution Act 1975* (Vic) ss 77(2), 82; *Constitution of Queensland 2001* (Qld) s 62(2); *Supreme Court Act 1935* (SA) s 12(3). Tasmania pegs judicial salaries to an average between South Australian and Western Australian equivalents, thereby importing the same rule by proxy: *Supreme Court Act 1887* (Tas) s 7. In New South Wales and Western Australia judicial salaries are determined by independent statutory authorities: *Salaries and Allowances Act 1975* (WA) s 7; *Statutory and Other Offices Remuneration Act 1975* (NSW) s 3.

office.⁴³ In return for these protections, judges swear oaths to act without bias or ill will towards the parties and in the administration of justice.⁴⁴

Thus State courts are protected through a range of measures, which emulate the British model of judicial independence. That said, most protections are far from entrenched in the constitutional law of the States. Rather, those protections derive from a mixture of received tradition, common law doctrine and legislation that has been developed as the States matured into independent entities. In all these cases such rules can generally be repealed by ordinary statute.⁴⁵ Furthermore, the *Act of Settlement* does not apply to the states, nor do their constitutions expressly apply the separation of powers doctrine utilised by the US founders to ensure the courts are free from interference.⁴⁶ Judicial authority within the State courts,⁴⁷ the Privy Council⁴⁸ and the High Court⁴⁹ indicates that no such doctrine can be implied into contemporary State constitutional law either.

In contrast to Blackstonian common law theory discussed above, it is also clear that State judicial power rests in the legislature and not in the judiciary.⁵⁰

43 The protection is wide-ranging and is one of the strongest forms of common law immunity from suit: see *Sirros v Moore* [1975] QB 118, 132 (Lord Denning MR). The issue has not been directly dealt with in the Australian context although it seems to be accepted that the rule applies here. See, eg, *Fingleton v The Queen* (2005) 227 CLR 166; *Wentworth v Wentworth* (2000) 52 NSWLR 602; *Carruthers v Connolly* [1998] 1 Qd R 339; *X v South Australia (No 3)* (2007) 97 SASR 180; *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2004) 189 FLR 360.

44 See, eg, *Promissory Oaths Act 1869* (Tas) s 4; *Oaths Act 1900* (NSW) sch 4; *Supreme Court Act 1935* (WA) sch 2; *Oaths Act 1936* (SA) s 11; *Constitution Act 1975* (Vic) s 6D; *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 20.

45 *Nicholas v Western Australia* [1972] WAR 168, 173, 175; cf *Clyne v East* (1967) 68 SR (NSW) 385, 395, 396–401; *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 400–1, 419; *Gilbertson v South Australia* (1976) 15 SASR 66, 84–5, 109–110; *Kotsis v Kotsis* (1970) 122 CLR 69, 76; *Mabo v Queensland* (1988) 166 CLR 186, 202; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652, 659–60.

46 As was noted in the case of *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullager and Kitto JJ): 'The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of separation of powers'.

47 *Clyne v East* (1967) 68 SR (NSW) 385; *Powercoal Pty Ltd v Industrial Relations Commission (NSW)* (2005) 64 NSWLR 406; *Gilbertson v South Australia* [1978] AC 772; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652; *S (a child) v The Queen* (1995) 12 WAR 392; *R v Tilley* (1991) 56 SASR 140.

48 This includes approval by the Privy Council of the proposition that the establishment of the Supreme Court was not part of the fundamental law of the state (in that case, of South Australia, but arguably in other States) but was rather subject to the plenary powers of Parliament and that 'such jurisdiction might involve the exercise of powers which do not fall within the concept of judicial power as it has been applied to constitutions based on the separation of powers which the State constitution of South Australia is not': *Gilbertson v South Australia* (1977) 14 ALR 429, 435.

49 Some commentators have argued that the decision of *Kable v DPP (NSW)* (1996) 189 CLR 51 (which is discussed at length below) has created a 'quasi-separation' of powers at the state level. See, eg, Kristen Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?' (1997) 20(2) *University of New South Wales Law Journal* 257, 271. However, that decision turned on a separate incompatibility doctrine, and it was accepted by the High Court that no separation of powers existed in the *Constitution Act 1902* (NSW) per se: *Kable v DPP (NSW)* (1996) 189 CLR 51, 93–4 (Toohey J), 117–18 (McHugh J), 142 (Gummow J).

50 *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ).

This means that State parliaments can significantly alter the constitution of State courts,⁵¹ require them to undertake non-judicial functions or indeed, grant non-judicial authorities judicial powers.⁵²

It is therefore relatively easy for State governments to influence or direct State courts, and thus the status of the courts as an independent institution relies largely on the goodwill of their respective parliaments. That said, the notion of judicial independence is so central to modern legal and political theory that overt attempts to undermine the judicial branch would attract significant criticism from the legal fraternity and, indeed, the wider public. As Clark notes, suggestions that a legislature might completely dismantle the court system are ‘so unlikely as to be practically in the realms of fantasy’.⁵³ Similarly, directly removing measures designed to ensure judicial independence is likely to be politically unpalatable. Rather, the real threat is the slow erosion of the institutional boundaries of the court, which is discussed in more detail below.

VII THE AUSTRALIAN POSITION AT A COMMONWEALTH LEVEL

Unlike the US, the Australian federation was not born of the desire for independence from the tyranny of foreign rule; Australia retained its place in the British Commonwealth and within the common law legal tradition. Central to that tradition was the doctrine of representative government, which, with its concomitant fusion of executive and legislative branches,⁵⁴ precluded the adoption of a clearly delineated separation of powers.⁵⁵ Yet, equally central to the English tradition was the concept of judicial independence, and it was clear the Founders intended this be reflected in the *Constitution* so as to ensure that the very liberties that representative government was intended to create were properly protected and maintained.⁵⁶

Having no written constitution, Britain provided little direction as to how to guarantee judicial independence within a single document. Nor did the limited, and arguably ineffectual, provisions of colonies’ constitution acts provide sufficient protection for the court that was to be the ‘guardian’ and ‘bulwark’ of the *Constitution*.⁵⁷ The founders therefore sought to formalise many of the rules

51 Although it would appear that, following *Kable v DPP (NSW)*, they can no longer abolish them. See especially *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 111–12 (McHugh J), 139 (Gummow J).

52 Indeed, Gibbs CJ considered in *Kostis* (1970) 122 CLR 69, 76 that ‘so far as their constitutions are concerned the States have no need to distinguish between the judicial and administrative functions’.

53 Clark, above n 41, 99.

54 *Commonwealth Constitution* ss 41, 62, 64.

55 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

56 See Blackstone, above n 13. It was also intended that the courts would determine the constitutionality of legislative and executive action; thus it was imperative for the Founders that the courts were capable of acting in an impartial and unbiased manner: Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000).

57 Patapan, above n 56, 156, citing *Constitution* debates.

set out in the British common law tradition where possible. Hence, section 72 of the *Constitution* guarantees security of remuneration and tenure of judges.⁵⁸ However, the Founders also paid heed to provisions of the *Constitution of the United States of America*, which formally established an independent and impartial judiciary.

Although a formally entrenched separation of powers was not possible in the Australian context, the *Constitution* adopts a structure that reflects the US model.⁵⁹ It is apparent that a dominant basis for structuring the *Constitution* in this manner was to connote judicial separation from the other branches.⁶⁰ In an equally clear adoption of the US model, section 71 of the *Constitution* vests the ‘judicial power of the Commonwealth’ in the High Court, and not the legislature, in wording that is extracted from article III of the *Constitution of the United States of America*.

The independence of the federal judiciary has been written about extensively elsewhere;⁶¹ suffice to say, the High Court quickly moved to resolve any ambiguity in the hybrid nature of the *Constitution*. In a series of early cases, the High Court set about interpreting the structure of the *Constitution* and the provisions of Chapter III as necessitating a clear separation of judicial power.⁶² The justification for this doctrinal separation was explained in the joint judgment of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*:⁶³

The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.⁶⁴

What is also worth noting at this juncture is the refusal by the High Court to decisively describe the scope and limits of the term ‘judicial power’ under section 71.⁶⁵ This has traditionally been justified on the basis that the concept of judicial power is nebulous and incapable of precise boundaries and that, ‘in the end, judicial power is the power exercised by the courts and can only be defined by reference to what courts do and the way in which they do it’.⁶⁶ As Sawyer

58 Now to the compulsory retirement age of 70 after the 1977 Referendum.

59 Specifically, by establishing three distinct branches, under three separate chapters.

60 Fiona Wheeler, ‘Original Intent and the Doctrine of the Separation of Powers in Australia’ (1996) 7 *Public Law Review* 96, 98–9.

61 See, eg, Sir Anthony Mason, ‘Judicial Independence and the Separation of Powers – Some Problems Old and New’ (1990) 13(2) *University of New South Wales Law Journal* 173; Peter Gerangelos, ‘The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes from the United States’ (2005) 33 *Federal Law Review* 391; the Hon Murray Gleeson, ‘The Right to an Independent Judiciary’ (2006) 16(4) *Commonwealth Judicial Journal* 6.

62 The insulation of the judicial branch would culminate in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, which set out two complementary and now axiomatic principles deriving from the separation of federal judicial power under the *Constitution*: that only properly constituted federal courts can wield federal judicial power; and that federal courts may not be conferred with non-judicial power.

63 (1996) 189 CLR 1 (*‘Wilson’*).

64 *Ibid* 11.

65 The High Court has instead looked to a number of indicia to indicate what judicial power is, giving them different weight or impact depending on the circumstances.

66 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

points out, such a circular argument is somewhat unconvincing.⁶⁷ Rather, it belies the fact that the ambiguity serves to actually facilitate the administration of justice and separation of power by, on the one hand, permitting minor judicial powers to be vested in non-judicial bodies so as to alleviate court case loads, whilst on the other hand ensuring that the definition is malleable and capable of maintaining judicial independence in the face of change in the constitutional, political and legal landscape of Australia.

Hence, at the Commonwealth level, judicial independence remains jealously guarded, both in the provisions of the *Constitution* and the interpretation given to it by the High Court. In fact, the Court has utilised ambiguities in the *Constitution* to further shore up the separation of judicial power as a bulwark against external interference. At all times it has justified these measures as central to preserving the ‘essential feature’ of the Court as an ‘impartial tribunal’.⁶⁸

VIII MAINTAINING THE RULE OF LAW

As noted above, resentment of judicial power exists in many fora, including – and increasingly from – within the other two branches of government. Despite this, the protections in the *Constitution* have ensured that political attacks on the federal courts have not, as yet, translated into successful institutional attacks on their integrity. However, the *Constitution* does not provide the same protections for State courts and therefore, the threat against judicial independence and impartiality is greatest at that level of our federation.

State courts are not ignored by the *Constitution*; the Founders intended that such courts would act as proxy adjudicators on federal matters until such time as federal courts could be established to replace them.⁶⁹ The *Constitution* additionally vests the High Court with appellate jurisdiction from all State Supreme Courts, placing it at the pinnacle of the Australian judicial hierarchy. Beyond this however, the *Constitution* is silent as to the character of the courts. For instance, the rules for appointment, tenure, and remuneration under section 72 are only expressed so as to apply to federal courts and no mention is made of State courts under that section. This silence has, historically, been taken to mean that such issues are to be determined solely by State legislatures who hold judicial power at that level and that the Commonwealth, in all its capacities, must take a State court ‘as it finds it’.⁷⁰

67 Geoffrey Sawer, ‘The Separation of Powers in Australian Federalism’ (1961) 35 *Australian Law Journal* 177.

68 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 271. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45.

69 Thus ss 71 and 73 of the *Constitution* allow the Commonwealth Parliament the power to vest federal jurisdiction in ‘such other courts’ as it deems necessary.

70 See, eg, *Federated Sawmill, Timberyard and General Woodworkers’ Employees’ Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ); *Kotsis v Kotsis* (1970) 122 CLR 69, 109 (Gibbs J); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J); *Kable v DPP (NSW)* (1996) 189 CLR 51, 102 (Gaudron J).

As has been previously discussed, the Commonwealth ‘finds’ State courts in a position that only attracts the most minor entrenched constitutional protections for judicial independence. This, along with a lack of any formalised separation of powers doctrine at the State level, means that ultimately, the independence of State courts are reliant upon the respect for such notions by the legislature, and more precisely, the executive officers who control them. Governments who do not hold a high regard for the protocols established to ensure separation between executive and legislative branches may remove such protocols;⁷¹ avoid them by passing resolutions without proper debate;⁷² or, in some instances, ignore them completely.⁷³ Perhaps more dangerously, governments may simply not understand the importance of the separation of powers doctrine.⁷⁴

Nor is a lack of recognition of the limits of executive power something that is relegated to one state or period of history. Certainly the colonial history of the states indicates a precedent for interference with the judicial branch. Recent allegations that the former Lennon Government in Tasmania interfered with all organs of government, including the judiciary, provides a contemporary reminder that such matters are not relegated to the history books.⁷⁵ Yet, such overt attacks on the court, even at the State level, are relatively rare, not least because of the potential backlash from the legal fraternity and electorate.⁷⁶ Rather, the real threat to the courts arises from a much more gradual diminution of the traditional boundaries and protections surrounding the courts.

One alarming trend has been a slow, but steady transition towards the politicisation of the judicial function and the decision-making processes. A greater willingness by politicians and even government ministers to personally

71 For instance, by ‘scrapping’ internal procedures designed to ensure judicial appointments are independent of the Executive branch: see Michael Stedman, ‘Law officer screening “dropped”’, *The Mercury* (Hobart), 18 September 2008, 11.

72 See Sir Guy Green, ‘The Rationale and Some Aspects of Judicial Independence’ (1985) 59 *Australian Law Journal* 135.

73 For instance, the Bracks Government’s rejection in 2004 of the independent tribunal’s recommendations on judicial salaries. See Peter Gregory, ‘Judges’ Fury Over Pay Rebuff’, *The Age* (Melbourne), 13 April 2004.

74 As the Hon C S C Sheller has noted extra-judicially:

Despite the importance of judicial independence and the often repeated statements by community leaders world wide that this independence must be preserved, many do not appreciate what the expression implies. Few understand that judicial independence is an essential condition for maintaining the rule of law: see Sheller, above n 1.

75 This included ‘leaning’ on an ex-judicial officer who was at the time chairing an independent tribunal, and overriding a judicial appointment of an individual who had contrary political views. See Sue Neales, ‘Lennon Tardy in New Appointments’, *The Mercury* (Hobart), 5 April 2008, 32; Sue Neales, ‘Push for Clearer Judge Postings’, *The Mercury* (Hobart), 4 July 2008, 2; Matthew Denholm ‘Bartlett Reforms to “Re-establish Trust”’, *The Australian* (Sydney), 16 August 2008, 4; ABC Television, ‘Jack Johnston’, *Stateline*, 15 August 2008 <<http://www.abc.net.au/stateline/tas/content/2006/s2336911.htm>> at 31 January 2009.

76 The disintegration of support for Premier Paul Lennon is a case in point, with the Premier retiring only a few days after a poll found his support within the electorate at a meagre 17 per cent: see Wayne Crawford, ‘Signs Hastened Lennon’s Going’, *The Mercury* (Hobart), 10 June 2008, 25.

attack contentious court judgments,⁷⁷ or of governments to promise greater public scrutiny of judges and/or their decisions,⁷⁸ reflects either a lack of understanding or sympathy for why judicial power must be separated, or indeed a rejection of that notion altogether. The refusal of some Attorneys-General to step into the ‘political melée’⁷⁹ and defend the courts – as they traditionally had done – reveals a disturbing trend by the executive to see courts as merely forming part of the political hierarchy who need not be shielded from the political skirmishing.⁸⁰

Also of concern to many commentators is the slow attrition of the institutional integrity of State courts. One way in which this has occurred is through the conferral of administrative functions on judicial officers, which risks politicising the courts by their sensitive nature.⁸¹ The use of judicial officers to authorise anti-terrorism measures and covert operations are two common examples. As Jersey CJ of the Queensland Supreme Court noted extra-judicially:

State legislatures plainly remain alive to the utility of invoking the reputations of their Supreme Courts to lend authority to what could be described broadly as administrative decisions in controversial areas. ... The proliferation of tribunals, especially in the States, might not reflect some change in Executive regard for the courts of law.⁸²

Conversely, institutional attrition has occurred through the gradual vesting of judicial powers in bodies other than courts, especially tribunals. This has been justified on a number of grounds, including their role in allowing the courts to concentrate on appellate matters, and the ability of specialist tribunals to prosper. In this respect such tribunals have an important role to play. Yet the transfer of responsibility for an increasingly wide range of matters – especially rights-based ones – away from the courts is also a matter of concern, particularly when recipient tribunals are constituted of non-tenured members who generally have a close attachment to government. Their growth seems to reflect an attitudinal shift from viewing the judiciary as the appropriate arbiters of individual rights towards seeing them more as an impediment to the realisation of government policy.

It is an interesting, but ultimately futile, exercise to consider whether the Founders of the *Constitution* would have been willing to take State courts ‘as

77 See, eg. Andrew Clennell, ‘Political Chiefs Say Judges are Fair Game for Criticism’, *Sydney Morning Herald* (Sydney), 13 May 2006, 11; Matthew Franklin, ‘Premier Says Some Judges Over Lenient’, *The Courier Mail* (Brisbane), 12 December 2002, 3; Mark Riley, ‘Judge Blasts Howard and Carr Over Remarks’, *Sydney Morning Herald* (Sydney), 7 November 2003, 25; ‘Vic: Judge Protest Sour Grapes: Hulls’, *Australian Associated Press*, 16 May 2008.

78 This has been particularly acute in NSW where the lemma government, with the support of the Opposition, has been pushing to introduce lay community representatives to the key conduct division of the ostensibly independent NSW State Judicial Commission, in the face of criticism from the bar and bench: Janet Fife-Yeomans, ‘Lemma Defies Judge’s Attack’, *The Daily Telegraph* (Sydney), 31 January 2007.

79 Chief Justice James Spigelman, ‘Judicial Appointments and Judicial Independence’ (Speech delivered at the Rule of Law Conference, Brisbane, 31 August 2007).

80 Haig Patapan, ‘Separation of Powers in Australia’ (1999) 34 *Australian Journal of Political Science* 391.

81 Although we accept that some circumstances might deserve the attentions of a judicial officer, or at least, a retired one.

82 The Hon Paul de Jersey, ‘Evolution of the Judicial Function: Undesirable Blurring?’ *Upholding the Australian Constitution*, (Speech delivered at the 17th Conference of The Samuel Griffith Society, Coolangatta, 8 April 2005).

they found them' at the present day. Perhaps the more relevant question is whether the various courts and quasi-courts of States are suitable receptacles of federal judicial power under contemporary constitutional principles. It is to these questions that we now turn.

IX A CHAPTER III 'COURT'

Since the early days of Federation, the High Court has accepted that State judicial power was a matter outside the jurisdiction of the Commonwealth.⁸³ Hence, in *Commonwealth v Hospital Contribution Fund of Australia*,⁸⁴ Gibbs CJ accepted the Court's position might allow the judicial power of the Commonwealth to be exercised by a State 'court' 'composed of laymen, with no security of tenure'.⁸⁵ This statement appears odd for an outspoken advocate of judicial independence, who had previously extra-judicially argued that:

[T]he independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves.⁸⁶

Such conflicting positions reflect the conundrum for a court, which on the one hand speaks to the universality of judicial independence but on the other, has been cautious about extending the principle beyond the limits of Commonwealth jurisdiction. The result has been, disappointingly, a division of the Australian court system into two tiers, one in which judicial independence is mandated, and one in which such ideals are discretionary.

The severity of this dichotomy was softened in the High Court decision of *Kable v Director of Public Prosecutions (NSW)*,⁸⁷ as the Court discovered a new avenue and new willingness to extend judicial independence to the State level. However, the equivocal and sometimes confusing application of that case in later judgments reflects an ongoing struggle to resolve the apparently conflicting desires of establishing universal boundaries for judicial independence whilst simultaneously respecting the division of powers under the *Constitution*.

83 See, eg, *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ); *Kotsis v Kotsis* (1970) 122 CLR 69, 109 (Gibbs J); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J); *Kable v DPP (NSW)* (1996) 189 CLR 51, 102 (Gaudron J). See also *Le Mesurier v Connor* (1929) 42 CLR 481, 495–6 (Knox CJ, Rich and Dixon JJ), which cited with approval the statement of Isaacs J in *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437, 452 that

[t]he *Constitution*, by Chapter III., draws the clearest distinction between federal Courts and State Courts, and while enabling the Commonwealth Parliament to utilize the judicial services of State Courts recognizes in the most pronounced and unequivocal way that they remain "State Courts"... the Courts of a State are the judicial organs of another Government. They are created by State law; ... that law, primarily at least, determines the *Constitution* of the Court itself, and the organization through which its powers and jurisdictions are exercised.

84 (1982) 150 CLR 49.

85 *Ibid* 57.

86 Cited in Sir Ninian Stephen, '1981 Southey Memorial Lecture' (1982) 13(3) *University of Melbourne Law Review* 334.

87 (1996) 189 CLR 51 ('*Kable*').

X KABLE AND BEYOND

In *Kable*, the High Court considered the validity of NSW legislation that directed a State court to detain a named individual past the term of his existing sentence. Although the legislation in question required that the court be satisfied of a continuing future threat, it ultimately centred upon ‘what [he] might do, not what [he] has done’.⁸⁸

The legislation was challenged on several grounds, including that it offended the separation of powers doctrine by constituting legislative judgment. This argument was unanimously rejected by the High Court, which reiterated that State constitutions are not predicated on a separation of judicial from non-judicial powers. Instead, the majority of the High Court applied the incompatibility doctrine, which had previously been utilised to test the limits of the validity of Federal Court judges acting in a personal, non-judicial capacity (*persona designata*).

In the *Kable* decision the majority considered that constitutional incompatibility arose when State courts were interfered with in such a way that public confidence in their ability to act independently and with due process was undermined. Because of the integrated nature of the court system, the loss of public confidence in lower courts would percolate up through the entire Australian legal system, of which the federal courts are also a part.⁸⁹ In such circumstances, the procedural safeguards of the *Constitution*, namely the separation of powers and associated incompatibility doctrine, could be invoked. Hence, according to McHugh J:

While nothing in Ch III prevents a State from conferring non-judicial functions on a State Supreme Court in respect of non-federal matters, those non-judicial functions cannot be of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State.⁹⁰

Justice McHugh therefore concluded that, ‘the effect of Ch III of the *Constitution* may lead to the same result as if the State had an enforceable doctrine of separation of powers’.⁹¹ The question that arose however, was just how far this doctrine extended and just when State law would offend the *Commonwealth Constitution*.

The initial reception to the *Kable* ratio certainly appeared to relegate the principle to a factual matrix, which Toohey J described as ‘virtually unique’.⁹² State courts rejected a number of attempts by counsel to invoke the principle⁹³ and, even when the High Court examined ostensibly similar State legislation in

88 Ibid 97 (Toohey J).

89 Ibid 101 (Gaudron J).

90 Ibid 117 (McHugh J).

91 Ibid 118.

92 Ibid 98.

93 See, eg, *R v Moffatt* [1998] 2 VR 229, 237, 579–80; *R v Whyte* (2002) 55 NSWLR 252, 271; *R v MSK and MAK* (2004) 61 NSWLR 204, 216.

*Fardon v Attorney-General*⁹⁴ and *Baker v the Queen*,⁹⁵ the decision in *Kable* was held not to apply.⁹⁶

In *Baker*, the joint judgment of McHugh, Gummow, Hayne and Heydon JJ confirmed the earlier position taken by the Court that the basic benchmark for the invocation of the *Kable* principle was that the legislation would necessarily offend Chapter III if exercised by a federal court.⁹⁷ Beyond that however, the line at which directions to a State court place it in a position of incompatibility were not clarified by the High Court and seem to have been relegated to the realms of severe and offensive interference. In *Fardon*, McHugh J emphasised that '*Kable* is a decision of very limited application',⁹⁸ and that:

The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges ... rather than in the context of *Kable*-type legislation.⁹⁹

Outside of this limited scenario, his Honour held that legislation affecting State courts would only offend Chapter III where it 'purports to confer jurisdiction on State courts but compromises the institutional integrity of State courts and affect their capacity to exercise federal jurisdiction ... impartially and competently'.¹⁰⁰ This test was much narrower than some commentators had taken from *Kable*. It also demoted the idea of public perception as a yardstick by which to determine incompatibility, preferring instead to focus on whether a 'reasonable person might think' a court's institutional integrity and/or impartiality had been significantly compromised.¹⁰¹

Justices Callinan and Heydon applied the most severe test; for them the legislation must render the court 'so tainted or polluted that it would no longer be a suitable receptacle for the exercise of federal judicial power'.¹⁰² Yet, the central consideration remaining within this test was whether the court could be seen as maintaining independence, albeit in a limited form. So long, they argued, that a Court's 'integrity and independence ... are not compromised, then the legislation in question will not infringe Ch III of the *Constitution*'.¹⁰³

94 (2004) 223 CLR 575 (*Fardon*).

95 (2004) 223 CLR 513 (*Baker*).

96 Both cases were distinguished on the grounds that the challenged legislation was aimed at a class rather than a specific individual, and, perhaps more importantly, that a sufficient quantum of judicial independence and impartiality was maintained by providing for judicial discretion and due process under the legislation.

97 A position previously endorsed by *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547.

98 *Fardon* (2004) 223 CLR 575, 601.

It is a serious constitutional mistake to think that either *Kable* or the *Constitution* assimilates State ... with federal courts ... Australia is governed by a federal, not a unitary, system of government. ... The extent of the jurisdiction of a State Court would naturally be determined by State Law: at 598 (citations omitted).

99 His Honour emphasised that state courts remain creations of state law, where the separation of powers doctrine is much weaker, and it would only be in limited circumstances that the incompatibility doctrine would apply: *ibid* 601–2.

100 *Ibid* 598–9.

101 Justice Gummow reinforced this position holding that: 'Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns *institutional integrity*': *ibid* 618 (emphasis added).

102 *Ibid* 655.

103 *Ibid* 656.

Thus, although the scope of the *Kable* principle is rather imprecise and its limits qualified restrictively,¹⁰⁴ it is clear that independence and impartiality remain fundamental indicia against which legislation affecting State courts must be tested. Yet, it must be recognised that these terms too are subject to ambiguity in their scope and operation. The question therefore remains as to just how independent and impartial a State court must remain to avoid offending Chapter III.

For the most part,¹⁰⁵ the High Court has appeared willing to give States a wide ambit to influence the decision-making capacity of State courts. The main caveat is that courts retain a degree of judicial discretion.¹⁰⁶ Outside of this limitation, the High Court has been unwilling to set any strict parameters by which judicial independence and impartiality of State courts can be measured. As we will discuss below this lack of clarity poses serious problems for lower courts and indeed the litigants before them. What is also problematic is the lack of clear direction by the High Court on what indicia are relevant to the incompatibility doctrine and what weight they can be given.

XI *BRADLEY*: A RENEWED INTEREST IN PUBLIC PERCEPTION?

Bradley was one of two cases that were brought before the High Court in which the *Kable* doctrine could be examined in the more specific circumstances discussed by McHugh J in *Fardon*, namely within the context of judicial appointment. The decision turned upon the conditions of employment of the Chief Magistrate of the Northern Territory, specifically that his salary was to be determined after two years of appointment. This was challenged on the grounds that the independence of the Chief Magistrate was compromised – or at the very least *appeared* to be compromised – by making the security of his remuneration subject to executive discretion.

The Court unanimously found the appointment to be valid, but simultaneously reaffirmed that judicial independence and impartiality are

104 This also has been the source of disappointment to many commentators, who originally viewed the decision as ‘far reaching’. See, eg, *Baker* (2004) 223 CLR 513, 544 fn 127 (Kirby J).

105 With the notable exception of Kirby J in dissent.

106 However, it does not matter that the considerations furnished for that discretion are hard to follow or are ‘imprecisely expressed’. Nor is there a need for considerations or other rules to meet the standard ordinarily expected in a trial of that kind. Simply put, a court will be considered independent so long as it retains a real semblance of discretion to pass judgment, which is not ‘futile’, nor a ‘meaningless charade’: *Baker* (2004) 223 CLR 513, 524 (Gleeson CJ).

fundamental to the operation of State courts.¹⁰⁷ Moreover, the Court recognised that the rule applied to all levels of State and Territory judicial institutions. In examining the application of the principle the majority cited with approval Justice Gaudron's observation in *Ebner v Official Trustee in Bankruptcy*¹⁰⁸ that:

Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system ... the *Constitution* also requires ... that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction.¹⁰⁹

What is interesting here is the additional emphasis on the appearance of impartiality. Indeed, the majority considered that the primary question in the case before it 'turn[ed] upon the permitted minimum criteria for the appearance of impartiality'.¹¹⁰ The concern to raise the *appearance* of impartiality to the same level as actual impartiality¹¹¹ seems curious, given the Court's clear intention to relegate public perception to a lesser 'indicator' as set out in *Fardon* and *Baker*. If public perception is not important, why be concerned with appearances?

Whether public perception is once again a relevant touchstone or whether simply it is relevant to impartiality only is unclear as the Court refused once again to find that the *Kable* boundary had been crossed.¹¹² According to the Court, there were sufficient protections both within and external to the legislation underpinning the employment contract¹¹³ to ensure that 'reasonable and informed

107 In a joint judgment, six of the seven members of the bench affirmed the *Kable* principle as it related to independence and impartiality. Gleeson CJ read the legislation in a manner that did not require application of the *Kable* argument. His Honour reasoned that the relevant legislation did not, as a matter of practicality or interpretation, place the Chief Magistrate at the mercy of executive discretion. Rather, it provided for the general review of magisterial remuneration to keep pace with inflation and other costs and was not to be taken as something that could be wielded as a device to direct and control judicial behaviour. However, he similarly affirmed that the 'fundamental importance of judicial independence and impartiality is not in question': *ibid* 152.

108 (2000) 205 CLR 337.

109 *Ibid* 363.

110 However, the Legal Aid Service refers in particular to the statement by McHugh J in *Kable* that the boundary of legislative power, in the present case that of the Territory, 'is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court': *Bradley* (2004) 218 CLR 146, 163.

111 Indeed to cite judgments that have focused on the maintenance of public confidence, see *Bunning v Cross* (1978) 141 CLR 54, 74–8; *Grollo v Palmer* (1995) 184 CLR 348, 365; *Ridgeway v The Queen* (1995) 184 CLR 19, 31; *Johnson v Johnson* (2000) 201 CLR 488, 492–3.

112 The High Court accepted the Legal Aid Service's proposition that under the *Constitution* a court capable of exercising Commonwealth judicial power (as the NT Magistrates Court was) be, and appear to be, an independent and impartial tribunal, but the Court held that this requirement had not been infringed.

113 The redetermination of his role was not arbitrary or at the discretion of the executive, but a mandatory requirement. Further, the Court held that, by implication, the legislation could not be utilised to 'diminish' the terms of the Chief Magistrate's employment, but could only be used to adjust factors such as salary in a positive manner. All of these terms of were enforceable conditions. Similarly, assurances in the second reading speech that the 'principle of judicial independence' was central to the legislation could be used by a court in interpreting the conditions of the Magistrate's appointment where executive interference had been alleged: *Bradley* (2004) 218 CLR 146, 169–71.

members of the public to conclude that the magistracy of the Territory was free from influence'.¹¹⁴

Although the Court posited, in obiter, that legislation which served to 'place the officeholder wholly at the favour of the executive government' would be invalid, it did not seek to clarify this rather extreme example, nor set out any indicia for when such a situation would arise. In fact, the Court purposefully avoided committing to a boundary, stating that there could be 'no exhaustive statement' as to the 'relevant minimum characteristic of an independent and impartial tribunal'. Chief Justice Gleeson similarly held that 'there is no single ideal model of judicial independence, personal or institutional',¹¹⁵ a position that would be repeated in the later case of *Forge v Australian Securities and Investments Commission*.¹¹⁶

XII FORGE – A BROADER TYPE OF INDEPENDENCE

In *Forge*, the High Court considered whether acting judges could be appointed to the bench of the NSW Supreme Court. The appellant argued that such appointments circumvented constitutional protections for the independence and impartiality of the judicial branch, namely security of appointment and tenure.

As provisions regarding salary or tenure in the *Constitution* have been deemed not to apply to State courts,¹¹⁷ the appellant led an incompatibility argument, in line with *Kable*, arguing that the temporary nature of acting appointments placed State judicial re-appointments at the pleasure of the executive. This, it was argued, fostered a 'temptation of executive preferment'¹¹⁸ and an actual, or perceived, loss of independence by those subject to executive discretion, rendering it incapable of receiving Commonwealth judicial power.

As Gleeson CJ recognised, the appellant's arguments centred not upon whether State legislation conferred an incompatible *function* upon a court (as was the case in *Kable*), but rather 'it is about state legislation providing for the *constitution* of a Supreme Court'.¹¹⁹ Nevertheless his Honour accepted that in both cases:

114 The fact that such assurances could be used to interpret the legislation for the benefit of the Chief Magistrate was also viewed positively by the Court: *ibid* 154–6.

115 *Ibid* 152.

116 (2006) 228 CLR 45.

117 See, eg, the comments in *Re Governor; Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 163 (Gleeson CJ) which established that s 72 of the *Constitution* had no application to the Supreme Court of the Australian Capital Territory because that Court was not a court 'created by the Parliament' within the meaning of s 72. It followed that there was 'no objection based upon the tenure requirement of section 72 to the appointment of an acting judge in that Court ... for these proceedings the point should be taken as settled'.

118 *Forge* (2006) 228 CLR 45, 69.

119 *Ibid* 67 (emphasis added).

State Supreme Courts must continue to answer the description of ‘courts’. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the *Constitution*.¹²⁰

It would appear the ‘principle’ of independence and impartiality to which his Honour refers is one that exists independently of *Kable*. Rather, it is derived from the text of the *Constitution*, namely the term ‘court of a State’ within section 77, and the necessarily implications that arise therein. However, other members of the bench continued to see the issue as a matter falling within the *Kable* doctrine. In a joint judgment, Gummow, Hayne and Crennan JJ agreed that

the relevant principle [from *Kable*] is one which hinges upon maintenance of ... the defining characteristics of a State Supreme Court. ... Essential to that system is the conduct of trial by an independent and impartial tribunal.¹²¹

Some commentators have suggested that conflating character¹²² with function ‘confuses’ the *Kable* principle, which only applies to the latter, with an independent textual principle, and that, ‘strictly speaking, *Kable* was irrelevant’.¹²³ Others have argued that *Forge* marks a ‘retrospective rework[ing]’ of *Kable*.¹²⁴ Regardless of which argument prevails, it is clear that independence and impartiality are basic requirements of all aspects of a court’s structure and competencies. Furthermore, the Court indicated that such principles ‘secured by a combination of institutional arrangements and safeguards’¹²⁵ provide some clarification on the *Bradley* position, insofar as mere appearances would not be enough of an indicator.¹²⁶ However, that is as far as *Forge* goes, with the decision adopting a now all too familiar pattern: the majority reiterating the importance of judicial independence and impartiality (indeed now in a much broader scope) but rejecting the assertion that the case before it breached those standards; and Kirby J, in dissent, finding the opposite.

In denying the incompatibility challenge, the Court once again left open the question of where the incompatibility boundary line, as it relates to independence and impartiality, lies. This meant that it remains unclear when State legislation, as a matter of practical reality, *actually* undermines the institutional integrity of the court, or perhaps more appropriately with respect to that case, places it in a position where it can no longer be said to be a court.

120 Ibid.

121 Ibid 76.

122 A term we prefer to ‘constitution’, so as to avoid confusion.

123 George Winterton, ‘Australian States: Cinderellas No Longer?’ in George Winterton (ed), *State Constitutional Landmarks* (2006) 1, 15 fn 119.

124 Anna Dziedzic, ‘*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges’ (2007) 35 *Federal Law Review* 129, 140.

125 *Forge* (2006) 228 CLR 45, 68 (Gleeson CJ).

126 Although the question remains as to whether ‘institutional arrangements and safeguards’ are, of themselves, sufficient indicia for institutional integrity or whether something further might also be needed.

XIII JUSTIFYING EQUIVOCATION

Underlying the equivocal stance adopted by the High Court on the question of judicial independence are two issues. First, State courts have historically been constituted in a variety of ways, often without sufficient institutional protections. Secondly, like judicial power, it is impossible to absolutely define what a court of a State is. For example, in *Forge*, Gleeson CJ remarked:

[F]or most of the twentieth century, many ... judicial officers ... were part of the State public service. If Ch III ... were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the State Supreme Courts and other State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of Federation, and have never done so since.¹²⁷

With respect, we would submit that Chapter III has, on occasion, been used by the High Court to set a standard for judicial independence regardless of the ‘embarrassing’ consequences that arise. Indeed, the early High Court utilised Chapter III to remove judicial power from the Interstate Commission, on the grounds that its members were not tenured,¹²⁸ despite the apparently clear words of section 101 of the *Constitution* that the Commission was to hold ‘powers of adjudication’. This finding suggests that the High Court placed greater emphasis on the principle of judicial independence than the need for the literal operation of constitutional provisions. Similar embarrassing implications arose from the decision to invalidate the operation of Commonwealth Court of Conciliation and Arbitration, after 30 years of operation, in the pivotal *Boilermakers* case.¹²⁹

If the *Constitution* is to remain relevant it must be interpreted in the current political and legal environment. More importantly, we question whether the current courts of State and the various tribunals at that level infringe the principles expounded by the extension of Chapter III. As Kenny J of the Federal Court has rightly stated:

there is no need to consider whether or not the descendants of these bodies, if any, would still be seen as having capacity to receive federal jurisdiction. The courts and other institutions of government have changed since that time and so have the conventions and other arrangements for safeguarding their independence and impartiality. Even if the essential elements of a constitutional expression have not changed, the circumstances in which the expression applies have. Nothing like [the current state tribunals] existed at federation or when the *Judiciary Act* came into operation.¹³⁰

The High Court has also, on a number of occasions, compared questions about the boundaries of State courts to the larger question of what the precise

127 *Forge* (2006) 228 CLR 45, [36] (Gleeson CJ), [83]–[84] (Gummow, Hayne and Crennan JJ). See also, *Commonwealth v Wood* (2006) 148 FCR 276, [72] (Heerey J); cf *Forge* (2006) 228 CLR 45, [256] (Heydon J) citing *King v Jones* (1972) 128 CLR 221, 229 (Barwick CJ).

128 *New South Wales v Commonwealth* (1915) 20 CLR 54.

129 When the High Court handed down its pivotal decision in *Boilermakers*, cementing the separation of judicial power once and for all, the embarrassing result was that the Commonwealth Court of Conciliation and Arbitration was found to have been invalidly constituted for 30 years. Again, one must assume that the protection of judicial independence took precedence over the administrative inconvenience and embarrassing historical considerations.

130 *Nichols* (2008) 169 FCR 85, 144.

boundary lines of judicial power are.¹³¹ For instance, in *Forge*, Gummow, Hayne and Crennan JJ emphasised that:

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.¹³²

As was discussed above, the High Court's reluctance to define what judicial power is has a number of bases, including the need to ensure flexibility to meet changing administrative, legal and political circumstances. Similar issues arise at the State level; that is, in demarcating a boundary, the Court risks limiting: the capacity of State legislatures to establish specialist, non-judicial tribunals; the ability of both the courts and the executive to effectively administer the judicial system when unforeseen or anomalous circumstances arise;¹³³ and the development of certain arms of the judicial branch.¹³⁴ Conversely, rigidly defining what constitutes a State court might allow State governments to craft non-judicial forums that fall outside of the set definition, and grant them jurisdiction over matters which later courts believe should fall under the judicial power.¹³⁵

The High Court's reluctance to clearly establish the judicial independence of State courts is therefore understandable. On the other hand, the historical equivocation on the 'identification of judicial power' has firmly centred upon the Court's jealous guarding of the separation of that power from the other two branches of government. Yet, it is well accepted, even after *Kable*, that such a separation does not exist at the State level. It is therefore questionable as to whether or not the refusal to identify the scope of judicial power at the Commonwealth level is an adequate basis for the refusal to demarcate the boundaries of judicial independence at the State level.

Even if *Kable* is to be taken as creating a 'quasi-separation' of judicial power at the State level, then it is only realistically at the most basic and fundamental level; that is, the minimum standard beyond which the court and its functions are

131 Deane, Dawson, Gaudron and McHugh JJ in *Brandy* (1995) 183 CLR 245, 267 justified this position as follows:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not. ... One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.

132 *Forge* (2006) 228 CLR 45, 76.

133 In the joint judgment in *Forge*, Gummow, Hayne and Crennan JJ used the example of 'hear[ing] a matter in which the permanent judges of the court would be embarrassed', the respondent even went as far as to suggest 'terrorist attack or an influenza pandemic': *ibid* 86. Less dramatic contingencies might include the need to quickly and effectively replace members of a bench due to incapacity or misbehaviour.

134 Indeed, in *Bradley*, Gleeson CJ seemed concerned that a rigid boundary would serve to inhibit the continued evolution of the state magistracy: (2004) 218 CLR 146, 153–4.

135 As Kenny J succinctly noted in the later case of *Nichols* (2008) 169 FCR 85, 140:

Whether or not a decision-making body will be relevantly independent and impartial in this constitutional sense does not always admit of an easy answer. Much will often depend on ... the nature of the constitutional or legislative "institutional arrangements and safeguards" for securing independence and impartiality.

‘so tainted and polluted’ as to render them incapable of wielding Commonwealth judicial power. The irony here is that even though the Court wishes to leave the boundaries unclear and flexible, the positioning of the incompatibility doctrine at the most severe end of the spectrum serves to broaden the available scope of legislative interference in State courts.

It is somewhat contradictory to say on the one hand ‘this principle delineates the absolute baseline standard’ and on the other hand to say ‘this principle is illusory and incapable of static definition’. At each juncture the Court refuses to apply the principle or set out its parameters as the accepted scope of possible legislative interference broadens. The threat from such a stance is an incremental attrition of the structural integrity of State courts through minor incursions – perhaps not death by a thousand cuts, but certainly an erosion of previously accepted barriers to legislative and executive interference.

The threat of institutional attrition was certainly a concern of Kirby J in *Forge* who, relying upon evidence provided by the appellant along with his own research, was able to demonstrate that, for the 17 years prior to the decision, there had been a ‘systematic and uninterrupted trend’ towards the ‘institutional supplementation of the judicial personnel of the [NSW] Supreme Court’.¹³⁶ Although other members of the bench were sceptical of such statistics,¹³⁷ Kirby J argued that basic minimal standards needed to be set and maintained. Even ‘modest infractions’ he argued, ‘remain infractions’ and ‘should be stopped now before it becomes permanent and spreads, as departures from constitutional principle have a tendency to do’.¹³⁸ He concluded:

There comes a time when the number of acting judges appointed, and appointed persistently, works an identifiable institutional alteration to the courts affected. Defining when that moment arrives may be difficult. But it invites the discharge of the most important function entrusted to this Court by the *Constitution*. When the test of principle arises, this Court must respond. ... The institutional change undermines the integrity and independence of the Supreme Court in a manner that occasional, special, ad hoc acting appointments never did. This Court should say so.¹³⁹

The majority however did not say so,¹⁴⁰ just as the previous courts had refused to say just how certain tenure or remuneration should be. Nor did the majority accept the ‘difficult’ challenge of providing an identifiable demarcation point. As we have noted above, the lack of clarity facilitates a situation in which State governments may slowly test, and expand the scope of their powers, to the detriment of the courts. What is also problematic is the uncertainty that such a situation creates for litigants, and the justice system generally, at the State level.

136 *Forge* (2006) 228 CLR 45, 102, 110.

137 For instance Gleeson CJ described the statistics as ‘misleading’: *ibid* 64.

138 *Ibid* 105, 109.

139 *Ibid* 134.

140 Although there was a tacit recognition that some barriers must be established to avoid institutional attrition.

XIV THE PROBLEMS WITH EQUIVOCATION

There are three principal problems that arise from the reluctance by the High Court to accept Kirby J's challenge and clearly provide an identifiable boundary. Most importantly it means that, at some time in the future, an action of a State government may cross the illusory boundary line, but go unchecked; indeed the boundary line may already have been crossed. Expecting litigants to challenge each and every incremental attack on the State judicial system is untenable and unrealistic, especially given the resources required to pursue a matter to any appellate court.

Secondly, even when challenged, the lack of a clear boundary leaves the lower courts with the undesirable task of having to pull together the bits and pieces of 20 years of judicial indecision in attempting to demarcate the boundary that the High Court has so far refused to establish. As Kirby J has previously noted, this is not a role for the lower courts, but the High Court itself at the 'apex' of the judicial system. Further, given the High Court's variable approach to indicia such as public perception, the lower courts are left with a lack of direction as to what may or may not be relevant. Two recent examples demonstrate the difficulties appellate courts have faced in attempting to make sense of a minefield of obfuscation.

In the Federal Court decision of *Commonwealth v Wood*,¹⁴¹ Heerey J followed the reasoning of the majority in *Bradley*¹⁴² to conclude that the Tasmanian Anti-Discrimination Tribunal ('ADT') was sufficiently constituted for it to be a recipient of federal judicial power. This was notwithstanding the lack of a number of indicia that would be usually accepted as denoting independence and impartiality, including an impartial appointment process, security of tenure, security of remuneration, legal training for decision-makers and the application of the rules of evidence.¹⁴³ However, his Honour took the lack of direction in *Bradley* as meaning that, so long as some form of restriction on interference exists, that will be sufficient, whether or not such protections are tangible, real or legal in nature.

Thus, his Honour was satisfied that political constraints were sufficient to ensure the Minister would not unduly interfere in the ADT's character or functions. He posited that, were a member of the Executive to 'just ring up the

141 (2006) 148 FCR 276 ('Wood').

142 Whilst Heerey J recognised that independence and impartiality were vital, he followed the High Court's reasoning that 'no single model of judicial independence' existed, especially at the state level where 'less stringent conditions are necessary' to protect institutional integrity: *ibid* 292–3.

143 The applicants pointed to a number of such features, including: the Tribunal is not called a court; not all members of the Tribunal must be lawyers; members do not take an oath of office; members have no security of tenure; they are appointed by the Minister and can be suspended or removed by the Minister; proceedings in the Tribunal are commenced by referral by the Commissioner, not by the complainant; a person may be represented before the Tribunal only with its permission; and the Tribunal is not bound by the rules of evidence and is to proceed with as little formality and as expeditiously as the requirements of the *Anti-Discrimination Act 1998* (Tas) and a proper consideration of the matters before the Tribunal permit.

Tribunal and tell it how to decide cases ... [p]ublic, political and media attacks on the government would be inevitable'.¹⁴⁴

Shortly after *Wood* was decided the High Court handed down its judgment in *Forge* in which it insisted that the foundations underpinning independence and impartiality must be 'secured by a combination of institutional arrangements and safeguards'.¹⁴⁵ The emphasis on structural *guarantees* of independence¹⁴⁶ as a necessary pre-condition for the exercise of federal judicial power,¹⁴⁷ would seem to run contrary to Heerey J's acceptance of 'practical political sanctions'¹⁴⁸ as sufficient protections for the institutional integrity of courts. This was certainly the position taken by Kenny J, in the later case of *Nichols*.

In *Nichols*, Kenny J, in obiter, considered the Tasmanian ADT not to be sufficiently protected from executive interference to permit it to be the recipient of federal judicial power. Her Honour posited that the basis for reaching a conclusion that contradicted Heerey J was that, 'His Honour did not have the benefit of the High Court's decision in *Forge*'.¹⁴⁹ Yet it was more than simply the shifting positions of the High Court; Kenny J's decision stands in contradistinction to Justice Heerey's – and arguably the High Court's – in its insistence on setting basic institutional hallmarks of judicial independence. Specifically her Honour considered the lack of provisions on tenure and the fact that 'members of the Tribunal are apparently subject to removal as the Minister sees fit' as conclusive evidence that the 'Tribunal cannot be justified as a suitable receptacle for federal jurisdiction'.¹⁵⁰ Her Honour emphasised more generally that:

In order to be a 'court of a state' ... [under section 77 of the *Constitution*] there must be some legislative or constitutional provision for tenure of some kind, precluding removal from office merely because the executive desires it.¹⁵¹

Her Honour's judgment drew support from the NSW Court of Appeal decision of *Trust Company of Australia Ltd (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany's)*,¹⁵² in which some discussion arose as to whether a 'court' must be constituted by 'judges', as that word is used in Chapter III of the *Constitution*. In the Court of Appeal, Spigelman CJ (Hodgson and Bryson JJA in agreement) held that the NSW ADT was not a court and was therefore unable to exercise Chapter III judicial power

144 *Wood* (2006) 148 FCR 276, 293; see also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 192 ALR 625, 697 in which Weinberg J states '[t]here is no doubt that *Kable* will, in certain circumstances, invalidate State legislation which operates to undermine public confidence in the independence of state courts'.

145 *Forge* (2006) 228 CLR 45, 68 (Gleeson CJ).

146 As opposed to mere appearances (on which the High Court focused so heavily in *Bradley*).

147 Stephen Donaghue, 'Judicial Independence: *Bradley*, *Fardon* and *Baker*' (Paper presented at the Gilbert + Tobin Centre of Public Law 2005 Constitutional Law Conference, Sydney, 18 February 2005).

148 *Wood* (2006) 148 FCR 276, 293.

149 *Nichols* (2008) 169 FCR 85, 143.

150 *Ibid* 143.

151 *Ibid* 141.

152 (2006) 66 NSWLR 77 ('*Stockland*').

because a “court of a state” must – exclusively, or at least predominantly – be constituted by judges’.¹⁵³

Hence the lower courts have presented divergent views on the issue of judicial independence and impartiality at the State level, from the extremely lax and broad view of Heerey J, to the much stricter view of Spigelman CJ, and the focus on actual institutional indicia by Kenny J. The latter two cases evidence the fact that the lower courts are trying to fill in the gaps and give substance to the broad and aspirational statements about independence and impartiality that have been expressed by the High Court. This is not to say their view is necessarily right and Justice Heerey’s view is necessarily wrong; the fact is that the broad generalities of the High Court permit such wide-ranging views to operate at lower levels. Moreover, successive High Court judgments often do take somewhat shifting and often sometimes contradictory positions on the inconsistency doctrine. This lack of clarity and commitment to decisive boundaries can frustrate the attempts by the lower courts to find clarity on the matter. Certainly, this would appear to be the case in *Wood*, but it might also be the case in *Stockland*. There the finding that a tribunal is not a court of a State because it is not constituted in a similar matter to courts of the Commonwealth would seem to run contrary to later findings by the High Court that ‘all courts in a hierarchy of courts must be constituted alike’ and that ‘judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court’.¹⁵⁴

Hence, despite attempts by the lower courts to pull together the pieces of High Court judgments, they do so in a fog of uncertainty and at risk of redundancy, often within very short time periods. Moreover, clarifying the law and setting minimum benchmarks should be the role of the peak body in the federal system, not its subordinates.

Regardless of the individual circumstances, the High Court has had the opportunity, if not in ratio, then in obiter, to set out some clear irreducible minimums for judicial independence and impartiality (be it appointment, tenure, remuneration, training and so forth). The fact that Kenny J was willing to comment on basic parameters for judicial independence, in obiter, shows that this is possible. Indeed, both her Honour’s and Chief Justice Spigelman’s decisions are much more decisive than any majority judgment of the High Court on the matter. In the absence of such decisiveness, litigants, tribunals and even State governments will remain uncertain as to exactly what the law is and, more importantly, which institutions are truly capable of wielding that law.

This leads us to our third argument, which is that the blurred boundary places existing and future State decision-making bodies in an uncertain situation vis-à-

153 Ibid 87. Whilst the Court did not articulate why the members of the Tribunal were not ‘judges’, it is likely that their Honours had regard to the benchmarks of tenure and remuneration contained within Ch III of the *Constitution*. Their Honour’s findings have been subject to criticism with some commentators concluding that the argument is circular, for determining a ‘judge’ will ultimately be answered by asking what is a ‘court’: see Duncan Kerr, ‘State Tribunals and Chapter III of the *Australian Constitution*’ (2007) 31 *Melbourne University Law Review* 622, 638.

154 *Forge* (2006) 228 CLR 45, 82 (Gummow, Hayne and Crennan JJ); see also at 65 (Gleeson CJ).

vis Commonwealth judicial power. It also provides bodies, such as the Commonwealth, with an avenue to challenge otherwise uncontroversial matters on purely technical grounds. The *Nichols* case provides a striking example of this.

Nichols involved an original discrimination complaint against the Commonwealth by a pensioner with a terminal illness following his treatment at a Commonwealth office in Tasmania.¹⁵⁵ Following a failed conciliation in Tasmania's ADT, the Commonwealth applied to the Federal Court maintaining that the ADT did not have jurisdiction over the matter, as inter alia, it was not a 'court' for the purposes of Chapter III of the *Constitution*.

The Federal Court reluctantly agreed, although only on the principal issue of whether the relevant legislation bound the Crown in respect of the Commonwealth, which meant that the incompatibility question did not have to be resolved in ratio. As discussed above however, Kenny J undertook an in-depth examination into the question as to whether the ADT could be characterised as a court of a State, which her Honour determined it could not be. This poses a real issue for the future of such disputes – especially where an intention to bind the Commonwealth exists – as many State tribunals experience a similar close proximity to the executive and a lack of tenure.¹⁵⁶

If judicial independence and impartiality are about maintaining confidence in the rule of law and the administration of justice, what confidence will the public have in the overall legal system when they cannot be certain if the institutions to which they are encouraged to bring their complaints, such as State ADTs, actually have the power or capacity to make decisions? More to the point, what confidence will they have in the legal system when the Commonwealth can challenge and potentially nullify unwelcome outcomes on apparently technical grounds? In the absence of a clear demarcation of the absolute boundaries of the character and functions of State courts, this would appear to be the unfortunate situation we find ourselves.

XV CONCLUSION

It is clear following the precedent established in *Kable* that the High Court is capable of utilising the Constitutional vision of an integrated court system to protect State courts from attacks that arise from the lack of safeguards under State law. It is also clear by the extension of *Kable* in *Bradley* and *Forge* that the High Court has viewed the triggers for constitutional intervention as an

155 Where he intended to make an appointment to discuss his entitlement as a disability pensioner. Upon his arrival, Mr Nichols was confronted with a long queue of people awaiting service. Due to pain he was encountering from his terminal prostate cancer, Mr Nichols spoke to a staff member and asked whether it could be noted where he would otherwise be in the queue but could he be seated until such time as he was seen. He was told that he would have to wait in the queue like everyone else. Growing increasingly frustrated with the Commonwealth's intransigence, he left the office. Several days later Mr Nichols lodged a complaint of discrimination under Tasmania's *Anti-Discrimination Act 1998* (Tas).

156 Not to mention a lack of judicial or legal training by some or even a majority of members.

infringement of State courts' independence and impartiality. On the other hand, the Court has been extremely reluctant to move beyond aspirational statements and establish clear indicia as to when independence especially has been breached; for instance, by reflecting constitutional and international guidelines on appointment, tenure and remuneration.

In this article we have set out the problems with this situation as they are exemplified by the decisions from lower courts that have attempted to tie together the loose threads of superior judgments. In some circumstances those attempts appear to have been reversed in later High Court decisions, although, without a decisive decision, even that remains unclear. What is also notable is the willingness of lower courts to be much more decisive in setting actual irreducible standards for the character and functions of the State courts, in obiter, if they have to. We question whether the grounds provided by the High Court are sufficient justification for its refusal to set down decisive indicia – in ratio or obiter – especially as *Kable* has been taken to demarcate the absolute boundary of State court integrity.

Given that what is being discussed in the incompatibility cases are the apparent irreducible minimums of State court functions and powers, the uncertainty that has been left by the High Court's stance (or lack of it) seems to run contrary to the interests of litigants and the bodies they appear before. In part, this arises because it creates uncertainty about whether certain bodies have the capacity to wield federal judicial power even if they have traditionally been understood to have the capacity to act in such a manner. The result is that we are threatened with a possible fragmentation to the Australian legal system. If a federal court, especially the High Court, does finally make a determination about the necessary features of a Chapter III court, a range of State tribunals may suddenly find they lose their powers of adjudication over any Commonwealth, or, in line with *Kable*, even judicial matters generally. Alternatively, such tribunals risk being 'picked off', one by one, by *Nichols*-style attacks. State legislatures ignore these threats at their detriment. If they do not bolster the institutional integrity of some of their courts and tribunals (such as ADTs), they may suddenly find those bodies greatly weakened, or altogether ineffectual.

In part, especially in the short term, the uncertainty created by the High Court also means that, in some cases, a party may resort to attacking the institutional competence of a State decision-making body where that party is dissatisfied with its finding. Nowhere was the unfairness of this situation more apparent than within the judgment in *Nichols*. As Goldberg J pointed out:

Mr Nichols is dying. ... [He] had only three, very modest, requests. He wanted a suitably worded apology ... for what he regarded as the rudeness of its staff towards him, an assurance that it would review its procedures ... and the payment of an utterly paltry sum ...¹⁵⁷

157 *Nichols* (2008) 169 FCR 85, 118.

His Honour went on to point out:

[I]t is important to determine whether the Commonwealth is subject to the *Anti-Discrimination Act* and other like statutes. Nonetheless, it is difficult to think of a less suitable vehicle than that of Mr Nichols' complaint to test the correctness of the reasoning in that case.¹⁵⁸

Mr Nichols, like others seeking to have their rights recognised, should only have had to concern himself with the merits of his own case. He should not have had to be concerned about the powers of the body before which he was invited and should have been permitted to present his case to be heard and binding decisions made relating to it. To have that avenue removed on technical grounds is patently unfair, as it is now unfair for future applicants before State tribunals considering Commonwealth matters – or indeed State courts more generally – who cannot be entirely certain whether those bodies will be suddenly robbed of their capacity to hear the applicants' complaint. Yet this is the position that has been created by ongoing infringements upon the integrity of State courts by State legislatures alongside a trenchant conservatism by the High Court with respect to decisively demarcating the necessary boundary that might control such infringements.

Some commentators have argued that it is necessary for legislatures to move to guarantee the independence and impartiality of their decision-making bodies.¹⁵⁹ We would hope that State legislatures respond to such a demand. However, history demonstrates that judicial independence is most often secured by laws outside the direct control or influence of those in power, be they executive or legislative. Without formal change to the State constitutions, the most suitable source of law is Chapter III of the *Commonwealth Constitution*, which stands outside the direct control of State governments and applies uniformly throughout Australia.

The High Court has shown that the *Constitution* has the capacity to protect the independence of State courts, but it now must commit to that aspirational ideal by establishing a boundary with clarity, certainty and authority. That clarity may serve to force State legislatures to change their legal and administrative arrangements, so as to better protect the independence of court and tribunal members; or it may place certain powers back within the remit of State Supreme Courts, neither of which we submit are necessarily adverse. Furthermore, the certainty of a High Court pronouncement will greatly benefit the interests of complainants and litigants, and can only increase the trust of the public in the Australian legal system.

It is an unfortunate historical observation that superior bodies have not always seen their subordinates as equally deserving of judicial independence. Of course, our constitutional framework complicates matters, but we would argue that it is important that the High Court act decisively and shirk that convention, for, as Gibbs CJ rightly stated, 'independence and authority of the Judiciary ... in

158 Ibid 119.

159 See, eg, Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 415.

the end has no more secure protection than the strength of the judges themselves'.¹⁶⁰

160 Cited in Sir Ninian Stephen, '1981 Southey Memorial Lecture' (1982) 13(3) *University of Melbourne Law Review* 334.