
Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?

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Introduction

The recent decisions of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*¹ and *Kable v Director of Public Prosecutions (NSW)*² are the latest developments in the preservation of judicial independence in Australia. Both decisions apply in quite different circumstances a doctrine of incompatibility which is designed to protect the independence and impartiality of the judicial branch. *Wilson* established a restriction on Commonwealth power in relation to the appointment of federal judges *persona designata* while *Kable* established a restriction on State power in relation to the vesting of non-judicial power in State Supreme Courts.

This article considers whether the same doctrine of incompatibility was applied in the quite different circumstances of each case, the nature of incompatibility and the ramifications of these decisions for the Commonwealth and especially for the States. In particular it is suggested that the reliance on Ch III in *Kable* provides a basis for further restrictions on State Parliaments comparable to those which apply to the Commonwealth Parliament by virtue of the doctrine of the separation of judicial power. These further restrictions on the States like that in *Kable* are the consequence not of a separation of powers as such but of the need to maintain the independence of the courts vested with federal judicial power. The decision in *Kable* is a further instance of a restriction on Commonwealth power being extended to the States by virtue of the indivisibility of Commonwealth and State affairs.

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1 (1996) 189 CLR 1; 138 ALR 220.

2 (1996) 189 CLR 51; 138 ALR 577.

Separation of judicial power

The primary principle securing the independence of the federal judicial branch is the *Boilermakers'* principle. Derived from the text and structure of the Commonwealth Constitution, this principle requires the separation of the judicial and non-judicial powers of the Commonwealth in order to preserve the independence of the judicial branch. As Viscount Simonds declared when delivering the opinion of the Judicial Committee of the Privy Council in the *Boilermakers' Case*:³ “[I]n a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.”⁴

By precluding the vesting of non-judicial power in those courts in s 71 of the Constitution, the *Boilermakers' Case* built upon earlier decisions⁵ which confined the exercise of Commonwealth judicial power to those courts. The decision in the *Boilermakers' Case*, however, has not escaped criticism, not least for the impossibility of adequately defining the difference between judicial and non-judicial power.⁶

No doubt encouraged by this criticism the High Court in *Drake v Minister for Immigration and Ethnic Affairs*⁷ and later in *Hilton v Wells*⁸ retreated from a strict separation of judicial personnel by adopting the doctrine of *persona designata* to accommodate the vesting of non-judicial powers in federal justices in their personal capacity. What accompanied this development was the first warning in *Hilton v Wells* that any vesting of non-judicial power in justices *persona designata* had to be *compatible* with their judicial office.

This was not, however, the first occasion on which compatibility had been raised in the context of judicial power. In the *Boilermakers' Case*,⁹ Williams J had dissented in the High Court on the ground that a federal court might be vested with non-judicial power provided it was not incompatible with the performance of its judicial functions:

In relation to Chap III the doctrine means that only courts can exercise the judicial power of the Commonwealth, and that nothing must be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament cannot, therefore, by legislation impose on the courts duties which would be at variance with the exercise of these functions or duties and which could not be undertaken without a

3 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

4 *Ibid* at 540.

5 *New South Wales v The Commonwealth* (the *Wheat Case*) (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434. Most recently applied in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

6 See Barwick CJ in *R v Joske; Ex parte Australian Building Construction Employees' & the Builders Labourers' Federation* (1974) 130 CLR 87 at 90. See also B Galligan, *Politics of the High Court* University of Queensland Press Brisbane 1987 pp 207-209.

7 (1979) 24 ALR 577.

8 (1985) 157 CLR 57.

9 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529 (PC).

departure from the normal manner in which courts are accustomed to discharge those functions. (What Fry LJ in *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson*¹⁰ calls their 'fixed and dignified course of procedure'.)¹¹

His Honour¹² considered other functions might be vested in federal courts under s 122 subject to this qualification: "The functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them."¹³

The appeal to the Privy Council was argued on a variation of that view, that any power might be vested in a s 71 court provided it was not inconsistent with the exercise of federal judicial power. Inconsistency was defined by reference to what was contrary to natural justice, such as the court being both actor and judge. The Privy Council regarded this argument as quite distinct from the approach of Williams J and in the end rejected both approaches preferring to rely on the text of the Constitution for the strict separation of judicial power.¹⁴

The constitutional role of the High Court in particular and the specification of federal judicial power in Ch III required in their view the separation of judicial and non-judicial power. Constraints on their mixing were insufficient to protect the independence of the judicial branch. Ironically, practical difficulties in the rigid enforcement of this principle resulted in the development of exceptions such as the doctrine of *persona designata* from which the doctrine of incompatibility has arisen.

The origins of the doctrine of incompatibility applied in *Wilson* lie in *Hilton v Wells*¹⁵ which upheld by majority (Gibbs CJ, Wilson and Dawson JJ) the validity of the *Telecommunications (Interception) Act 1979* (Cth) vesting in Federal Court judges as *persona designata* the non-judicial power of issuing interception warrants. The minority of Mason and Deane JJ accepted the *persona designata* principle as an exception to the *Boilermakers' Case* but on the facts found that the power had not been vested in the judges in their personal capacity. Both the majority and minority, however, warned that the exception could not undermine the *Boilermakers'* principle. The joint judgment of the majority described incompatibility in these terms, noting that it was derived from the principle underlying the *Boilermakers' Case*:

10 [1892] 1 QB 431 at 447.

11 (1956) 94 CLR 254 at 314.; at 313 relied on *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 as holding that non-judicial power can be vested in Ch III courts provided not "incompatible with the court functioning as a court".

12 *Ibid* at 315-316.

13 *Ibid* at 316 referred to *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 that non-judicial functions cannot be vested in State Courts. Taylor J at 341 also in dissent while of the view that legislative and executive powers could not be vested in Ch III courts unless incidental to judicial power, accepted that non-judicial powers not clearly of either nature could be vested in s 71 courts.

14 (1957) 95 CLR 529 at 542-543.

15 (1985) 157 CLR 57.

If the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle underlying the *Boilermakers' Case* would doubtless render the legislation invalid.¹⁶

The minority while adding that non-judicial functions could not be imposed on judges without their consent similarly qualified their acceptance of the *persona designata* exception with:

the general qualification that what is entrusted to a judge in his individual capacity is not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.¹⁷

Grollo v Palmer

More recently in *Grollo v Palmer*¹⁸ a further challenge was brought to the vesting of the power to issue interception warrants under the *Telecommunications (Interception) Act* 1979 (Cth). By then the Act had been amended in response to the minority judgments of Mason and Deane JJ in *Hilton v Wells*. The challenge was brought mainly on the basis that the exception of *persona designata* was unsustainable as a charade. After holding that the non-judicial power was vested in the judges in their personal capacity, the majority of the Court in a joint judgment (Brennan CJ, Deane, Dawson and Toohey JJ; McHugh J in dissent) was only prepared to consider the challenge on the ground that the vesting of the power was incompatible with the exercise of judicial power. The joint judgment relied in particular on the minority judgment of Mason and Deane JJ in *Hilton v Wells* in declaring two conditions restricting the *persona designata* principle:

[F]irst, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, second, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.¹⁹

The joint judgment suggested incompatibility might arise in the following ways:²⁰

[S]o permanent and complete commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable.

16 *Ibid* at 73-74.

17 *Ibid* at 83 (see also at 81).

18 (1995) 184 CLR 348.

19 *Ibid* at 364.

20 *Ibid* at 365.

[T]he performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired.

[T]he performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions is diminished.

Their Honours went on to identify the principle underlying these examples of incompatibility:

Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth.²¹

This principle was said to be “implied from the separation of powers mandated by Chs I, II and III of the Constitution and from the conditions necessary for the valid and effective exercise of judicial power”.²²

Reference²³ also was made to the approach taken by the United States Supreme Court in *Mistretta v United States*:²⁴ “The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.”

The joint judgment concluded that no incompatibility arose in this case despite the “troubling” argument that the obligation of secrecy attaching to the proceedings for the issue of a warrant might place a judge in an invidious position if related legal proceedings were to be heard by that judge. Court practices would need to evolve to avoid this danger. While the joint judgment accepted that judicial participation in criminal investigation would be incompatible, the power in this case was not so regarded. Although the clandestine proceedings before a judge might be of concern, this secrecy necessitated the use of a judge whose “professional experience and cast of mind of a judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.”²⁵

In dissent, McHugh J concluded that the *nature* of the power to issue interception warrants to authorise an invasion of privacy for the purposes of a criminal investigation and the *manner* of its in camera exercise were likely to give rise to a direct conflict with the judges’ judicial functions which meant that “public confidence in the ability of the judges to perform their judicial functions in an independent and impartial manner is likely to be jeopardised”.²⁶

21 *Ibid* at 365.

22 *Ibid*.

23 *Ibid*.

24 (1989) 488 US 361 at 404.

25 (1995) 184 CLR 348 at 367.

26 *Ibid* at 378.

This doctrine of incompatibility would be equally applicable to the personal appointment of a federal judge to a non-judicial body such as the Administrative Appeals Tribunal in *Drake v Minister for Immigration and Ethnic Affairs*.²⁷ A further opportunity to apply this doctrine of incompatibility arose in *Wilson* in circumstances more akin to those in *Drake* than those in *Hilton v Wells*.

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs

The background to *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*²⁸ was that in January 1996, the Minister nominated a judge of the Federal Court, Justice Jane Matthews, to prepare a report under s 10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) on the area of Hindmarsh Island in South Australia. Under the Act, the Minister was empowered to issue a declaration to preserve areas of Aboriginal significance upon being satisfied of a number of matters including – “a report ... from a person nominated by him” (s 10(1)(c)).

The report was to be prepared in accordance with subs 3 and address the matters in subs 4 which included inter alia: “(b) the nature and extent of the threat of injury to, or desecration of, the area; (c) the extent of the area that should be protected; (d) the prohibitions and restrictions to be made with respect to the area”.

The plaintiffs, nine Aboriginal women connected with Hindmarsh Island, challenged the validity of the appointment of Justice Matthews on the basis that it was incompatible with her commission as a judge of the Federal Court or with the proper performance of her judicial duties. This challenge was upheld by a majority of the Court (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; Kirby J dissented) on the basis²⁹ of the third example of incompatibility given in *Grollo v Palmer*:

the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions is diminished.³⁰

The joint judgment of Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ³¹ identified a range of factors to be considered when applying this test, that is, whether the non-judicial functions vested in the judge persona designata are:

- an integral part or closely connected with legislative or executive functions;
- required to be performed independently of any advice or instruction of the legislature or the executive;
- involve a discretion to be exercised on political grounds;

27 (1979) 24 ALR 577.

28 (1996) 189 CLR 1; 138 ALR 220.

29 *Ibid* at 230.

30 (1995) 184 CLR 348 at 365.

31 (1996) 189 CLR 1 at 17-20; 138 ALR 220 at 230-233.

- to be performed judicially.

The joint judgment concluded that the appointment was incompatible having regard to the first three factors above.³² The judge was “firmly in the echelons of administration” and “in a position equivalent to a ministerial advisor”. The Act did not require the reporter to act independently. The reporter was required to make political decisions such as the extent of the area to be protected.

The dissent of Kirby J³³ found no incompatibility given the clear divorce in law and appearance between the appointment as a judge and appointment as a reporter; the duties of reporter were closer to judicial duties than those in *Grollo*; the appointment was to utilise her judicial qualities of detachment and was consistent with a century of experience of appointment of judges to troublesome inquiries. Yet his Honour’s dissent could not point to any precedent where a federal judge has been appointed as an advisor to a minister.

The primary concern of the majority was the use being made, particularly by the executive branch, of the judicial talents of those in judicial office. The same concern had been expressed by the United States Supreme Court in *Mistretta v United States*:

The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.³⁴

The majority indicated, however, that the appointments of federal judges to head royal commissions and non-judicial bodies such as the Administrative Appeals Tribunal are not necessarily incompatible because they are required to act independently or judicially.³⁵ Moreover, the joint judgment confined incompatibility to the area of governmental activity:

[T]he principle does not touch personal relationships or relationships outside the area of governmental activity between judges and those who perform legislative and executive functions. Those relationships are matters for judicial sensitivity but not of constitutional significance.³⁶

This doctrine of incompatibility under Chpt III was distinguished in the joint judgment³⁷ from the common law doctrine of incompatibility which appears not to have been the subject of prior judicial consideration in Australia although it has

32 *Ibid* at 18-19; at 232.

33 *Ibid* at 47-50; at 255-257.

34 (1989) 488 US 361 at 404 at 407.

35 (1996) 189 CLR 1 at 17-18; 138 ALR 220 at 231.

36 *Ibid* at 16; at 230.

37 *Ibid* at 15-16; at 229.

been in the United States.³⁸ The common law doctrine effects automatic vacation of a public office upon acceptance of another public office the duties of which are such that it is not possible for the two offices to be faithfully and impartially discharged by the same person. It was probably first applied in *Dyer's Case*³⁹ which held that the acceptance by a Justice of the Common Bench of appointment to the King's Bench thereby vacated his Common Bench position.

Later developments suggest rather than the first office being vacated, it is the second office which the person is incapacitated from accepting. This approach has been adopted in the United States. In *In re Richardson*⁴⁰ the New York Court of Appeals in an opinion delivered by Cardozo CJ held invalid the appointment by the Governor of a justice of the New York Supreme Court to conduct an inquiry into the conduct of the president of the borough of Queens and report thereon to the Governor. Another example of incompatibility is *People v Bott*⁴¹ where an elected police magistrate was elected town clerk in the same city. Greater flexibility has been shown during war-time such as in *In re the Opinion of Justices*⁴² where the justices of the Supreme Judicial Court of Massachusetts upheld the appointment by the President of the United States of justices of the Superior Court to local draft boards and appeal boards during the Second World War.

This common law doctrine was, however, distinguished by the majority in *Wilson* from the doctrine of incompatibility arising under Ch III which is concerned with protecting the independence of federal judges. The constitutional doctrine does not vacate the office to which the judge is appointed but "sterilises the power to interfere with the protection which the Constitution gives to the independence of Ch III judges".⁴³

The impact of *Wilson* will be to make the Commonwealth Executive much more cautious when appointing federal justices to persona designata positions. The benefits of judicial impartiality cannot be used for the purpose of defusing publicly contentious issues without assessing the risk their involvement may pose for public confidence in their impartiality. Retired judges therefore may be called upon more for assisting the Executive in public inquiries. And if *Kable v Director of Public Prosecutions (NSW)* is taken to its logical conclusion, State judges are likely to be subject to the same protection as federal judges.

38 See eg, *In re Richardson* (1928) 247 NY 401, 160 NE 655; *People v Bott* (1931) 261 Ill App 261; *In re the Opinion of Justices* (1940) 29 N E 2d 738.

39 (1557) 2 Dyer 158b; 73 ER 344. See also *Milwood v Thatcher* (1787) 2 Term Rep 81 at 86-87; 100 ER 45 at 47-48.

40 (1928) 247 NY 401, 160 NE 655.

41 (1931) 261 Ill App 261.

42 (1940) 29 N E 2d 738. See also *Koblarz v Mercer* (1943) 130 NJL 44, 31 A 2d 208; *Smith v Dillon* (1943) 44 NY S 2d 719.

43 (1996) 189 CLR 1 at 16; 138 ALR 220 at 229-230.

Kable v Director of Public Prosecutions (NSW)

This case⁴⁴ involved a challenge brought by Kable to the validity of the *Community Protection Act* 1994 (NSW) the express object of which in s 3(1) was “to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable”. Kable was then in prison. He had been charged with the murder of his wife but his guilty plea to manslaughter was accepted by the Crown on the ground of diminished responsibility. While in prison, he had written threatening letters to his deceased wife’s family in relation to his children who were in their care and was facing 17 charges under s 85S of the *Crimes Act* 1914 (Cth) for improper use of postal services.

The Supreme Court of New South Wales was empowered by s 5(1) of the Act to order the detention in prison for maximum periods of six months of “a specified person” if satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence and it was appropriate for the protection of particular persons or the community that he be held in custody. Moreover, s 3(2) provided that “[i]n the construction of this Act, the need to protect the community is to be given paramount consideration.” The Act was originally drafted to apply to a class of persons but when enacted was confined to Kable although certain general terms of the legislation (of no significance in this case) were not deleted.

The challenge to the Act was based principally on the doctrine of separation of powers applying in New South Wales and on Ch III of the Commonwealth Constitution. The Court of Appeal of New South Wales upheld the Act and special leave was granted to appeal to the High Court. The ground of appeal based on the doctrine of separation of powers applying in New South Wales was rejected by Brennan CJ, Dawson, Toohey and McHugh JJ.⁴⁵ This was the first occasion on which the High Court was asked to rule on the issue. Authority existed in nearly every State that no binding doctrine of separation of powers could be derived from their respective State Constitutions.⁴⁶ In an endeavour to distinguish that authority, reliance was placed on the insertion in 1992 and the entrenchment in 1995 of Part 9 headed “The Judiciary” into the *Constitution Act* 1902 (NSW) which provided for security of tenure for holders of judicial office.⁴⁷ But this argument did not succeed for the reason given by Dawson J:

44 (1996) 189 CLR at 51; 138 ALR 577.

45 *Ibid* at 65; at 582 per Brennan CJ (agreed with Dawson J); at 77-80; at 591-594 per Dawson J; at 92-94; at 603-604 per Toohey J; at 109; at 617 per McHugh J.

46 See for: *NSW Clyne v East* (1967) 68 SR(NSW) 385 at 395, 400 and *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 381, 407, 410, 419-420. For Vic: *Collingwood v Victoria (No 2)* [1994] 1 VR 652. For SA: *Gilbertson v South Australia* (1976) 15 SASR 66 at 85, *affd* [1978] AC 772 at 783, (1977) 14 ALR 429; *Grace Bible Church v Reedman* (1984) 54 ALR 571, 36 SASR 376. For WA: *JD & WG Nicholas v Western Australia* [1972] WAR 168.

47 Section 53 provides no holder of judicial office may be removed from office except on an address of both Houses of Parliament on the grounds of proved misbehaviour or incapacity.

While these provisions are concerned with the preservation of judicial independence, they cannot be seen as reposing the exercise of judicial power exclusively in the holders of judicial office. Nor can they be seen as precluding the exercise of non-judicial power by persons in their capacity as holders of judicial office. They clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested.⁴⁸

The second ground of appeal, however, succeeded and the Act was held invalid by a different majority of the Court (Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissented) on the basis that the vesting of the power in the Supreme Court of New South Wales to order the detention of Kable was *incompatible* with Ch III of the Commonwealth Constitution. The infringement of Ch III was based on the incompatibility of the power vested in the Supreme Court with the federal judicial power already vested in that Court. An essential step in the reasoning of the majority was the identification of an “integrated Australian judicial system”. Three of the majority, Gaudron⁴⁹, McHugh⁵⁰ and Gummow JJ,⁵¹ relied on the role given to State Supreme Courts as repositories of federal judicial power by Ch III.⁵² Gummow J observed that the judicial power of the Commonwealth engages the Supreme Court of a State at two stages or levels: first, the Supreme Court is vested with judicial power of the Commonwealth: s 77(iii) and s 39 *Judiciary Act* 1903 (Cth)⁵³ and secondly, a right of appeal from the Supreme Court to the High Court is prescribed by s 73(ii).⁵⁴ As repositories of federal judicial power, State Supreme Courts were to be accorded the same protection of judicial independence as other federal courts – any suggestion that there exist two grades of judicial power was firmly rejected.⁵⁵

According to those majority Justices⁵⁶, the Constitution especially Ch III implicitly required in each State a Supreme Court at the apex of a State judicial system. Therefore, a State Parliament is precluded from abolishing the Supreme Court and from leaving the State devoid of a State judicial system. Moreover, McHugh J suggested without deciding the issue that rights of appeal to a State Supreme Court from inferior State courts might also be guaranteed by the Constitution:

[A] State law that prevented a right of appeal to the Supreme Court from, or a review of,

48 (1996) 189 CLR 51 at 77; 138 ALR 577 at 591-592.

49 *Ibid* at 102; at 611.

50 *Ibid* at 111-115; at 619-622.

51 *Ibid* at 137-139; at 639-641.

52 Especially by ss 71 and 77(iii) with s 39 of the *Judiciary Act* 1903 (Cth) and the requirement necessarily implied from covering clause 5 and ss 51(xxiv), (xxv), 73 and 118 that there exist a State judicial system.

53 (1996) 138 ALR 577 at 631.

54 *Ibid* at 141; at 643.

55 *Ibid* at 103; at 612 per Gaudron J; at 115; at 621 per McHugh J; at 138; at 640 per Gummow J.

56 *Ibid* per Gaudron J at 103; at 611; McHugh J at 109-111; at 617-619; Gummow J at 139; at 640-641.

a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.⁵⁷

From the constitutional creation of the integrated Australian judicial system, Gaudron, McHugh and Gummow JJ derived from Ch III a restriction on State Parliaments not to confer on State courts vested with federal jurisdiction any power which is incompatible with the exercise of federal judicial power. Such incompatibility arose where public confidence in the integrity or independence of those courts is eroded.⁵⁸ Gaudron J observed that “Ch III requires that the parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.”⁵⁹ Similarly, McHugh J considered:

Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power. Thus, neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power.⁶⁰

While McHugh J acknowledged that one of the basic principles underlying Ch III is that federal courts must be and be perceived to be independent of the legislature and the executive, it followed that “[g]iven the central role and the status that Ch III gives to State courts invested with federal jurisdiction,...that those courts must also be, and be perceived to be, independent of the legislative and executive government in the exercise of federal jurisdiction.”⁶¹ Otherwise public confidence would be lost. But for State courts it also meant that they must be independent and appear to be so from their own State’s legislative and executive government as well as from that of the Commonwealth.

Surprisingly, little reference was made by McHugh and Gummow JJ to the doctrine of incompatibility applied in *Grollo v Palmer*. However, Gaudron J⁶² distinguished the principle in that case as one concerned with persona designata appointments. Her Honour acknowledged though that the two notions of incompatibility were closely related since both were concerned with the integrity of the judicial process and of the courts specified in s 71.

57 *Ibid* at 114; at 620-621.

58 See Gaudron J at 103; at 612; at 116 and 121; at 622 and 627 per McHugh J; at 134; at 636-637 per Gummow J; cf 96 and 98; cf Toohey J who at 606 and 608 relied on the doctrine of incompatibility applied in *Grollo v Palmer* (1995) 184 CLR 348.

59 *Ibid* at 103; at 612.

60 *Ibid* at 116; at 622.

61 *Ibid* at 116; at 622-623.

62 *Ibid* at 103-104; at 612.

On the facts, Gaudron J concluded that the Act compromised the integrity of the Supreme Court of New South Wales because public confidence could not be maintained when it was vested with a power which was the “antithesis of the judicial process”:⁶³

Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s 5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so.⁶⁴

Similarly, McHugh J found that “ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of the law.” As an “instrument of executive government policy”, public confidence in the impartial administration of the judicial functions of the court must have been impaired.⁶⁵

Gummow J described the power given to the Supreme Court as “repugnant to the judicial process in a fundamental degree”.⁶⁶ Accordingly by virtue of Ch III it could not be vested in any federal court nor any State court exercising federal jurisdiction. Later his Honour referred to the Act as one which “saps the appearance of institutional impartiality and the maintenance of public confidence”⁶⁷ since the political and policy decisions made by the Act were “ratified by the reputation and authority of the Australian judiciary. The judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature”.⁶⁸

Reference was made by McHugh⁶⁹ and Gummow⁷⁰ JJ to the fact that the Supreme Court was actually exercising federal jurisdiction in this case. Kable had raised in the court of first instance and in the Court of Appeal of New South Wales certain constitutional defences, namely, an implied right to equality and a right to trial by jury under s 80.⁷¹ This appears not to have been significant in the reasoning of McHugh J nor probably in that of Gummow J and was apparently irrelevant to Gaudron J who made no reference to the matter. On the other hand, Toohey J who formed the majority, clearly relied on the fact that the Supreme Court was actually exercising federal jurisdiction.

63 *Ibid* at 106; at 615.

64 *Ibid*.

65 *Ibid* at 124; at 628-629.

66 *Ibid* at 132; at 635.

67 *Ibid* at 133; at 636.

68 *Ibid* at 134; at 636-637.

69 *Ibid* at 114; at 621.

70 *Ibid* at 136; at 638.

71 Gummow J merely raised this point but appears not to base his judgment on it.

His Honour differed in a further respect from the other three majority Justices in relying on and applying⁷² the doctrine of incompatibility espoused in *Grollo v Palmer*, in fact applying the third example of incompatibility given in that case – the performance of a non-judicial function of such a nature that public confidence in the integrity of the judiciary as an institution is diminished. Such incompatibility arose because the Supreme Court was required to consider the making of a detention order where no breach of the criminal law is alleged and no determination of guilt made.⁷³

Accordingly, the strict ratio of the decision in *Kable* is the approach taken by Toohey J – that it is necessary to establish that the Supreme Court was exercising federal judicial power in order to raise the doctrine of incompatibility. Nonetheless, this requirement is satisfied simply by raising the doctrine of incompatibility at least during the course of the original proceedings. Given the superficiality of this position, it is submitted that the preferable view is, on the basis of the reasoning of the other majority Justices, that the vesting of federal judicial power in the State Supreme Court is sufficient to activate the protection of Ch III.⁷⁴

The dissenting judgments of Brennan CJ and Dawson J relied on the well-established principle in *Alexander's Case*⁷⁵ that the Commonwealth takes State courts as it finds them when vesting them with federal judicial power. In other words, although the Commonwealth may prescribe the practice and procedure for the exercise of federal judicial power, it cannot alter the character or constitution of the courts.⁷⁶ Brennan CJ confined the *Grollo* concept of incompatibility to the vesting of non-judicial powers in judges *persona designata* given the absence of any foundation in the text or structure of the Constitution for the majority's view.⁷⁷ Dawson J responded to the view of the integrated Australian judicial system by denying there was a unitary judicial system. The State courts were not merely a component of the *federal* judicature.⁷⁸ Additionally, his Honour recognised that the Constitution draws a clear distinction between federal courts and state courts exercising federal jurisdiction because the Constitution does not provide security of tenure for State judges nor prevent the States from vesting non-judicial power in State courts.⁷⁹ Finally, *Grollo's* concept of incompatibility was considered irrelevant being derived from the separation of powers prescribed by the Constitution to which the States are not subject.⁸⁰

72 *Ibid* at 98; at 608.

73 *Ibid* at 96; at 606.

74 See Gaudron J at 103; at 612; at 115-6; at 622 per McHugh J; at 136; at 638 per Gummow J (where his Honour acknowledged that federal judicial power is engaged at two levels as noted above and see espec at 142; at 643 on s 73(ii)).

75 (1912) 15 CLR 308 per Griffith CJ at 313.

76 (1996) 138 ALR 577 at 67; at 583 per Brennan CJ and at 81; at 595 per Dawson J.

77 *Ibid* at 67-68; at 584.

78 *Ibid* at 83-84; at 596-597.

79 *Ibid* at 82; at 595.

80 *Ibid* at 86; at 598.

Further implications of *Kable*

The principle to be derived from the decision in *Kable* is clear: Ch III of the Commonwealth Constitution prevents the vesting in a State Supreme Court by the State Parliament of non-judicial power which is incompatible with the exercise of federal judicial power. Incompatibility arises when the vesting of a power has the effect of impairing the independence and integrity of the Court.

It is submitted, however, that the *Kable* principle is simply one of several principles to be derived from Ch III in so far as it extends to State courts as repositories of federal judicial power.⁸¹ Also derived from Ch III is the principle of incompatibility applied in *Wilson* to the appointment of federal judges *persona designata*. Indeed, in each case the same notion of incompatibility was applied in quite different circumstances.

The overarching requirement of Ch III which underlies both these decisions is the maintenance of the independence and impartiality of those Ch III courts vested with the exercise of federal judicial power.⁸² This requirement applies equally to federal courts and to State courts vested with federal judicial power. The position is succinctly put by Gaudron J in *Kable* "...the limitation derives from the necessity to ensure the integrity of the judicial process and the integrity of the courts specified in s 71 of the Constitution."⁸³

Similarly, McHugh J in *Kable* stated:

One of the basic principles which underlie Ch III and to which it gives effect is that judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government. Given the central role and the status that Ch III gives to State courts invested with federal jurisdiction, it necessarily follows that those courts must also be, and be perceived to be, independent of the legislative and executive government in the exercise of federal jurisdiction. Public confidence in the impartial exercise of federal judicial power would soon be lost if federal or State courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government.⁸⁴

● It can be argued that the inevitable consequence of this constitutional requirement is that a State Parliament is prevented from acting *in any way* to undermine or impair the independence of the Supreme Court and of other State courts vested

81 (1996) 138 ALR 577. McHugh J (at 110; at 617) refers to other restrictions on State power including "to regulate the exercise of judicial power by State courts and judges". His Honour (at 117-118; at 623-624) considered that the vesting of powers in State judges *persona designata* was also constrained by incompatibility (cf Gaudron J at 107; at 615).

82 This article does not consider the nature of judicial power and what protections Ch III provides for the exercise of federal judicial power as such. On those issues see: *Leeth v Commonwealth* (1992) 174 CLR 455 espec 469-470 per Mason CJ, Dawson and McHugh JJ; at 486-487 per Deane and Toohey JJ; at 501-502 per Gaudron J; C Parker, "Protection of Judicial Process as an Implied Constitutional Principle" (1994) 16 Adel L R 341.

83 (1996) 138 ALR 577 at 104; at 612.

84 *Ibid* at 116; at 622.

with federal judicial power. This overarching requirement of Ch III was clearly enunciated by McHugh J in *Kable* as previously quoted:

Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power.⁸⁵

Moreover, although Ch III protection for State courts arises merely with the vesting of federal judicial power, the protection afforded is not confined to the exercise of that power but also extends, as suggested earlier, to the exercise of State judicial power. The indivisibility of public confidence in the impartial exercise of judicial power was implicitly recognised by McHugh J in *Kable*:

[I]t is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.⁸⁶

In the case of State courts, this means they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government.⁸⁷

Interestingly, there is a parallel here with the reasoning in *Stephens v West Australian Newspapers Ltd*⁸⁸ which relied on the indivisibility of political affairs to include discussion of purely State affairs within the protection of the implied freedom of discussion of government and political affairs under the Commonwealth Constitution. Similarly, at least Gaudron, McHugh and Gummow JJ in *Kable* recognised in effect the indivisibility of the independence of the Supreme Court. Any impairment of public confidence in the exercise of State judicial power would inevitably affect public confidence in the exercise of federal judicial power. This indivisibility required Ch III protection to be accorded to the exercise of both State and federal judicial power. However, it could be argued that to rely merely on the indivisibility of an activity to justify the extension to the States of restrictions on Commonwealth power is to give the Commonwealth Constitution an operation dependent on factors outside the terms of the Constitution. To use this practical outcome to support the extension of constitutional guarantees into areas of State responsibility maybe akin to the bootstraps argument of Commonwealth power.⁸⁹

85 *Ibid* at 116; at 622.

86 *Ibid* at 118; at 624.

87 *Ibid* at 116; at 623. Similarly, Gummow J in *Kable* (at 127-128; at 631-632) referred to the "institutional integrity" of the State court structure.

88 (1994) 182 CLR 211.

89 A similar criticism is made of the implied freedom of political discussion as a restriction on State power in G Carney, "The Implied Freedom of Political Discussion – Its Impact on State Constitutions" (1995) 23 Fed LR 180 at 187-192.

If a State Parliament is prevented from acting *in any way* to undermine or impair the independence of the Supreme Court and of other State courts vested with federal judicial power, it must follow that a State Parliament is precluded from acting in the following ways but only in so far as they may impair that independence:

- the vesting of non-judicial power in State courts vested with federal jurisdiction (such as in *Kable*);
- the vesting of such power *persona designata* in a judge of those courts (such as in *Wilson*);
- an interference in a federal or State judicial process within those courts; and
- possibly even an interference in the tenure of judges of those courts.

These suggested restrictions on a State Parliament reflect those which arise in the case of the Commonwealth Parliament under the *Boilermakers'* doctrine of the separation of judicial power. It may well be that the observation of McHugh J in *Kable* that this doctrine of incompatibility has in some cases the same result as if the doctrine of separation powers applied in the State, is not confined to the principle applied in that case.⁹⁰

There is, however, one particular restriction from the *Boilermakers'* doctrine which is unlikely to apply to a State Parliament by virtue of Ch III, that is, the restriction on the Commonwealth vesting judicial power in non-judicial bodies. Such an arrangement at the State level is unlikely to have any effect on public confidence in the exercise of federal judicial power to attract the protection of Ch III. An important qualification to that view is, however, that if Ch III requires a State to maintain a State judicial system, a significant divestment of State judicial power from the courts to non-judicial bodies may be considered to breach that requirement.

Returning to the suggested protections from Ch III, each of them needs to be considered.

The vesting of non-judicial power in State courts vested with federal jurisdiction

The principle from *Kable* ensures that the independence of the institution of the judiciary, that is, the integrated Australian judicial system is not impaired by the vesting of incompatible non-judicial power.

Is it arguable though that the mere vesting of non-judicial power is incompatible with federal judicial power? The *Boilermakers* principle of course precludes the mixing of judicial and non-judicial powers but not, in the view of the majority of the High Court and of the Privy Council, on the basis of incompatibility. That strict division was based on the separation of judicial power prescribed by the structure of the Constitution and the exhaustive definition of judicial power in Ch III.⁹¹ On the

90 *Ibid* at 118; at 624.

91 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529 (PC).

other hand, the focus of Ch III is the protection of the independence and integrity of the s 71 courts. It cannot be said that the mere commingling of judicial and non-judicial powers impairs that independence. Other circumstances will be needed to invoke the protection of Ch III.

The *Kable* principle appears to be confined to the vesting of non-judicial power. If the vesting of a particular judicial power by a State Parliament were challenged, the appropriate basis to do so would be that it constitutes an interference in the judicial process (discussed below).

The vesting of such power persona designata in a judge of those courts

In *Kable*, only McHugh J⁹² indicated that the principle of incompatibility applied in *Grollo* and *Wilson* would apply to State vesting of executive functions in a State judge persona designata. That is, the vesting would be invalid if it gave the appearance that the court as an institution was not independent of the executive. His Honour considered few judicial persona designata appointments made at the State level would be invalid. The appointment of the Chief Justice as Lieutenant-Governor or of a judge as a member of an electoral commission with responsibility for fixing electoral boundaries would not give such an appearance. But the appointment of the Chief Justice of the Supreme Court to Cabinet might well be incompatible. On the other hand, Gaudron J⁹³ did not extend the doctrine of incompatibility to this extent noting that it was different from the *Grollo* doctrine.

As noted earlier, the persona designata cases are concerned with the independence of the judges to ensure that their exercise of non-judicial power as persona designata does not impair their actual or perceived independence when exercising federal judicial power. Since the same concern underlies the *Kable* principle, there appears to be no logical basis for denying the application of this restriction to the vesting of non-judicial power in State judges whose court is vested with federal judicial power.

An interference in a federal or State judicial process within those courts

Under both of the previous propositions, the independence of the judiciary is maintained by thwarting the vesting of incompatible powers in the court or the judge, that is, powers which may create the impression that the judges and their courts are no longer independent from the legislature or the executive. But the overarching principle of Ch III must also protect the judicial branch from a direct assault on its independence, that is, by an attack on the independence and impartiality of the judicial process itself. On this basis, State Parliaments ought to be precluded from enacting legislation which interferes in the judicial process of the Supreme Court. The Court must be protected in the exercise of both its state and

92 (1996) 138 ALR 577 at 117-118; at 623-624.

93 *Ibid* at 103-104; at 612.

federal jurisdiction given that any impairment of its independence and integrity in the exercise of either jurisdiction will impact on the other. Viewed in this light, the independence and integrity of a court is indivisible.

This was not an issue raised in *Kable* but the importance of the integrity of the judicial process was recognised by Gaudron J:

The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process (citing *Grollo v Palmer* (1995) 184 CLR 348 at 365, 377, 391-2 and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220).⁹⁴

It is submitted that any interference with the State judicial process is likely to impair public confidence in the independence and integrity of the court. The same test as that applied in *Kable* to the vesting of non-judicial power can be applied to an interference in the judicial process, that is, the interference “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”.⁹⁵

If this proposition were established, it would mark another significant guarantee of individual liberty at the State level, one which is already available at the Commonwealth level. The Commonwealth Parliament is unable by virtue of the doctrine of separation of powers to exercise judicial power or to usurp the judicial process. It cannot therefore enact a bill of attainder or a bill of pains and penalties although it may otherwise enact retrospective criminal laws.⁹⁶ Nor can it direct courts “as to the manner and outcome of the exercise of their jurisdiction”⁹⁷ This is to be distinguished from the declaration of substantive rights at issue in pending proceedings.⁹⁸

In the absence of a binding doctrine of separation of powers, the States have not been subject to these restrictions. But if the reasoning in *Kable* is taken to its logical conclusion, the State Parliaments will be unable to interfere in the judicial process in these ways in so far as any interference impairs the independence of State courts vested with federal judicial power. *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*⁹⁹ might well be decided differently today for the Court of Appeal of New South Wales found that the New South Wales Parliament had usurped the judicial process but that the

94 *Ibid* at 107; at 615.

95 *Ibid* at 117; at 623 per McHugh J and see at 124; at 628-629.

96 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

97 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 37 per Brennan, Deane and Dawson JJ. See also *Liyanage v The Queen* [1967] 1 AC 259.

98 See *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 at 96-97; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 503-504, 579-580; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250; *Mabo v Queensland* (1988) 166 CLR 186 at 202 per Wilson J with whom Mason CJ agreed at 195.

99 (1986) 7 NSWLR 372.

validity of the legislation could not be impugned in the absence of a doctrine of separation of powers. Chapter III of the Commonwealth Constitution was not raised. This decision must now be reviewed in the light of the reasoning in *Kable*.

An interference in the tenure of judges of those courts

There is but a short step from the previous proposition that an interference in the judicial process infringes Ch III to the proposition that the security of tenure currently enjoyed by judges is similarly protected. Superior court judges in all States are liable to be removed by the Governor on an address from Parliament. In some cases, the grounds of removal are confined to proved misbehaviour or incapacity; in other cases, removal may be on any ground. In most cases such security of tenure under State law is precarious, being liable to normal legislative amendment. The proposition suggested here engages Ch III to preserve that security from legislative erosion.

Some support for this proposition might be derived from McHugh J in *Kable*. Despite acknowledging that New South Wales was not subject to any doctrine of separation of powers under the Commonwealth or State Constitution and that the Commonwealth in vesting federal jurisdiction in State courts pursuant to s 77(iii) must take them as found, his Honour nevertheless observed:

But in my opinion none of the foregoing considerations means that the Constitution contains no implications concerning the powers of State legislatures to abolish or regulate State courts, to invest State courts or State judges with non-judicial powers or functions, or to regulate the exercise of judicial power by State courts and judges.¹⁰⁰

A difficulty with the proposition suggested here is at what point has this restriction on State legislative power arisen?

Conclusion

If the overarching requirement of Ch III is the maintenance of the independence and integrity of the s 71 courts, then the doctrine of incompatibility which was applied in *Wilson* and *Kable* must be seen in that broader context. Accordingly, it is argued that the power of a State Parliament is restricted by this requirement of Ch III in relation to those State courts vested with federal judicial power. And this is the position whether the court is exercising federal or state judicial power.

The decisions in *Wilson* and *Kable* each illustrate a different challenge to the integrity of the exercise of federal judicial power. In *Wilson*, it was the independence of a judge which was directly at stake while in *Kable*, it was the independence of the Supreme Court. This article argues that at least a further restriction on State power can be derived from Ch III, that is, that it may not interfere in the judicial process of those State courts vested with federal judicial power. In this way, the

100 (1996) 138 ALR 577 at 110; at 617.

independence and integrity of all three elements of the judicial branch, the courts, their judges and the judicial process are protected by Ch III. Unless all three elements are protected, the protection afforded one or more of them becomes illusory.

The line of reasoning advocated here does not depend on the *Boilermakers'* doctrine of separation of powers which has never been regarded as applying at the State level either under the Commonwealth Constitution or the State Constitution. Yet, as McHugh J acknowledged of the doctrine of incompatibility in *Kable*, it may have the same effect, at least to the extent outlined above, as if the doctrine of separation of powers did apply at the State level.¹⁰¹

101 *Ibid* at 118; at 624.