

**CURRENT DEVELOPMENTS: CONSTITUTIONAL LAW  
FOR  
FOURTH AUSTRALASIAN DRAFTING CONFERENCE 2005  
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The choice of “current constitutional issues for drafters” is wide. If you are a drafter from New Zealand, issues about federalism are irrelevant. If you are a drafter from an Australian Territory, s. 122 of the *Commonwealth Constitution* looms large. If you are a drafter from an Australian State or the Commonwealth, federalism is highly relevant.

What all jurisdictions have in common in “constitutional issues” is the general concern about the limits, if any, of legislative power arising from the relevant constating document.

That consideration would be short and simple if a “Dicean” view that there was no constitutional limit on the legislative power of the United Kingdom Parliament applied unconditionally. We know that it does not. In Australia, most issues arise, necessarily, under the *Commonwealth Constitution*, either directly (that is, because of an expressed power or prohibition) or indirectly (that is, because of an implication from the *Constitution* or its structure).

I have selected two recent issues which might have relevance for drafters:

1. “Cooperative” schemes;
2. Implications from a united federal judicial system.

I will also briefly refer to the freedom of political speech.

### **1. “Cooperative” Schemes**

This issue really covers numerous areas, but the area I want to focus on is the potential for a State to refer to the Commonwealth a matter about which the Commonwealth can make laws under s. 51(xxxvii) of the *Constitution*.

Section 51(xxxvii) of the *Constitution* provides that the Commonwealth Parliament may make laws for the peace, order and good government of the Commonwealth with respect to matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any

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State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

The successful operation of the Australian Federation depends upon cooperation between the legislatures and executives of the members of the Federation. Thus, for many years there have been various schemes in which such cooperation has been given. For instance, the establishment of the Tribunal to deal with both interstate and intrastate disputes in the coal industry relied upon the making of cooperative legislation by the Parliaments of the Commonwealth and New South Wales. In a series of cases dealing with that legislation, it was recognised that, in the words of Deane J in *The Queen v Duncan*:

“Cooperation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the *Constitution*: to the contrary, it is a positive objective of the *Constitution*.” (*The Queen v Duncan; Ex parte Australian Iron & Steel Pty Limited* (1983) 158 CLR 535 at 589.)

Thus, cooperation between the members of the Federation may achieve an object that neither could achieve by its own legislation (see McHugh J in *Re: Wakim; Ex parte McNally* (1999) 198 CLR 511 at 556). It is recognised that the defining quality of cooperative federalism is “the ability of parties to the federal compact to exercise their respective legislative powers to produce a result which one of them alone would not have been able to produce” (see *BP Australia Limited v Aman Aviation* (1996) 62 FCR 451 at 493 per Lindgren J). However, as was seen in *Re: Wakim*, the simple fact that a legislative scheme is made as a result of cooperation and achieves a result which no member of the Federation acting alone could achieve is not sufficient to ensure the scheme’s validity. As McHugh J noted in *Re: Wakim* at [55]:

“Where constitutional power does not exist, no cry of cooperative federalism can supply it. If the object lies outside the reach or the effect of what a State or the Commonwealth can constitutionally do, the subject matter is beyond the reach of legislatures of Australia.”

Several forms of “cooperative federal schemes” have been used over the years. One of the more common was that which was used for the former *Corporations Law* whereby a law of one jurisdiction, in that case the Commonwealth, was enacted for its own law area (in that case the Australian Capital Territory) and the provisions of that law were applied in each other law area of the members of the Federation as a law of its own. One of the perceived advantages of such a scheme was that it preserved for each law jurisdiction a function in

making the relevant law and of exercising powers over it. Critics of such arrangements have stated, amongst other things (leaving aside criticisms of the complexity of such), that such schemes were really “cases of multiple laws masquerading as one”.

An alternative method is where the Commonwealth establishes its own regulatory body invested with such powers as the Commonwealth may have, based upon its legislative powers and the *Constitution*. Additional powers are then conferred on such body by the States and Territories.

The effect of the decision in *R v Hughes* (2002) 202 CLR 502 is that there is a potential that the conferral of functions on Commonwealth officers and authorities by a State, and the acceptance of such conferral by the Commonwealth, may be ineffective in some circumstances. The joint majority of six judges of the High Court in that case concluded that the conferral of functions on the Commonwealth Director of Public Prosecutions by the State of Western Australia was effective because the Commonwealth law which accepted such conferral could be characterised as a law with respect to a head of federal legislative power (see at [40]).

The joint majority in *R v Hughes* noted the previous decisions of the Court in *Duncan* (1983) 158 CLR 535 and *Cram; Ex parte New South Wales Colliery Proprietors Limited* (1987) 163 CLR and noted that *Duncan* was one of a number of decisions “which recognises that cooperation on the part of the Commonwealth and the States may well achieve objects that could be achieved by neither acting alone. Nothing in these reasons denies that general proposition. The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, when no such power is directly conferred on that officer or instrumentality by the *Constitution* itself, requires a law of the Commonwealth supported by an appropriate head of power” (at [46]).

During the hearing of *McLeod v Australian Securities Commission* [2002] HCA 37 submissions were made to the High Court which sought clarification of the relationship between *Hughes* on the one hand and *Duncan* and *Cram* on the other. That clarification was not given, but Kirby J confirmed that cooperation alone was insufficient to ensure validity. For my own part I still do not find clear how the requirement to identify a head of Commonwealth legislative power can be reconciled with a recognition that cooperation on the

part of the Commonwealth and the State may well achieve objects that could be achieved by neither acting alone.

The other method used to implement cooperative schemes is, of course, the use of the referral power. The most recent example of the use of that power is the enactment of the *Corporations Act 2001* (Cth).

The three dominant questions on the introduction in the drafting of the referral power were:

1. whether a reference could be revoked;
2. whether a referral deprived a State of the legislative power to make laws on the same matter (that is, whether the Commonwealth acquired exclusive power); and
3. the continuing constitutional status of Federal laws made by reason of a referral if the reference was revoked or otherwise expired.

The history of the referrals power and a discussion of it can be found in a recent paper delivered by the Solicitor General for Victoria: 18 February 2005: *New Directions in Cooperative Federalism: Referrals of Legislative Power and their Consequences*.

Much of what follows is based upon the material contained in that paper.

As noted by the Victorian Solicitor General, the High Court has on occasion expressed views about those questions. It is apparent that the power once exercised is a concurrent power, not exclusive (see *Graham v Patterson* (1950) 81 CLR 1). On balance, it appears that a reference is revocable (although the question has not finally been determined: see *Graham v Patterson* and *The Queen v Public Vehicles Licensing Appeal Tribunal (Tasmania)*; *Ex parte Australian National Airways Pty Limited* (1964) 113 CLR 207).

As to the effect of any termination or lapsing on a Commonwealth law based on such referral, there has not, as the Victorian Solicitor General notes, been an authoritative statement on the point; the *obiter dicta* comment by Windeyer J in *Airlines of New South Wales v New South Wales* (1964) 113 CLR 1 at 52-53 would indicate that the Commonwealth law based on such referral would cease to operate on its termination or expiration. However, as noted by the Victorian Solicitor General, French J speaking extra-judicially has expressed a different view. It may be difficult to justify how a Commonwealth law based upon a source of power may

exist when the source of power has disappeared.<sup>1</sup> Many State laws referring power to the Commonwealth make express provision for their review or termination after a particular period, but do not purport to say anything about the continued operation of the Commonwealth law on which they are based. Of course, if French J is correct, it may well be that the States would be unable to make such provision in any event. Presumably, any effect on a Commonwealth provision arises from the operation of the *Constitution*, rather than any exercise by a State of its legislative power.

An aspect of the use of references of power under s. 51(xxxvii) which does not appear to have received consideration is whether or not such references of power might infringe the principle in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

That principle has recently been reconsidered by the High Court in *Austin v The Commonwealth* [2003] HCA 3. In that case, the Court held that there was but one principle and that was that the Commonwealth lacked legislative power to legislate in a way which interfered with the essential functions of a State. Discrimination was but one element of such principle.

The application of the *Melbourne Corporation* principle to a referral of power under s. 51(xxxvii) does not appear to have been previously considered. There does not appear to have been any academic discussion of the possibility.

In his paper entitled “*Hughes Case and the Referral of Powers*”, the late B M Selway QC (Public Law Review, Vol. 12, 288) discussed various aspects of events preceding the enactment of the *Corporations Act 2001* (Cth), including the referral of powers upon which that Act relies. In the course of that paper, there is some discussion about other possible bases on which cooperative schemes might be held valid. In this regard, consideration is given as to whether s. 122 of the *Constitution* (the Territories power) with the incidental power in s. 51(xxxix) might support validity.

In that article, the author observed that “it is certain that a reference of power cannot be justified in relation” to all cooperative schemes. The possibility of the possible impediments on the use of s. 51(xxxvii) arising from *Melbourne Corporation* is not referred to.

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<sup>1</sup> French J’s views are contained in a paper entitled “The Referral of State Powers” 2003 31 University of Western Australian Law Review 19 at 33.

However, logically it would appear that s. 51(xxxvii) is capable of being so constrained. In *Gould v Brown* (1998) 193 CLR 346 at 443, Gummow J appears to raise the possibility that some of the difficulties he identified in that case could be overcome by a referral of power, notwithstanding that such difficulties arose from Chap. III of the *Constitution*. His Honour also raised the matter in argument. In the transcript for 8 April 1997, his Honour said “there was power under s. 51(xxxvii), it would seem. But no one chose to engage it.” However, his Honour appears to have clarified in *Wakim* that the heads of legislative power in s. 51 of the *Constitution* are subject to the *Constitution* and that Chap. III of the *Constitution* would accordingly affect any exercise of Commonwealth legislative power, including that under a referral under s. 51.

Just as a referral is subject to Chap. III of the *Constitution*, so too it would appear it would be subject to implied limitation on Commonwealth legislative power arising from *Melbourne Corporation*.

However, it seems clear that the principle in *Melbourne Corporation* is subject to the content, context or subject matter of a head of legislative power (see, for instance, *Queensland Electricity Commission v The Commonwealth* 159 CLR (at 206, 208 per Gibbs CJ; 218 per Mason J; 231-233, 240 per Brennan J; 250 per Deane J). Further, it is now apparent that the implied limitation arising from *Melbourne Corporation* is, in fact, one principle alone, of which discrimination is but one aspect. Thus, the High Court has explained the principle by saying that it was not a matter of financial consequences of laws but rather the impairment of a State’s constitutional status and interference with a State’s capacity to function as a government. It may be said that there will be no impairment of a State’s constitutional status if a Commonwealth law is enacted in reliance on a reference of power by that very State. Thus, it could hardly be said that a State’s constitutional capacity or functions were impaired or threatened by a Commonwealth law enacted in reliance upon that same matter which was referred to the Commonwealth by the State. Against that, it might be said that s. 51(xxxvii) does not justify a State and the Commonwealth altering the federal compact enacted under the *Constitution*; that is what s. 128 of the *Constitution* is for and s. 128 requires a referendum passed by a majority of voters in a majority of States. Thus, it might be said that a State could not refer to the Commonwealth legislative power with respect to its judicial system or its legislature because such would be incompatible with the federal compact and a continuation of the State constitutions guaranteed by s. 106. However, even that argument is correct, it

does not necessarily follow that a reference of power with respect to regulation in a particular area in fact interferes with the capacity of the States to function as a government or interfere with their constitutional status. Much might depend upon the subject matter of the particular referral.

The final comment I would make about the use of s. 51(xxxvii) is in the context of the present *Corporations Act* scheme and the use of the so-called “roll-back” mechanism in Pt 1.1A. That Part has what are by now conventional expressions of intention not to “cover the field” but the effect of s. 5G is to set out circumstances in which Commonwealth law will not apply so that it will not render what would otherwise be directly inconsistent State laws inoperative under s. 109 of the *Constitution*. It is said that such a mechanism is designed to ensure that States need not give up their capacity to enact inconsistent laws when they cooperate in a reference based arrangement.<sup>2</sup> There are questions of the construction and effectiveness of such provisions (see, for instance, *DPP v Tat Sang Loo* (2002) 42 ACSR 459 per Ashley J, Victorian Supreme Court; *HIH Casualty and General Insurance Limited (in Liquidation) v Building Insurers’ Guarantee Corp* (2003) 202 ALR 610 per Barrett J, NSW Supreme Court). One issue which may arise is whether or not s. 5G will allow a State to legislate about what may be characterised as being duties and liabilities otherwise created under Commonwealth law because such a provision could not be a valid State law for reasons other than inconsistency with Commonwealth law.

## **2. Implications from a united federal judicial system**

When Gregory Wayne Kable was dealt with under the *Community Protection Act 1994* (NSW) and the High Court decided that that legislation was invalid in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, there followed a series of cases in which legislation was argued to be invalid because it was incompatible with the conferral of Federal judicial power on the State courts. All but one of those cases failed in that argument, but the principle remains relevant to a drafter of legislation in Australia. The most recent consideration of the principle is the High Court’s decision in *Fardon v Queensland* (2004) 78 ALJR 1519.

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<sup>2</sup> Jim Faulkner, “Recent Developments in Commonwealth Constitutional Policy”, *Constitutional Law Forum* 2005, 18 May 2005 at page 7.

There have been many challenges to legislation based on *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 but, with one exception, those challenges have failed. I want to talk today about a recent case in which an argument based upon what might loosely be described as *Kable* principles is likely to be used. The case involves, amongst other things, a challenge to legislative provisions which allow the use of acting judges. It will be dealt with by the High Court and involves among many other things, a challenge to the appointment of Foster AJ, who had dealt with proceedings for breaches of the *Corporations Law* (NSW) (*Forge & Ors v ASIC & Ors*).

The argument to be made is likely to build on general principles of judicial independence and, in particular, whether the application of the principle in *Kable* (seen in the light of the High Court's decision in *Fardon v Queensland* (2004) 78 ALJR 1519) may require security of tenure of judicial office at the State level.

*Kable* itself contains a number of general propositions which might be used in an attempt to support the argument that security of tenure (and also of remuneration) might be mandated at the State level. One underlying principle of the doctrine is that Courts cannot exercise functions that are incompatible with the exercise of Federal judicial power because their exercise diminishes public confidence in the integrity of the judiciary as an institution (although "public confidence" is now seen as only one indicator of a wider principle). The objection to Courts being required to perform certain incompatible functions seems to be merely one manifestation of a fundamental principle of more general application. For example, McHugh J at 116, formulated the principle in the following terms:

“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. Neither Parliament, for example, can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power.”

Fundamental elements of the constitution of courts, including the terms of appointment and remuneration of judicial officers, would seem to be of equal if not greater significance to the public confidence in the integrity of the judiciary. Accordingly, as a matter of principle and

in the appropriate case it would seem that the High Court would have little difficulty in extending the *Kable* principles from incompatible functions to incompatible constitutive elements.

However, *Kable* confirmed the principle that in vesting federal jurisdiction in State Courts, the Commonwealth must take State Courts as it finds them. For present purposes, there are a number of comments in obiter in *Kable* which suggest that the implied principles arising from Chap. III do not have an equivalent operation when it comes to determining the constitution of “other courts” in which the Commonwealth vests federal judicial power. This is because of the principle that, in vesting judicial power in “other courts”, the Commonwealth must take such courts as it finds them. Brennan CJ (at 67), albeit in dissent, referred to “accepted constitutional doctrine” that when the Commonwealth invests judicial power in a State court it must take the court “constituted and organised as it is from time to time”. Toohey J in the majority, at 95-96, accepted that the result in *Kable* did not involve a challenge to the “well established doctrine that, in investing judicial power in the States, the Parliament must take the State courts as it finds them.”

McHugh J, at 109-110, held as follows:

“Federal judicial power may be vested in a State court although that court exercises non-judicial as well as judicial functions. Moreover, when the Parliament of the Commonwealth invests the judicial power of the Commonwealth in State courts pursuant to s 77(iii) of the Constitution, it must take the State court as it finds it. This is because the Constitution recognises that the jurisdiction, structure and organisation of State courts and the appointment, tenure and terms of remuneration of judges of State courts is not a matter within the legislative power of the federal Parliament. 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.”

McHugh J went on to consider the extent to which the *Constitution* presupposes the continued existence of State courts and held, at 112:

“It necessarily follows, therefore, that the *Constitution* has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system. That does not mean that a State cannot abolish or amend the constitutions of its existing

courts. Leaving aside the special position of the Supreme Court of the States, the States can abolish or amend the structure of existing courts and create new ones. However, the *Constitution* requires a judicial system in and a Supreme Court for each State and, if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system. With the abolition of the right of appeal to the Privy Council, therefore, this Court is now the apex of an Australian judicial system.”

At 115, McHugh J further noted:

“It is true that the *Constitution* does not protect the appointment, remuneration and tenure of the judges of State courts invested with federal jurisdiction although it protects the judges of federal courts in respect of those matters. But this difference provides no ground for concluding that the exercise of federal judicial power by State courts was intended to be inferior to the exercise of that power by federal courts.”

Gaudron J, at 101-103, dealt in some detail with the question of how to reconcile this principle with the implied restriction on the conferral of incompatible functions which was identified in Chap. III. Her Honour held as follows:

“When s 77 is considered in conjunction with s 72 which, as earlier indicated, provides as to the appointment, tenure and remuneration of the members of this Court and federal courts created by the Parliament, it is correct to say, by reference to those provisions, that Ch III recognises that this Court and other federal courts are creatures of the Commonwealth and that State courts are the creatures of the States.

*Once it is accepted that State courts are the creatures of the States and are constitutionally recognised as such, it follows that it is for the States and for the States alone to determine the appointment, tenure and remuneration of State judges and the structure, organisation and jurisdictional limits of State courts. In that sense, it is correct to say, as it often is, that the Commonwealth must take State courts as it finds them ...*

Neither the recognition in Ch III that State courts are the creatures of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from what is, to my mind, one of the clearest features of our Constitution, namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth. Moreover, neither that recognition nor that consequence directs the conclusion that State Parliaments may enact whatever laws they choose with respect to State courts. If Ch III requires that State courts not exercise particular powers, the Parliaments of the States cannot confer those powers upon them ...

The question whether the Constitution requires that State courts not have particular powers conferred upon them depends, in my view, on a proper understanding of the integrated judicial system for which Ch III provides - the 'autochthonous expedient', as it has been called. One thing which clearly emerges is that, although it is for the States to determine the organisation and structure of their court systems, they must each maintain courts, or, at least, a court for the exercise of the judicial power of the Commonwealth. Were they free to abolish their courts, the autochthonous expedient, more precisely, the provisions of Ch III which postulate an integrated judicial system would be frustrated in their entirety. To this extent, at least, the States are not free to legislate as they please." (emphasis added).

The High Court has not directly considered the validity of the appointment of acting Judges to State courts. It has twice considered matters involving what could be broadly be said to be a challenge based on judicial independence of appointments to Territory courts. The first of these was in *Re: Governor, Goulburn Correctional Centre, ex parte, Eastman* (1999) 200 CLR 322, the second was in *North Australia Aboriginal Legal Service v Bradley* (2004) 206 ALR 315. Comments in relation to *Kable* principles and acting appointments were also made in *Fardon*.

*Eastman* involved a prosecution in the ACT pursuant to s. 18 of the *Crimes Act 1900* (NSW) as picked up by s. 6 of the *Seat of Government Acceptance Act 1909* (Cth) and s. 4 of the *Seat of Government (Administration) Act 1910* (Cth). Section 34(5) of the *Australian Capital Territory Self-Government Act* in effect provided that s. 18 of the *Crimes Act* was taken to be an enactment of the Assembly of the ACT. The matter was heard in the ACT by Carruthers AJ. It was accordingly clear that as an acting Justice he had not been appointed consistently with s. 72 of the *Constitution*. Ultimately the Court found that s. 72 of the *Constitution* and the principles therein did not apply to the Supreme Court of the ACT. However Kirby J, dissenting, found that as the Territories were part of the Federation, Territory courts were Federal courts, and that accordingly Territory Judges must have the security of tenure of federal Judges (at 356). Whilst his Honour found that Territory courts were "Federal" courts to which requirements of Chap. III of the *Constitution* applied, he appeared to acknowledge that State courts were beyond those limitations. In this respect his Honour said:

"It is unnecessary for the Constitution to provide expressly for appointment to, tenure and remuneration in, and removal from, office as a State Judge. Such matters were at federation, and still are provided for in State constitutions saved by s. 106 of the Australian Constitution

of the State laws. But it is necessary to provide, as s. 72 does, such terms of appointment, tenure, remuneration and removal in the case of Justices of the High Court and of courts created by the Federal Parliament. A court is no less 'federal' nor any less 'court created by the Parliament', if it is a court for a Territory established by an Act of Federal Parliament, as the Supreme Court of the ACT unarguably was in 1933, and continued to be, until the Transfer Act and possibly thereafter."

Ultimately I think *Eastman* provides little assistance in discerning what view the High Court might take to acting Judges of State courts, being courts clearly not created by Federal Parliament.

### *Bradley*

*Bradley* involved a challenge to s. 6 of the *Magistrates Act 1980* (NT) to the extent that it allowed the administrator of the Northern Territory to determine the remuneration of a Magistrate on a fixed term basis. The Magistrate was appointed to hold office until age 65, nevertheless remuneration was to be set on a fixed term. It was argued that such arrangement contravened implied principles in Chap. III of the *Constitution* identified in *Kable*. In the Full Federal Court Black CJ and Hely J, echoing the majority in *Eastman* noted that whilst s. 72 of the *Constitution* expressly provided for remuneration and appointment of federal Judges, it was silent in relation to such matters in respect of other courts in which federal jurisdiction was vested. In this respect their Honours concluded as follows (at [137]-[138]):

“[T]he proposition that the federal judiciary and other judges who are to exercise the judicial power of the Commonwealth must be, and be perceived to be, independent of the legislature and the executive government, overstates the constitutional position if it is intended to convey that the ‘other judges’ must be appointed on terms which give them security of tenure equivalent to that given to the federal judiciary under s 72.

[138] The proposition that the federal judiciary must be, and be perceived to be, independent of the legislature and the executive government does not exist in the air. It is a proposition that is grounded in the doctrine of separation of powers and Ch III of the *Constitution*, particularly s 72. Once it is recognised that s 72 of the *Constitution* does not apply to Territory Courts (or, for that matter, to State Courts) there is no room for any implication regarding tenure and remuneration of Territory judges or magistrates which replicates the precise requirements of s 72. If the express provision in Ch III, s 72, prescribing security of tenure and protecting the level of remuneration for judges has no application to Territory Courts and judicial officers,

there is no basis on which an implication to the same or some similar effect can be drawn from Ch III.”

Ultimately the High Court also rejected the challenge to the Territory legislation. It is clear however from the judgment that what his Honour Chief Justice Gleeson referred to as the “fundamental importance of judicial independence and impartiality” was assumed (see pg. 317). In this respect his Honour referred to the principles enunciated by the Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343. However significantly his Honour said the following (at 317):

“With the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of Judges and Magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and the court administration. All those arrangements are relevant to independence. The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements. For example, s. 72 of the Constitution does not permit the appointment of federal acting Judges. On the other hand, acting Judges are commonly appointed for fixed, renewable, terms in some States and Territory courts. This court decided in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* that acting Judges may be appointed in the Supreme Court of the Australian Territory. In the Northern Territory, the legislation with which this case is concerned provides for the appointment of acting Registrars; s. 9.”

His Honour went on to note as follows:

“As a number of decisions of the Supreme Court of Canada demonstrate, it is possible to identify certain minimum conditions that must be satisfied if a judicial body is to be regarded as independent and impartial. Beyond those minimum conditions, however, both history and current practice reveal that there is significant room for divergence.”

His Honour ultimately pointed out that in terms of interference with the judiciary, Parliament could effect a financial disadvantage by simply taking no action at all in relation to judicial remuneration (at 321 – 322).

Justices McHugh, Gummow, Kirby, Hayne, Callinan and Heydon also clearly stressed the importance of judicial independence and said the following (at 26 - 31):

“The Legal Aid Service relies upon the analysis by Spigelman CJ of *Kable* in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*, where his Honour said:

‘The reasoning of the majority in *Kable* was not confined to the *character* of a function or power conferred by a State law. Some of the reasoning encompasses the *manner* in which a function or power is to be performed. Although *Kable* was concerned with the compatibility of a specific non-judicial power (to order imprisonment without any finding of criminal guilt) with the exercise by a State Supreme Court of the judicial power of the Commonwealth, the reasoning of the majority did involve principles of broader application: see *Bruce v Cole*.’

Further, in *Ebner v Official Trustee in Bankruptcy*, Gaudron J observed:

‘Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with *Kable v Director of Public Prosecutions (NSW)*, 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. And as courts created pursuant to s 122 of the Constitution may also be invested with the judicial power of the Commonwealth, it should now be recognised, consistently with the decision in *Kable*, that the Constitution also requires that those courts be constituted by persons who are impartial and who appear to be impartial.’

In his reasons in *Ebner*, Kirby J, by reference to *Kable*, also expressed the view that:

‘... in Australia, the ultimate foundation for the judicial requirements of independence and impartiality rests on the requirements of, and implications derived from, Ch III of the Constitution.’

Counsel for the Legal Aid Service put an argument in three steps. The first is that a court of the territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the parliament. That proposition, to which there was no demurrer by the territory or by the Attorney-General of the Commonwealth who intervened in this court, is supported by the citations of authority by Gaudron J in the above passage from *Ebner*. It should be accepted.

The second step in the Legal Aid Service’s argument is that it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an

independent and impartial tribunal. That proposition, which again appears in the passage from *Ebner*, also should be accepted.

The difficulty arises with the third step. This requires discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides. No exhaustive statement of what constitutes that minimum in all cases is possible. 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.’

Much then turns upon the permitted minimum criteria for the appearance of impartiality.”

Their Honours referred to the decision in *Eastman* noting that the proposition of s. 72 of the *Constitution* had no application to Territory courts. Their Honours went on to say the following:

“Moreover, it may be added that the absence of a full commission to the trial Judge in *Eastman* did not gain say of the appearance of impartiality. No question arose in *Eastman* respecting the effect upon the appearance of impartiality and the application of *Kable* to a series of acting rather than full appointments which is so extensive as to distort the character of the Court concerned. No question arises in this case.”

Significantly it follows from their Honours’ comment above that the question of whether a series of acting appointments could “distort the character of the court” for the purposes of the principles in *Kable* was not determined either in *Eastman* or in *Bradley*. It also suggests that the matter is one of degree. It is in this respect that comments by the court in *Fardon* gain additional significance.

### *Fardon*

The narrowness of the principle in *Kable* is apparent from the judgment of the High Court in *Fardon*. Whilst the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which was challenged in that case was arguably the closest in form to the legislation which was declared invalid in *Kable* itself, the High Court upheld its validity by a majority of 6 to 1 (Kirby J

dissent). The narrowness of the principle in *Kable* is evident in the following statement by McHugh J at 41:

“The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court’s capacity to exercise Federal jurisdiction impartially and according to Federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation.”

His Honour also confirmed that the separation of powers derived from Chaps I, II and III of the *Constitution* did not apply to the States, notwithstanding *Kable*, and reiterated the principle that in investing State courts with federal jurisdiction the Commonwealth must take State courts as it finds them. His Honour also held that State courts often validly undertake functions which could not be undertaken by a Chap. III court (at 38). His Honour noted that there was nothing in the *Constitution* precluding the States from empowering even non-judicial tribunals from determining issues of criminal guilt.

However narrow the principle appears to be, significantly for present purposes McHugh J went on to say the following (at para. 43):

“In my opinion, *Kable* does not govern this case. *Kable* is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts. *Kable* was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the *Community Protection Act* pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired. The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in *Kable* is unlikely to be repeated. 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 or in circumstances where State judges are used to carry out non-judicial functions, rather than in the context of *Kable*-type legislation.”

Gummow J (with whose judgment Hayne J in substance agreed) said the following in relation to the requirement that *Kable* principles preclude the vesting of functions on State courts which are repugnant to the exercise of Commonwealth judicial power and the role of “public confidence” as an indicator of potential incompatibility (at paras. 102 – 104):

“Thirdly, one important indication that a particular law has the character just stated is that the exercise of the power or function in question is calculated, in the sense of apt or likely, to undermine public confidence in the courts exercising that power or function. The relationship between institutional integrity and public confidence in the administration of justice was discussed, in strongly disapproving any judicial participation in ‘plea bargaining’, by the Full Court of the Supreme Court of Victoria in *R v Marshall*. However, although in some of the cases considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity.

Fourthly, the notions of repugnancy and incompatibility appear elsewhere in constitutional doctrine. Examples are provided by the interaction between Imperial law and colonial and State law before the enactment of s 3 of the *Australia Act 1986* (Cth), between federal and Territory laws, and between statute and delegated legislation. A closer, if inexact, analogy is provided by the constitutional restriction on the availability of Ch III judges to perform non-judicial functions as designated persons.

But, in that last category, as with *Kable* and the present case, the critical notions of repugnancy and incompatibility are unsusceptible of further definition in terms which necessarily dictate future outcomes. For example, in the joint judgment in *North Australian Aboriginal Legal Aid Service Inc v Bradley*, there was reserved for consideration elsewhere ‘the application of *Kable* to a series of acting rather than full [judicial] appointments which is so extensive as to distort the character of the court concerned’. The notions of particular disability or burden upon State activity which are derived from *Melbourne Corporation v The Commonwealth* provide another instance of constitutional doctrine which is not framed in terms apt to dictate future outcomes. That a particular constitutional doctrine requires close attention to the detail of impugned legislation and that its invalidating effect may be demonstrated infrequently does not, as the history of the application of *Melbourne Corporation* over 50 years shows, warrant its description at any one time as a dead letter.”

Accordingly their Honours still appear to consider the question as to whether a series of acting appointments are invalid on *Kable* grounds open.

### *Kable and Acting Judges*

As was clear in *Kable* itself and from subsequent statements of the Court in the *Kable* context, it remains true that in investing State courts with federal jurisdiction, the Commonwealth must take such State courts as it finds them. They remain creatures of the State and their structure and the appointment of their Judges remains a matter of State law. Chapter III of the *Constitution* has no direct application to State courts. The only application it has at all at State level is through the incompatibility principle in *Kable*, which subsequent cases have shown to be extremely limited in scope. However the comment of McHugh J in *Fardon*, the known views of Kirby J in respect of acting Judges and comments by Gummow J with whom Hayne J agreed in *Fardon* in relation to the issue of acting Judges, suggest that there may be some potential scope for a “*Kable* issue” to arise as to legislation authorising the appointment of acting Judges at the State level. Whilst I suspect a serious restriction on what the High Court has described as the minimum characteristics of judicial independence could provoke an application of the *Kable* principle, it seems very unlikely that the present practice as to acting appointments in the Supreme Court in New South Wales (as I understand it) would lead to that result. Acting Justice Foster as he then was, was a senior retired Judge, falling within what commentators would seem to have thought would have been a permissible practice in terms of temporary appointments.

The issue will no doubt also be raised in the context of recent amendments in Victoria dealing with the appointment of acting judges (*Courts Legislation (Judicial Appointments & Other Amendments) Act 2005* (Vic)). Those provisions authorise the appointment of acting Judges of the Supreme Court for a period of up to five years or the attainment of the age of 70 years whichever is the sooner.

The current proceedings relating to the NSW acting Judge provisions may also determine the validity of the provisions relating to the appointment of acting Judges in Victoria and elsewhere.

### *Implied Freedom of Political Discourse*

I will not deal with this implied freedom in any great detail. An implication might arise to constrain the legislative drafter in quite unforeseen circumstances. The recent decisions in relation to it in the High Court (for instance, *Coleman v Power* [2004] HCA 39 and recent argument in the High Court as to it in *Australian Plaintiff Lawyers Association v New South*

*Wales*) dealt with provisions which perhaps might have been foreseen to raise such issues. However, even when drafting a provision such as that considered in *Coleman v Power*, it may not be at first sight be obvious that prescribing an offence as to the use of threatening, abusive or insulting words to a person in or near a public place may infringe the implied freedom of political discourse. But McHugh J in the High Court in *Coleman v Power* found that such a provision did constitute a burden on political discourse and was not reasonably adapted to serve a legitimate end compatible with that freedom. The other Justices in the majority, who upheld the appeal by Mr Coleman, found that, as a matter of construction, that provision did not apply to his conduct.

The task of predicting when a particular provision might be exposed to an assertion that it is invalid because it infringes the right to political free speech has not yet in Australia reached the “heights” that it has in the United States of America. For instance, in 1983, those associated with Blackie the Talking Cat asserted that s. 2 of *Augusta Business Ordinance No 5006*, which imposed a business licence tax, was invalid and unconstitutional on grounds that included that it offended the right of free speech (*Miles v City Council of Augusta*, Georgia 710 F. 2d 1542 (1983)). The facts of the case were set out by the Court as follows:

“Plaintiffs Carl and Elaine Miles, owners and promoters of “Blackie the Talking Cat”, brought this suit in the United States District Court for the Southern District of Georgia, challenging the constitutionality of the Augusta, Georgia, Business License Ordinance. Their complaint alleged that the ordinance is inapplicable in this case or is otherwise void for vagueness and overboard, and that the ordinance violates rights of speech and association. The district court granted summary judgment in favour of the defendant City Council of Augusta. *Miles v City of Augusta*, 551 F.Supp. 349 (S.D.Ga.1982). We affirm.

The partnership between Blackie and the Mileses began somewhat auspiciously in a South Carolina rooming house. According to the deposition of Carl Miles:

Well, a girl come around with a box of kittens, and she asked us did we want one. I said no, that we did not want one. As I was walking away from the box of kittens, a voice spoke to me and said, “Take the black kitten.” I took the black kitten, knowing nothing else unusual or nothing else strange about the black kitten. When Blackie was about five months old, I had him on my lap playing with him, talking to him, saying I love you. The voice spoke to me saying, “The cat is trying to talk to you.” To me, the voice was the voice of God.

Mr Miles set out to fulfil his divination by developing a rigorous course of speech therapy.

I would take the sounds the cat would make, the voice sounds he would make when he was trying to talk to me, and I would play those sounds back to him three and four hours a day, and I would let him watch my lips, and he just got to where he could do it.

Blackie's catechism soon began to pay off. According to Mr Miles:

He was talking when he was six months old, but I could not prove it then. It was where I could understand him, but you can't understand him. It took me altogether a year and a half before I had him talking real plain where you could understand him.

Ineluctably, Blackie's talents were taken to the marketplace, and the rest is history. Blackie catapulted into public prominence when he spoke, for a fee, on radio and on television shows such as "That's Incredible". Appellants capitalized on Blackie's linguistic skills through agreements with agents in South Carolina, North Carolina, and Georgia. The public's affection for Blackie was the catalyst for his success, and Blackie loved his fans. As the District Judge observed in his published opinion, Blackie even purred "I love you" to him when he encountered Blackie one day on the street.<sup>1</sup>

Sadly, Blackie's cataclysmic rise to fame crested and began to subside. The Miles family moved temporarily to Augusta, Georgia, receiving "contributions" that Augusta passers-by paid to hear Blackie talk. After receiving complaints from several of Augusta's ailurophobes, the Augusta police – obviously no ailurophiles themselves<sup>2</sup> – doggedly insisted that appellants would have to purchase a business license. Eventually, on threat of incarceration, Mr and Mrs Miles acceded to the demands of the police and paid \$50 for a business license."

It appeared to the Court that there was no question that what was occurring was a business and accordingly Blackie and those associated with him were required to have a licence. An assertion was made that Blackie's right to free speech had been infringed. The Court thought that it was arguable that Blackie possessed such an unusual ability but could not be considered a "person" within the protection of the US *Bill of Rights*. Further, the Court thought that Blackie could "clearly speak for himself" if such a right was to be asserted. The litigation does not seem to have been pursued further than the Court of Appeals, Eleventh Circuit.

Although that case arose in circumstances that would not have given rise to any serious argument in Australia, there remain unresolved questions about the extent to which laws which might, on one characterisation, have legitimate and worthy objectives, such as

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<sup>1</sup> We note that this affectionate encounter occurred before the Judge ruled against Blackie. See *Miles, supra*, 551 F.Supp. At 340 n. 1.

<sup>2</sup> See 551 F.Supp. at 351 n. 2.

improvements in legal process, but which are seen by others as necessarily impinging on fundamental rights of political discourse, are valid. Some of those questions may well be resolved in the proceedings involving the validity of the provision of the *Legal Professional Regulation 2002* (NSW) which prevents barristers and solicitors from publishing information that advertises legal services relating to personal injury. The proceedings, brought by *The Australian Plaintiff Lawyers Association* are presently reserved for decision by the High Court but may well provide that Court with the opportunity to clarify what can constitute “political communication” for the purposes of that freedom. With that clarification, it would be hoped that those advising governments and drafting legislation for them would be better able to identify circumstances in which existing and proposed provisions might validly operate.