

ANU COLLEGE OF LAW

---

Dr Fiona Wheeler  
Reader  
ANU College of Law

Canberra ACT 0200 Australia  
Telephone: +61 2 6125 4167  
Facsimile: +61 2 6125 3971  
Email: [fiona.wheeler@anu.edu.au](mailto:fiona.wheeler@anu.edu.au)  
<http://law.anu.edu.au>

3 February 2006

Dr Hanna Jaireth  
Standing Committee on Legal Affairs  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

Dear Hanna,

**Inquiry into Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005  
(ACT)**

As discussed, I enclose a submission to the Standing Committee on Legal Affairs in relation to the above inquiry.

I understand that the public hearings in this matter have concluded. However, I have recently published an article that provides a more detailed account of matters raised in my submission. A copy of that article is included as part of my submission.

Yours sincerely

Dr Fiona Wheeler

## Submission to Standing Committee on Legal Affairs

### Inquiry into Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)

This submission is concerned with one aspect of the constitutional validity of the Draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT).

A question arises whether the Supreme Court of the ACT can be validly empowered to issue preventative detention orders — as envisaged by cl 19 of the Draft Bill — consistently with the Australian Constitution.

The question arises because of a series of recent High Court decisions concerning the ‘*Kable* doctrine’ or ‘*Kable* principle’. The *Kable* doctrine is a limitation on legislative power implied from the text and structure of Chapter III of the Australian Constitution. In the present context, the major cases concerning the doctrine are *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable’s Case*), *NAALAS v Bradley* (2004) 218 CLR 146 and *Fardon v Attorney-General (Qld)* (*Fardon’s Case*) (2004) 210 ALR 50.

The *Kable* doctrine prevents State Parliaments from validly conferring functions on State courts ‘that would undermine the “institutional integrity” of those courts as part of the Australian judicial system, including their independence from the political arms of government’ (F Wheeler, ‘The *Kable* Doctrine and State Legislative Power Over State Courts’ (2005) 20 *Australasian Parliamentary Review* 15, 16). This proposition was established by *Kable’s Case* and confirmed in *Fardon’s Case*. Importantly, in *NAALAS v Bradley* it was established that this rule also limits the power of Territory Legislatures in relation to Territory courts.

In *Kable’s Case*, the High Court found that a New South Wales Act that empowered the Supreme Court of New South Wales to make a preventative detention order infringed the *Kable* doctrine and was invalid. By contrast, in *Fardon’s Case* a Queensland Act that empowered the Supreme Court of Queensland to make a preventative detention order survived constitutional challenge on *Kable* doctrine grounds. While the High Court in *Fardon’s Case* affirmed the existence of the *Kable*

doctrine, a majority found that the Queensland Act operated in a different way to the earlier New South Wales Act. In particular, the statutory conditions under which the Supreme Court of Queensland exercised its preventative detention powers — unlike those in *Kable's Case* — sufficiently 'preserve[d] judicial independence and respect[ed] basic judicial procedure' (Wheeler, *ibid*, p 25).

In light of these decisions, a live question arises whether the preventative detention power given to the Supreme Court of the ACT under cl 19 of the Draft Bill is sufficiently analogous to that upheld in *Fardon's Case* to survive *Kable* doctrine challenge.

Whilst Part 2 of the Draft Bill has clearly been constructed in light of *Fardon's Case* in an endeavour to protect the power given to the Supreme Court of the ACT from constitutional attack, the *Kable* doctrine is uncertain in scope. Thus, it remains unclear whether cl 19 would be constitutionally valid. In particular, the modern High Court has not had to consider whether (and, if so, under what conditions) Australian Courts can be validly empowered to issue preventative detention orders on national security or 'terrorism' grounds. The facts of *Kable's Case* and *Fardon's Case* both concerned detention to prevent an anticipated breach of the general criminal law.

Although this submission focuses on the validity of cl 19 of the Draft Bill, a further question arises whether cll 63 and 70 — which empower the Supreme Court of the ACT and the Magistrates Court to issue preventative authorisation orders and investigative authorisation orders — may also potentially infringe the *Kable* doctrine. Again, given the uncertain scope of the doctrine, it is unclear whether these clauses would be constitutionally valid.

I have recently published an article on the *Kable* doctrine. Since the article may be of use to the Committee, I attach it for further reference. The article states the law as at the middle of 2005.

Dr Fiona Wheeler  
ANU College of Law  
3 February 2006

## The *Kable* Doctrine and State Legislative Power Over State Courts

Fiona Wheeler\*

Contests over the scope of state law-making power under the Australian Constitution have typically been disputes about federalism. As is well-known, the High Court's expansive interpretation of Commonwealth legislative power — culminating in its landmark decision in the *Tasmanian Dam Case*<sup>1</sup> — has given the Commonwealth far greater authority to override state laws than envisaged at federation. While battles over states' rights continue, state law-makers in the twenty-first century now face additional constitutional hurdles. In particular, the High Court has recognised a growing number of implied constitutional limitations on state power with which state legislators must comply if their laws are to survive legal challenge.<sup>2</sup> One such implied limitation is the freedom of political communication first recognised by the High Court in 1992 in *Australian Capital Television Pty Ltd v Commonwealth*.<sup>3</sup> This article considers a second limitation known as the *Kable* doctrine. This doctrine, first recognised by the High Court in 1996, narrows state legislative power by establishing, albeit to a limited degree, a constitutionally entrenched separation of judicial power at state level. In so doing, the *Kable* doctrine has altered the traditional constitutional relationship between state parliaments and state courts in important respects.

This article is intended to provide those involved with the legislative process in the Australian states and territories with an account of the controversial *Kable* doctrine and its uncertain sphere of application. Part I of the article explores the basic features of the *Kable* doctrine, including its origins and constitutional significance.

\* Faculty of Law, ANU. This is a revised version of a paper presented at the Ninth Australasian and Pacific Conference on Delegated Legislation and Sixth Australasian and Pacific Conference on the Scrutiny of Bills, 'Legislative Scrutiny in a Time of Rights Awareness', Canberra, 2-4 March 2005. I would like to thank James Fleming for his research assistance and Dr John Williams for his helpful comments on an earlier draft.

<sup>1</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>2</sup> Anne Twomey, 'The Limitation of State Legislative Power' (2001) 4 *Constitutional Law and Policy Review* 13, 13 and 19. In her paper, Twomey discusses this trend in detail referring both to the *Kable* doctrine and to the implied freedom of political communication.

<sup>3</sup> (1992) 177 CLR 106. See also, for example, *Coleman v Power* (2004) 209 ALR 182.

The 'extraordinary'<sup>4</sup> legislation which led to the emergence of the doctrine as part of Australian law is discussed. Part II then examines the scope of the constitutional protection which the doctrine currently extends to state courts. In particular, this involves assessing the effect of the decision of the High Court in 2004 in *Fardon v Attorney-General (Qld)* (*Fardon's Case*).<sup>5</sup> *Fardon's Case* confirms the existence of the *Kable* doctrine but shows that the Gleeson Court is presently applying it in a cautious and restrained manner. This attitude of caution is likely to characterise the judicial development of the doctrine for the foreseeable future. The article concludes in Part III with some reflections on whether the *Kable* doctrine should be included in lists of constitutional human rights protections in Australia. Whether the Australian community is better off because of the *Kable* doctrine's existence is also considered. As will be seen, there is room for doubt on both these matters.

### 1. The *Kable* Doctrine

The *Kable* doctrine is an implication from the Australian Constitution which prevents state parliaments from making certain laws that adversely affect the integrity of state courts. As currently understood, the doctrine has two components. First, it prevents state parliaments from abolishing their Supreme Court,<sup>6</sup> or, at least, from legislating to abolish the state judiciary in its entirety.<sup>7</sup> Secondly, and more controversially, it prevents state parliaments from giving functions to state courts that would undermine the 'institutional integrity'<sup>8</sup> of those courts as part of the Australian judicial system, including their independence from the political arms of government. To take a simple example, under the doctrine a state court could not be empowered to determine the state's budgetary priorities.<sup>9</sup> To give a state court a non-judicial function of this nature would clearly embed the court in the political process and compromise its independence from government. Importantly, legislation that infringes the *Kable* doctrine is invalid. The doctrine is thus a 'hard' as opposed to a 'soft' rule of constitutional law.

#### A Origins of the *Kable* doctrine

The *Kable* doctrine was first recognised by the High Court in 1996 in *Kable v Director of Public Prosecutions (NSW)* (*Kable's Case*).<sup>10</sup> There a majority of the High Court found the *Community Protection Act 1994* (NSW) invalid. The

<sup>4</sup> Two High Court judges in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 used this adjective to describe the legislation at issue in that case: at 98 (Toohey J), 134 (Gummow J).

<sup>5</sup> (2004) 210 ALR 50.

<sup>6</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 110–11 (McHugh J), 139–42 (Gummow J); *Baker v The Queen* (2004) 210 ALR 1, 18 (Kirby J).

<sup>7</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 110–11 (McHugh J), 140–2 (Gummow J).

<sup>8</sup> Preserving the 'institutional integrity' of state courts has recently been described as the 'touchstone' of the *Kable* doctrine: *Fardon v A-G (Qld)* (2004) 210 ALR 50, 78 (Gummow J).

<sup>9</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 117 (McHugh J).

<sup>10</sup> (1996) 189 CLR 51.

*Community Protection Act* was a preventive detention statute. Even when judged by the standards of other preventive detention regimes, it contained several 'striking'<sup>11</sup> and unusual features. Specifically, it empowered the Supreme Court on the application of the Director of Public Prosecutions (DPP) to order that Mr Kable be detained in prison if the court was satisfied of two things. First, that Mr Kable was 'more likely than not to commit a serious act of violence' and, secondly, that his detention was 'appropriate' for 'the protection of a particular person or persons or the community generally' (s 5(1)). It followed that a detention order was based not on what Mr Kable had actually done, but on an assessment by the Supreme Court — or as one High Court judge put it 'an educated guess'<sup>12</sup> — as to what he might do in the future.<sup>13</sup> In addition, although an order under the Act resulted in Mr Kable's imprisonment, the DPP's case against him only needed to be proved on the balance of probabilities (s 15). The standard rules of evidence were also modified by widening the range of admissible materials (s 17). The most startling feature of the *Community Protection Act*, however, was its ad hominem character. Its object was 'to protect the community by providing for the preventive detention ... of Gregory Wayne Kable' (s 3(1)). The Act thus identified Mr Kable by name and was expressed to apply to him alone.

The circumstances that led to Gregory Wayne Kable being targeted in this way bear all the hallmarks of contemporary law and order politics. Mr Kable had been convicted in 1990 of the manslaughter of his wife and sentenced to several years imprisonment. The *Community Protection Act* was passed shortly before he was due to be released. The legislation was initiated by the minority Fahey Government and, when introduced into Parliament, was of general application.<sup>14</sup> It was widely understood that Mr Kable was the 'genesis of th[e] legislation', however.<sup>15</sup> Thus, when Opposition and other non-government members expressed concern about the far-reaching nature of the proposed law, it was amended to apply to Mr Kable alone.<sup>16</sup> In subsequent debate on the *Community Protection Bill* the Minister for Police told Parliament that Mr Kable had 'come to the notice' of the government because of letters he had written while in prison containing 'veiled threats of violence' to others. To protect the public 'every avenue which might allow for Mr Kable's detention beyond his release date' had been explored. The existing law had been 'found wanting', however, prompting the Bill.<sup>17</sup> The Minister conceded that

<sup>11</sup> Ibid 133 (Gummow J).

<sup>12</sup> Ibid 106 (Gaudron J). See also at 123 (McHugh J).

<sup>13</sup> Ibid 120 (McHugh J).

<sup>14</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 27 October 1994, 4790-2 (John Hannaford, Attorney-General and Minister for Justice).

<sup>15</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 15 November 1994, 4952 (Jeff Shaw).

<sup>16</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 16 November 1994, 5091-4.

<sup>17</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1994, 5649 (Garry West, Minister for Police and Minister for Emergency Services). The *Community Protection Bill* originated in the Legislative Council and was amended there to apply to Mr Kable alone. By the time the Bill was introduced and debated in the Legislative Assembly it had taken its final form. Garry West delivered the government's second reading speech in the Assembly.

the government was 'aware of the unprecedented nature of the proposed legislation'<sup>18</sup> but claimed that Mr Kable's civil rights had not been neglected, one safeguard being the Supreme Court's involvement in the detention process.<sup>19</sup> Independent MP John Hatton, however, forcefully condemned the Bill as 'enacted specifically to deprive an individual of his rights before the law' and as 'passed because a State election is approaching'.<sup>20</sup>

Despite the *Community Protection Act's* extraordinary features, the decision in *Kable's Case* that the Act was invalid surprised many constitutional commentators. In particular, decisions prior to *Kable's Case* appeared to accept that state parliaments had general law-making power over state courts.<sup>21</sup> In successfully challenging the established constitutional position, Mr Kable was fortunate to be represented in the High Court by the late Sir Maurice Byers QC in one of Sir Maurice's final High Court appearances.<sup>22</sup> Sir Maurice was a constitutional advocate of rare ability. In addition to *Kable's Case*, his many High Court victories included the *Tasmanian Dam Case* and *Australian Capital Television Pty Ltd v Commonwealth*.<sup>23</sup> In *Kable's Case* a majority of the High Court accepted Sir Maurice's novel constitutional arguments and struck down the *Community Protection Act* on the basis that it undermined the Supreme Court's independence from the New South Wales government and required that court to act inconsistently with its traditional functions. This in turn was incompatible with the Supreme Court's wider role under the Australian Constitution as a body capable of exercising both state and federal judicial functions.<sup>24</sup> Writing in *Kable's Case*, McHugh J identified the Act's fatal flaws as follows:

The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed

<sup>18</sup> Ibid 5651

<sup>19</sup> Ibid 5649–51

<sup>20</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 December 1994, 6278 (John Hatton)

<sup>21</sup> See, for example, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

<sup>22</sup> Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 236. A survey of the *Commonwealth Law Reports* shows that *Kable's Case* was Sir Maurice's penultimate High Court appearance in a fully argued matter. He was subsequently one of the record number of counsel that appeared before the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>23</sup> McHugh, above n 22, 236 (McHugh notes that during Sir Maurice's time as Commonwealth Solicitor-General from 1973 to 1983, Sir Maurice won 37 of the 44 constitutional cases in which he appeared); Tony Blackshield et al, 'Counsel, notable' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 160, 166.

<sup>24</sup> For the High Court's core finding that state courts cannot be given functions incompatible with the exercise by those courts of federal judicial power, see *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 109, 116 (McHugh J), 135, 143–4 (Gummow J). See also the more limited approach of Toohey J at 96–9.

from the judicial process that is ordinarily invoked when a court is asked to imprison a person.<sup>25</sup>

Thus, Mr Kable was freed from the continuing threat of civil detention because of a finding that the Act damaged the institutional integrity of the Supreme Court. In accordance with the *Kable* doctrine, it was the effect of the Act on the Supreme Court, rather than on Mr Kable, which was the source of invalidity.

A full analysis of the basis upon which the High Court found the *Kable* doctrine to be implicit in the Australian Constitution is beyond the scope of this article.<sup>26</sup> In essence, however, the High Court derived the *Kable* doctrine from a broad reading of the Constitution that emphasised the role played by state courts within the Australian judicial system as a whole. Specifically, the majority in *Kable's Case* reasoned that the Constitution contemplates a system where the functions of state and federal courts are integrated with each other.<sup>27</sup> Two forms of integration were highlighted. First, the majority drew attention to the fact that the Constitution expressly allows the Commonwealth Parliament to invest state courts with federal judicial power (ss 71 and 77(iii)). Indeed, under the umbrella of these provisions, state courts have decided federal matters throughout the history of the Commonwealth and continue to play a vital role in the federal justice system. Trials of federal offences, for example, take place almost exclusively in state and territory courts.<sup>28</sup> Secondly, it was pointed out that the Constitution recognises that a federal court — the High Court of Australia — is the final court of appeal for state and federal courts on questions of both state and federal law, including the common law (s 73).<sup>29</sup> In light of this 'constitutional scheme', the High Court reasoned that state courts cannot be given functions that would 'undermine the[ir] role' as part of the wider Australian judiciary, particularly as bodies capable of deciding federal cases.<sup>30</sup> Thus it followed that there was a limitation on state power protecting the institutional integrity of state courts against the threat posed by incompatible functions such as those contained in the *Community Protection Act*.<sup>31</sup>

<sup>25</sup> Ibid 122.

<sup>26</sup> For a more extensive discussion of this aspect of the case see, for example, Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 218–21.

<sup>27</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 102 (Gaudron J), 111–15 (McHugh J), 138–43 (Gummow J).

<sup>28</sup> Both these points are made in James Crawford and Brian Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, 2004) 43. There are limits to this integration, however. Thus it has been held that the Constitution impliedly prevents state judicial power being given to federal courts: *Re Wakim. Ex parte McNally* (1999) 198 CLR 511.

<sup>29</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 101 (Gaudron J), 112–14 (McHugh J), 138–9, 142–3 (Gummow J).

<sup>30</sup> Ibid 115–6 (McHugh J). See also at 103 (Gaudron J), 143 (Gummow J).

<sup>31</sup> The reasoning supporting that limb of the *Kable* doctrine that protects the existence of state judicial systems was somewhat different, however. It focused upon the numerous textual references in the Australian Constitution to state courts: ibid 103 (Gaudron J), 110–11 (McHugh J), 139–42 (Gummow J).

The *Kable* doctrine was accordingly based on the need to uphold the basic design or scheme of the Constitution's judicature provisions. It was the result of a broad, purposive reading of the constitutional text, rather than a formal examination of the meaning of specific constitutional language. Given the bold and expansive nature of this reasoning, it is not surprising that a number of constitutional commentators have found the *Kable* doctrine limitation on the functions of state courts difficult to accept.<sup>32</sup>

### *B Constitutional significance of the Kable doctrine*

The constitutional significance of the *Kable* doctrine lies in the fact that it transforms longstanding assumptions about the extent of the protection which the Australian Constitution confers on federal and state courts respectively. On the one hand, Commonwealth legislative authority has always been regarded as limited by a binding separation of judicial power.<sup>33</sup> As expounded by the High Court since 1909, the federal separation doctrine limits Commonwealth power in two main ways. First, the Commonwealth Parliament, when conferring judicial power, must vest that power in a court as opposed, for example, in an administrative tribunal. Secondly, under the federal separation doctrine, federal courts cannot validly be given legislative or executive functions such as making industrial awards or undertaking merits review of administrative action.<sup>34</sup> Both these limitations operate in practice as important constraints on Commonwealth law-making. In particular, they have shaped the federal industrial relations system<sup>35</sup> as well as the framework for review of federal administrative action<sup>36</sup> and enforcement of federal human rights law.<sup>37</sup> In 1999 in *Re Wakim, Ex parte McNally*,<sup>38</sup> the principles associated with the federal separation doctrine led to the collapse of a major part of the national scheme for cross-vesting the jurisdiction of Australian courts.

State parliaments, by contrast, have traditionally been regarded as possessing unlimited power over state courts. Thus historically an enforceable separation of powers has not operated at state level, under either the state constitutions or the

<sup>32</sup> See, for example, George Winterton, 'Justice Kirby's Coda in Durham' (2002) 13 *Public Law Review* 165, 167–8; Dan Meagher, 'Should the Victorian Constitution be Reformed to Strengthen the Separation of Judicial Power?' (2000) 2 *Constitutional Law and Policy Review* 63, 68–70.

<sup>33</sup> *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v IW Alexander Ltd* (1918) 25 CLR 434; *R v Kirby, Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>34</sup> See generally *R v Kirby, Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. The High Court has recognised exceptions to both these rules. For example, federal courts can be given legislative or executive functions that are incidental to their judicial functions.

<sup>35</sup> *Waterside Workers' Federation of Australia v IW Alexander Ltd* (1918) 25 CLR 434; *R v Kirby, Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>36</sup> Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 25.

<sup>37</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

<sup>38</sup> (1999) 198 CLR 511.

Australian Constitution.<sup>39</sup> Clearly, the outcome in *Kable's Case* now alters this, bringing state courts and their functions within the control of the Australian Constitution to an extent that had not been anticipated prior to that decision. In this sense, the *Kable* doctrine is a 'radical'<sup>40</sup> addition to the body of Australian constitutional law. Nonetheless, there remain major differences between the *Kable* doctrine and the federal separation doctrine.<sup>41</sup> The *Kable* doctrine does not prevent state courts receiving non-judicial functions as such. It is only when those functions are 'incompatible' with their 'institutional integrity' as components of the 'integrated Australian court system' contemplated by the Constitution for the exercise of state and federal judicial power that the doctrine is engaged.<sup>42</sup> Thus unlike the federal doctrine, the *Kable* doctrine does not shield state courts from all types of legislative and executive power. Moreover, *Kable's Case* still allows state parliaments to vest state judicial functions in tribunals and other non-judicial bodies.<sup>43</sup> It follows that while the *Kable* doctrine is an important inroad on state power, it is much more confined than the corresponding limitation on the Commonwealth.

Since the constitutional changes brought about by the *Kable* doctrine in 1996, the High Court, which now includes four Howard Government appointees, has arguably become more conservative in its approach to the Australian Constitution.<sup>44</sup> Nonetheless, in *Fardon's Case* in 2004 the Gleeson Court affirmed that the *Kable* doctrine remains part of Australian law. *Fardon's Case* represents the High Court's most significant re-examination of the *Kable* doctrine since *Kable's Case* itself. Although in *Fardon's Case* the High Court upheld the validity of the state law under challenge, no judge queried the legitimacy of the *Kable* doctrine. In addition, in another recent judgment — *North Australian Aboriginal Legal Aid Service Inc v Bradley*<sup>45</sup> (*NAALAS v Bradley*) — the High Court extended the *Kable* doctrine's coverage to the territories, accepting that it limits both state and territory legislative power.<sup>46</sup> Thus, in light of *Fardon's Case* and *NAALAS v Bradley*, the *Kable* doctrine, despite recent changes in High Court membership, must now be regarded

<sup>39</sup> See, for example, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

<sup>40</sup> Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (Inaugural Sir Anthony Mason Lecture in Constitutional Law, Sydney, 26 November 2004) ? available at [http://www.hcourt.gov.au/publications\\_05.html](http://www.hcourt.gov.au/publications_05.html) (viewed 10 February 2005).

<sup>41</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 103–4 (Gaudron J), 118 (McHugh J); *Fardon v A-G (Qld)* (2004) 210 ALR 50, 62, 64 (McHugh J), 75 (Gummow J), 110 (Callinan and Heydon JJ).

<sup>42</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 56 (Gleeson CJ). See also at 60, 62 (McHugh J), 78 (Gummow J), 108 (Callinan and Heydon JJ); *Kable v DPP (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 116, 118–19 (McHugh J), 132–4 (Gummow J).

<sup>43</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 103–4 (Gaudron J), 121 (McHugh J); *Fardon v A-G (Qld)* (2004) 210 ALR 50, 64 (McHugh J).

<sup>44</sup> For one contribution to the debate over shifting patterns of constitutional interpretation in the current High Court, see Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21.

<sup>45</sup> (2004) 206 ALR 315.

<sup>46</sup> *Ibid* 326 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

as an established feature of the constitutional landscape.<sup>47</sup> The critical question is instead its scope.

## II. Scope of the *Kable* doctrine

What sorts of laws does the *Kable* doctrine, as re-examined in *Fardon's Case*, prevent state and territory parliaments from enacting? The concepts that underpin the *Kable* doctrine — in particular the idea that certain functions are incompatible with the institutional integrity of a state court — are flexible enough, at least in theory, to support a wide range of limitations on state legislative power over state courts. Can it be argued, for example, that the application by a state court of a racially discriminatory law would undermine its 'institutional integrity' as part of the Australian judicial system? Although a majority of the current High Court would almost certainly say no — there is no general constitutional prohibition against discrimination in Australian law<sup>48</sup> — the leading High Court cases on the *Kable* doctrine fail to define the concepts of incompatibility and integrity 'in terms which necessarily dictate future outcomes'.<sup>49</sup> Instead the High Court has tended to explore the question whether a function or arrangement is incompatible with the institutional integrity of a state court on a case-by-case basis, focusing on the specific features of the state legislation under challenge. While this incremental approach is consistent with traditional judicial method, it provides limited guidance for state law-makers concerned to ensure the validity of their legislative schemes.<sup>50</sup>

What is clear is that the High Court, with the exception of Kirby J, is currently applying the *Kable* doctrine in a guarded and restrained way. Gummow J in *Fardon's Case* suggested that the doctrine will invalidate legislation 'infrequently'.<sup>51</sup> In the same case, McHugh J claimed that '*Kable* is a decision of very limited application'.<sup>52</sup> Indeed, despite considerable litigation involving the *Kable* doctrine, the *Community Protection Act* remains the only law struck down by the High Court on this basis. Moreover, there has been only one successful *Kable* doctrine

<sup>47</sup> The same view is expressed in Dan Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2003) 16 *Public Law Review* (forthcoming).

<sup>48</sup> *Leeth v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1. See, however, Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 221–4 discussing the possible existence of a limited guarantee of 'equal justice' in the exercise of federal judicial power.

<sup>49</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 79 (Gummow J) where his Honour defended the lack of a formula for applying the *Kable* doctrine. Dan Meagher has also highlighted the 'elusive' nature of the 'notions of judicial "integrity, independence and impartiality"' which now underlie the *Kable* doctrine: see Meagher, 'The Status of the *Kable* Principle', above n 47.

<sup>50</sup> See also Twomey, above n 2, 19 for criticism of the *Kable* doctrine as uncertain prior to *Fardon's Case*.

<sup>51</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 79.

<sup>52</sup> *Ibid* 65. Kirby J, however, has applied the doctrine more expansively than other members of the current High Court. See, for example, his dissenting judgments in *Fardon's Case* and *Baker v The Queen* (2004) 210 ALR 1.

challenge in the state courts.<sup>53</sup> Bearing these matters in mind, a series of propositions designed to provide state law-makers with general guidance concerning the scope of the *Kable* doctrine follow. The propositions and accompanying examples draw largely from *Kable's Case*, *Fardon's Case* and *NAALAS v Bradley*. In the course of this discussion, the actual decision in *Fardon's Case* is also explored.

1. First, as stated above, the *Kable* doctrine limits both state and territory legislative power. Theoretically, it also limits Commonwealth legislative power.<sup>54</sup> In practice, however, the *Kable* doctrine is unlikely to add to the significant constitutional limitations to which the Commonwealth's power to affect state courts is already subject.<sup>55</sup> While *NAALAS v Bradley* shows that *Kable's Case* applies in the territories, the state and territory limitations are not necessarily identical in scope. The special status of the territories under the Australian Constitution — territories are subject to the general overriding power of the Commonwealth Parliament (s 122) and territory courts, unlike state courts, are not mentioned in the Constitution — means that the possibility of some difference in operation of the doctrine there cannot be excluded.<sup>56</sup> It seems unlikely, for example, that the Constitution guarantees the existence of a system of territory courts.<sup>57</sup> The incompatibility limb of the *Kable* doctrine, by contrast, is likely to constrain state and territory legislative power to a similar extent.

2. Secondly, under the *Kable* doctrine, a state court can still exercise non-judicial functions so long as the functions concerned are compatible with the court's institutional integrity as part of the wider Australian judicial system. For example, there is little doubt that the activity of independent merits review of administrative action, although forbidden to a federal court, can validly be conferred on a state court consistently with *Kable's Case*.<sup>58</sup> By parity of reasoning it follows that if a particular function can be classified as 'judicial' and can validly be conferred by the Commonwealth on a federal court, it can also be given by a state to a state court without infringing the *Kable* doctrine.<sup>59</sup> Over many years, the High Court has given

<sup>53</sup> See the remarks of Kirby J in *Baker v The Queen* (2004) 210 ALR 1, 17. A *Kable* doctrine argument succeeded in the Queensland Court of Appeal in *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

<sup>54</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 116 (McHugh J).

<sup>55</sup> It has long been accepted, for example, that the Commonwealth Parliament cannot validly invest a state court with non-judicial power: see *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

<sup>56</sup> See Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33 *Federal Law Review* 57, 90–92.

<sup>57</sup> *Ibid* 91 where McDonald says 'there is no requirement that territory courts remain in existence' (footnote omitted). But see the argument explored by Meagher, 'The Status of the *Kable* Principle', above n 47.

<sup>58</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 117–19 (McHugh J). See also at 106 (Gaudron J), 132 (Gummow J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17–18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

<sup>59</sup> *Silbert v DPP (WA)* (2004) 217 CLR 181, 186 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Baker v The Queen* (2004) 210 ALR 1, 16 (McHugh, Gummow, Hayne and Heydon JJ).

the constitutional concept of 'judicial power' a broad interpretation. It has recognised, for example, that 'discretionary powers, and jurisdiction to apply broad standards'<sup>60</sup> are part of normal judicial activity. Thus under the *Kable* doctrine, state parliaments can continue to confer judicial functions of this kind, such as those commonly found in fair trading and contracts review legislation, on state courts

3. Thirdly, and as also stated above, the High Court has not developed a single unifying test for identifying those functions that state parliaments can no longer confer on state courts. Proceeding case-by-case, the High Court has instead considered a number of factors when determining whether a particular use of a state court undermines its constitutionally entrenched institutional integrity.<sup>61</sup> *Kable's Case* and *Fardon's Case* suggest that functions which undermine the independence and impartiality of state courts — whether in actuality or appearance — are particularly vulnerable to *Kable* doctrine invalidity.<sup>62</sup> Situations in which the political branches of government seek to 'co-op' state courts into reaching a particular outcome or which involve courts acting in a manner significantly at odds with traditional judicial procedure — such as contrary to the rules of natural justice — are also suspect.<sup>63</sup> Significantly, all three factors were present on the facts of *Kable's Case* and each contributed to the High Court's finding that the *Community Protection Act* was invalid. As discussed in Part I, the disabling features of that Act 'included the apparent legislative plan to conscript the Supreme Court ... to procure the imprisonment of ... [Mr Kable] by a process which departed in serious respects from the usual judicial process'.<sup>64</sup>

By contrast, in *Fardon's Case* state legislation with similar policy objectives to that considered in *Kable's Case* survived constitutional challenge. *Fardon's Case* concerned the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). This Act allowed the Supreme Court on the application of the Attorney-General to order that a serious sexual offender remain in prison even though the offender's term of imprisonment had expired. Under the Act the Supreme Court could make such an order if 'satisfied the prisoner is a serious danger to the community' because of 'an unacceptable risk that the prisoner will commit a serious sexual offence' (s 13(1)

<sup>60</sup> Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, 393

<sup>61</sup> See, for example, the approach of Gummow J in *Fardon's Case* including his observation that in *Kable's Case* 'it was a particular combination of features of the NSW Act that led to its invalidity': (2004) 210 ALR 50, 78. Of the current members of the High Court, McHugh J has come closest to a 'test' for applying the *Kable* doctrine. In *Fardon's Case*, he spoke of the need to show that an impugned function 'affects ... [the state] court's capacity to exercise federal jurisdiction impartially and according to federal law': at 64.

<sup>62</sup> See, for example, *Kable v DPP (NSW)* (1996) 189 CLR 51, 116–19 (McHugh J); *Fardon v A-G (Qld)* (2004) 210 ALR 50, 56–7 (Gleeson CJ), 62, 64–5 (McHugh J). See also *NAALAS v Bradley* (2004) 206 ALR 315, 326 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>63</sup> This trio of factors is recognised in *Fardon v A-G (Qld)* (2004) 210 ALR 50, 110 (Callinan and Heydon JJ). See also at 76 (Gummow J). Cf at 64–5 where McHugh J downplayed the significance of a departure from traditional judicial process in determining whether the *Kable* doctrine has been breached.

<sup>64</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 78 (Gummow J).

and (2)) In distinguishing this law from the failed *Community Protection Act*, the majority in *Fardon's Case* highlighted several elements of the Queensland preventative detention scheme. For example, unlike the *Community Protection Act*, the Queensland Act was of general application and permitted the Supreme Court to make a detention order only if 'satisfied by acceptable, cogent evidence and to a high degree of probability' (s 13(3)). If this standard was met, the Court had a choice whether to order continuing detention or the prisoner's supervised release (s 13(5)). The Act also provided for regular review by the Supreme Court of the continued need for a detention order (Pt 3). In this setting, it was accepted by the High Court that the law did not threaten the Supreme Court's independence — in contrast to *Kable's Case* no perception could arise that the Supreme Court was being used 'as a mere instrument of government policy'.<sup>65</sup> Moreover, the Supreme Court was required to act consistently with judicial process.<sup>66</sup>

*Fardon's Case* demonstrates that despite the outcome in *Kable's Case*, state courts can still validly be empowered to order preventative detention. However, this is provided the relevant legislative scheme preserves judicial independence and respects basic judicial procedure. The difference between the legislation considered in *Kable's Case* and *Fardon's Case* was one of degree only, however. In this regard, *Fardon's Case* highlights the subtle distinctions the Gleeson Court is inclined to draw in its constitutional reasoning. Whether the legislation considered in *Fardon's Case* was properly distinguishable from that in *Kable's Case* is clearly open to debate.<sup>67</sup>

4. Fourthly, while *Fardon's Case* shows that careful legislative drafting and design will do much to shield a state law from a successful *Kable* doctrine challenge, the decision offers few specific insights into the *Kable* doctrine's application beyond preventative detention. Nonetheless, *Fardon's Case* may signal that legislation giving state courts power to impose an indefinite sentence upon a defendant found guilty of a criminal offence is valid.<sup>68</sup> If so, this outcome would be consistent with the decision of the Victorian Court of Appeal in *R v Moffatt* which, in the immediate wake of *Kable's Case*, upheld the validity of Victorian indefinite sentencing laws.<sup>69</sup> Curiously, the High Court in *Fardon's Case* did not comment

<sup>65</sup> Ibid 57 (Gleeson CJ). See also at 61–2, 65–6 (McHugh J), 80, 81 (Gummow J).

<sup>66</sup> Ibid 57 (Gleeson CJ), 61–2 (McHugh J), 76–81 (Gummow J), 110–13 (Callinan and Heydon JJ). Gummow J (with whom Hayne J generally agreed) also relied on the criteria upon which the Queensland Act operated — specifically the Act's selection of a person convicted of a serious sexual offence and an 'unacceptable risk' that they would commit another offence of the same nature. These criteria of operation meant, in Gummow J's opinion, that there was 'a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of s 13': at 80.

<sup>67</sup> See, for example, Mengher, 'The Status of the *Kable* Principle', above n 47.

<sup>68</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 52, 57 (Gleeson CJ), 71 (Gummow J), 92, 95 (Kirby J). Neither the Chief Justice nor Gummow J directly considered this point, however. See also *Kable v DPP (NSW)* (1996) 189 CLR 51, 97–8 (Toohey J), 121 (McHugh J).

<sup>69</sup> [1998] 2 VR 229.

upon the decision of the Queensland Court of Appeal in *Re Criminal Proceeds Confiscation Act 2003*<sup>70</sup> — the only state court decision striking down legislation on *Kable* doctrine grounds. There a Queensland law that required the Supreme Court to hear an application by the State for a property restraining order in the absence of the affected person and without that person having notice of the proceedings was held invalid. In reaching this conclusion, the Court of Appeal accepted that the law required the Supreme Court to act contrary to natural justice and to proceed 'in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially'.<sup>71</sup> Although this decision turned on quite specific legislative provisions, the outcome seems correct in the circumstances.

5. Fifthly, it is important to recall that the *Kable* doctrine, at least as currently understood, does not prevent state judicial power being exercised by state legislatures or state executive bodies such as non-judicial tribunals.<sup>72</sup> In other words, the doctrine does not dictate that only courts can exercise state judicial functions. This is a significant qualification upon the scope of the *Kable* doctrine when compared with the federal separation of judicial power.<sup>73</sup> In recent decades, state and territory parliaments have conferred a range of judicial responsibilities on administrative tribunals — such as the Victorian Civil and Administrative Tribunal — usually with the object of promoting accessible and relatively inexpensive dispute resolution.<sup>74</sup> At the federal level, by contrast, the federal separation doctrine largely prevents the use of non-judicial tribunals in this flexible way. Nonetheless, were a state parliament to strip its courts, especially its Supreme Court, of judicial power and transfer that authority to non-judicial bodies, the *Kable* doctrine would arguably be infringed.<sup>75</sup> Such action would be tantamount to abolishing the Supreme Court, a step which the *Kable* doctrine prohibits.

6. Sixthly, in several respects the ultimate institutional boundaries of the *Kable* doctrine remain to be determined. For example, and as several commentators have noted, there is lingering uncertainty over whether the *Kable* doctrine limits the functions that may be conferred on *all* state and territory courts. The activities of state Supreme Courts are clearly subject to the *Kable* doctrine, but what about

<sup>70</sup> [2004] 1 Qd R 40.

<sup>71</sup> *Ibid* 55.

<sup>72</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 103–4 (Gaudron J), 121 (McHugh J); *Fardon v A-G (Qld)* (2004) 210 ALR 50, 64 (McHugh J).

<sup>73</sup> See generally Elizabeth Handsley, 'Do Hard Laws Make Bad Cases? — The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)* (1997) 25 *Federal Law Review* 171, 171, 177–9.

<sup>74</sup> See, for example, Crawford and Opeskin, above n 28, ch 12 ('Small Claims Courts and Tribunals'); Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 12; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ).

<sup>75</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51, 114, 117 (McHugh J), 139–42 (Gummow J). See the argument to this effect in, for example, Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337, 346 and Johnston and Hardcastle, above n 26, 223.

District or County Courts and Magistrates Courts?<sup>76</sup> The constitutional theory that supports the *Kable* doctrine suggests that it should logically operate to shield all state and territory courts that decide federal cases from incompatible functions. On this basis, District and Magistrates Courts fall within the ambit of the limitation.<sup>77</sup> *NAALAS v Bradley*, in which the High Court entertained a *Kable* doctrine challenge to provisions of the *Magistrates Act* (NT), reinforces this view. Although the High Court decided *NAALAS v Bradley* on the basis that the relevant territory legislation, properly understood, did not undermine the magistracy's institutional integrity, the decision indicates that the High Court regards the incompatibility doctrine as operating in regard to both Supreme Courts and Magistrates Courts.<sup>78</sup> Given the significant role played by lower state courts in the wider Australian justice system, this is an appropriate outcome. The real question is likely to be whether the incompatibility test is stricter in the case of higher as opposed to lower courts. There are hints in *NAALAS v Bradley* that this might be so.<sup>79</sup>

In addition, there are live questions about the effect, if any, that the *Kable* doctrine has on the conditions under which state judges are appointed, including their tenure and remuneration.<sup>80</sup> In *NAALAS v Bradley* six members of the High Court raised the question of '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'.<sup>81</sup> Acting appointments were not under consideration in *NAALAS v Bradley*, so the Court tantalisingly left the question open. This passage is significant, however, because it suggests that the *Kable* doctrine may limit state power in relation to the structure and composition of state courts as well as the functions they perform.<sup>82</sup> If so, this would be an important expansion in the reach of the doctrine. Moreover, since some state courts have made heavy use of acting judges in recent times — in its 2003 Annual Review, the District Court of New South Wales reported that 35 individuals held a commission that year as an acting judge of the

<sup>76</sup> This question is explored, for example, in Johnston and Hardcastle, above n 26, 224–9 and in George Williams, *Human Rights under the Australian Constitution* (1999) 213.

<sup>77</sup> Johnston and Hardcastle, above n 26, 227–8; Williams, above n 76, 213.

<sup>78</sup> (2004) 206 ALR 315, 326 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also Stephen Donaghue, 'Judicial Independence: *Bradley*, *Fardon* and *Baker*' (Paper presented at the 2005 Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, Sydney, 16 February 2005) 3 available at <http://www.gtcenre.unsw.edu.au/Conference-Papers-February-2005.asp> (viewed 29 June 2005).

<sup>79</sup> (2004) 206 ALR 315, 326 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

<sup>80</sup> See, for example, Johnston and Hardcastle, above n 26, 236–42; Donaghue, above n 78. A further question concerning the institutional boundaries of the *Kable* doctrine is whether it limits the functions that can be given to state judges when acting in their personal capacity (as when conducting a Commission of Inquiry, for example). For a discussion of this, see Johnston and Hardcastle, above n 26, 229–30.

<sup>81</sup> (2004) 206 ALR 315, 327 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Fardon v A-G (Qld)* (2004) 210 ALR 50, 65 (McHugh J), 79 (Gummow J).

<sup>82</sup> The potential effect of the *Kable* doctrine on the composition of state courts after *NAALAS v Bradley* and *Fardon's Case* is discussed in further detail in Donaghue, above n 78, 6–12.

court<sup>83</sup> — the High Court's sensitivity to this particular practice cannot be ignored. The use of an acting judge or judges may, of course, depending on the circumstances compromise judicial independence.<sup>84</sup>

7. Seventhly and finally, the *Kable* doctrine, as it emerges from the above propositions, is clearly a constitutional work in progress. How it develops from this point will depend largely on shifting patterns of interpretation in the High Court. The extent to which the states seek to reform their judicial procedures and court structures and the ingenuity of leading barristers and constitutional advisers in shaping the course of constitutional litigation will also be significant. For the time being, it appears that the doctrine will evolve slowly and in a piecemeal fashion, imposing only relatively narrow limitations on state power. In the hands of a more adventurous High Court, however, the doctrine could be readily refashioned to protect an expansive range of due process interests traditionally associated with the work of the courts.

### III. Rights Protection and the *Kable* Doctrine

Reflecting on the wider impact and significance of the *Kable* doctrine, the question whether the doctrine should be regarded as an addition to the armoury of constitutional human rights protection in Australia is an important one. The answer has the potential both to shape general understanding of the role of the Australian Constitution and to guide future development of the doctrine itself, whether that development proceeds cautiously or at greater pace. Taken at face value, the outcome in *Kable's Case* clearly suggests that the *Kable* doctrine is rights protective in nature. The doctrine led to the invalidity of a contentious piece of legislation that, to repeat the assessment of MP John Hatton, was designed to 'deprive an individual of his rights before the law'.<sup>85</sup> In addition, the fact that the *Kable* doctrine creates a separation of judicial power in the states and protects the existence and independence of state courts as part of the Australian judicial system — albeit to a qualified extent — also lends the doctrine a rights protective claim. All western liberal democracies accept that an independent judiciary is an essential requirement for the maintenance of individual liberty and the rule of law.<sup>86</sup>

<sup>83</sup> District Court of New South Wales, *Annual Review 2003*, 7 available at <http://www.lawlink.nsw.gov.au/dc.nsf/pages/Annual%20Review%202> (viewed 29 June 2005). In 1998, there were 30 acting judges on the District Court of NSW: see Justice P W Young, 'Current Issues — Acting Judges' (1998) 72 *Australian Law Journal* 653, 653. Overall, the use of acting judges in the states and territories is becoming more limited: Justice Ronald Sackville, 'Acting Under the Influence' (2004) 218 *Lawyers Weekly* 10, 11. But see *Constitution Act 1975* (Vic), s 80D ('Appointment of acting Judges') inserted in 2005.

<sup>84</sup> Sackville, above n 83, 10.

<sup>85</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 December 1994, 6278. See also, for example, Melissa Castan and Sarah Joseph, *Federal Constitutional Law: A Contemporary View* (2001) 147.

<sup>86</sup> Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) xv.

On the other hand, in an article published shortly after *Kable's Case* was decided, Elizabeth Handsley convincingly argued that Mr Kable may have enjoyed more 'rights protection' under the *Community Protection Act* — which at least meant that his continued detention was subject to some form of judicial scrutiny — than the alternative of detention by direct legislative decree.<sup>87</sup> For, as explained in Part II above, if courts are kept out of the decision-making loop, then the *Kable* doctrine, as currently understood, is not engaged. Of course, a parliament or minister that orders the imprisonment of a person in circumstances like those involving Mr Kable, or that gives that task to another non-judicial body, must face the political consequences of their actions. But as Handsley points out, in the current political climate such actions may be electoral pluses, rather than liabilities.<sup>88</sup> In *Fardon's Case*, Gleeson CJ similarly recognised the 'paradox' inherent in the *Kable* doctrine, hinting that the doctrine could potentially result in certain decisions about individual rights being transferred from the judiciary to the executive where diminished due process safeguards apply.<sup>89</sup> By contrast Kirby J, who has applied the *Kable* doctrine more broadly than any other current member of the High Court, clearly regards the doctrine as protecting civil liberties. In his dissent in *Fardon's Case* he emphasised the role of the doctrine in protecting 'the rights of unpopular minorities'. Specifically, he claimed that the doctrine helped prevent 'serious injustices' against such groups being cloaked 'with the semblance of judicial propriety'.<sup>90</sup>

Which of these two perspectives is correct? It may be that both have validity and that the *Kable* doctrine and the outcome in *Kable's Case* resist neat classification. For whether broadly or narrowly applied, the *Kable* doctrine remains grounded in the need to preserve the institutional arrangements adopted by the Australian Constitution for the exercise of judicial power. Given these institutional foundations, the doctrine — like the federal separation of judicial power — cannot be directly rights protective in the same way as, for example, the express constitutional guarantee against discrimination on the basis of interstate residence (s 117). However the *Kable* doctrine may — again like the federal separation doctrine — produce a rights protective effect, particularly in maintaining judicial independence and the rule of law.<sup>91</sup>

In addition, despite Handsley's argument that *Kable's Case* was a setback for civil liberties, as a landmark ruling the decision retains the capacity to shape our legal and political culture in a way that promotes human rights. An imperfect analogy in this regard is with the constitutional demise of another piece of ad hominem legislation, the *Communist Party Dissolution Act 1950* (Cth). That Act famously

<sup>87</sup> Handsley, above, n 73, 177–9.

<sup>88</sup> *Ibid* 177.

<sup>89</sup> *Fardon v A-G (Qld)* (2004) 210 ALR 50, 52.

<sup>90</sup> *Ibid* 86. See also at 83, 87–8. In *Baker v The Queen* (2004) 210 ALR 1, 25 Kirby J said that the *Kable* doctrine exists 'not for the protection of the judiciary, as such, but for the protection of all people in the Commonwealth'. See also his discussion at 36–9.

<sup>91</sup> See, for example, Margaret Allars, 'Theory and Administrative Law: Law as Form and Theory as Substance' (1996) 79 *Canberra Bulletin of Public Administration* 20, 22–4.

failed in the High Court because of a doctrine based on the rule of law under a federal Constitution<sup>92</sup> — in essence, the High Court found that the Commonwealth Parliament did not have power to make laws about communism. The fact that state parliaments could have legislated to dissolve the Communist Party and were free to impose a greater range of civil disabilities upon communists than the Commonwealth, has not prevented the outcome in the *Communist Party Case* being regarded as a victory for civil rights in Australia.<sup>93</sup> *Kable's Case* can be seen in a similar light. Thus, while many civil libertarians would condemn the legislation upheld in *Fardon's Case*, that legislation — which significantly retains a role for the courts in ordering preventative detention — surely contains more safeguards for the defendant than if *Kable's Case* had never been decided.

#### IV. Conclusion

In conclusion, is the *Kable* doctrine a worthwhile constitutional innovation? Acknowledging its place in our constitutional jurisprudence following *Fardon's Case*, should Australians be applauding it? The uncertain scope of the doctrine, in particular the lack of a clear framework for its application, is a continuing cause for concern.<sup>94</sup> Given the general language in which much of the Australian Constitution is written and its role as 'an instrument of government meant to endure',<sup>95</sup> uncertainty in constitutional interpretation is inevitable. But if a constitutional doctrine exists, it must be possible to frame that doctrine in a way that provides reasonable clarity and predictability for those bound to observe it. Viewed from this perspective, the *Kable* doctrine, a decade after its appearance, is under-performing.

On the other hand, the recognition of a basic level of constitutional protection for state courts within the state governmental systems is surely a desirable outcome, especially when compared to the constitutional position that prevailed at state level prior to *Kable's Case*. In an era in which there are recurring tensions between the courts and the political arms of government, the limited legal and symbolic protection that the *Kable* doctrine places around state courts will arguably improve overall legislative outcomes for Australians. The need to ask the *Kable* doctrine question whenever legislation affects state courts will necessarily lead to closer consideration being given to the impact of state laws on core values of judicial independence and due process. So long as the political process forestalls any significant transfer of functions away from the courts, thereby meeting Handsley's concerns, increased attention to the integrity of our courts is surely a good thing. ▲

<sup>92</sup> George Winterton, 'The Communist Party Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 108, 131.

<sup>93</sup> *Ibid* 129–33. However, for these same reasons, Professor Winterton warns against overstating 'the civil liberty aspects of the decision' in the *Communist Party Case*; at 132.

<sup>94</sup> See the concerns voiced earlier by Twomey, above n 2, 19.

<sup>95</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J).