Judicial Conference of Australia

JUDICIAL INDEPENDENCE FROM THE EXECUTIVE

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EXECUTIVE SUMMARY

This report details how the Australian judiciary has asserted its independence from the executive arm of government. It does so by examining the case law of federal, state and territory courts in light of domestic and international understandings of the concept of judicial independence. It also identifies how judges have asserted their independence by way of extra-curial activity, such as speeches and letters to members of the executive.

The report identifies the very considerable extent to which judicial independence from the executive has been realised by Australian courts. On the other hand, it also highlights major gaps and areas of unrealised potential. It suggests ways in which the law might develop to more comprehensively protect judicial independence at the federal, state and territory levels.

The report begins by examining the notion of judicial independence from the executive. It synthesises the leading international and Australian resources to arrive at a first-principles conception. The following four key indicators of judicial independence are identified:

- appointment, tenure and remuneration;
- operational independence;
- decisional independence; and
- personal independence.

These indicators are then applied to assess the decisions of Australian courts on judicial independence. This is undertaken in the context of constitutional and legislative protections for the concept.

The examination reveals the extent to which the jurisprudence has focused only on some aspects of judicial independence, and that other aspects have received little or no judicial attention, and may not be the subject of any current legal protection. Overall, it is found that judicial independence from the executive is only partially protected in Australia, and that state and territory courts are subject to weaker and less developed safeguards than their federal counterparts.

The report finds that the appointment, tenure and remuneration of federal judges enjoys robust protection, but that these aspects of independence are at risk in most states and territories. Only New South Wales has taken the step of entrenching protections for the tenure of its judges.

The operational processes and procedures of courts require freedom from executive interference, but also a sufficient level of funding. Our study reveals that the operational independence of federal, state and territory courts is both un-litigated and unshielded, making it susceptible to executive interference.

Decisional independence requires that courts enjoy protections over the scope of their jurisdiction, and that the powers of the judiciary not be controlled by the executive. The decisional independence of federal courts is protected by constitutional provisions regarding aspects of the High Court's jurisdiction, as well as by the strict separation of federal judicial power. In the states and territories, recent cases have extended constitutional protection to the review jurisdiction of these courts, and the *Kable* principle has significantly enhanced protection for the independence with which state and territory judges exercise their decision-making powers.

The personal independence of all Australian judges is now protected by a constitutional limitation on judges being vested with powers that are incompatible with judicial independence or institutional integrity. However, the punishment and reward of judges for the conduct of their judicial duties remains subject only to regulation through common law, statute and conventional practice.

Gaps and weaknesses in the protection afforded give rise to a significant risk that judicial independence from the executive will at some future time be eroded by a series of minor incursions or larger interferences. This risk may be mitigated by appropriate political practice and the development of conventions. However, these are subject to breach without a legal remedy.

Given this, the report identifies further means by which judicial independence from the executive may be strengthened. These include the engagement of judges in extra-curial activity designed to strengthen respect for the judiciary and its independence. The report also identifies significant scope for the further development of legal principle by courts in ways that will provide additional protection.

I. INTRODUCTION

Judicial independence is a central pillar of Australia's constitutional system. Courts themselves play a pivotal role in maintaining this, and recent years have seen a surge in cases and significant and rapid developments in the area. These developments have advanced and reinforced protections for judicial independence, particularly with respect to the independence of judges and courts from the executive branch. In this report we consider how the judiciary has asserted its independence from the executive through an examination of the case law of federal, state and territory courts, and assess whether these cases have fully realised the principle.

In order to measure the extent to which courts have succeeded in establishing their independence from the executive, we must first identify what judicial independence means and what it requires. Courts, judges, lawyers, international associations, commentators and experts have tackled these same questions in countless forums. The result is a diversity of terminology and approaches describing and giving content to the notion of judicial independence. In Part II we synthesise the leading international and Australian resources to arrive at a first-principles conception of judicial independence. Through this review we identify four key indicators of judicial independence, namely: appointment, tenure and remuneration; operational independence; decisional independence; and personal independence.

These indicators frame our analysis of the Australian cases in Part III, and reveal that the jurisprudence has focused on some aspects of judicial independence at the expense of others. In addition to revealing gaps in the case law, our analysis highlights areas of unrealised potential and suggests ways in which the law might develop to more comprehensively protect judicial independence at the federal, state and territory levels. We discuss these gaps and areas for further development in Part IV. Ultimately, our analysis demonstrates the importance of judicial vigilance in respect of every facet of judicial independence.

II. JUDICIAL INDEPENDENCE

Judicial independence is a fundamental constitutional value, commanding almost universal approval.[1] Article 1 of the United Nations Basic Principles on the Independence of the Judiciary requires that judicial independence 'be guaranteed by the State and enshrined in the

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1 HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 7; Stephen Parker, 'The Independence of the Judiciary' in Fiona Wheeler and Brian Opeskin (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 63.

Constitution or the law of the country', and says that 'it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.[2]

The importance of judicial independence is bolstered by its inherent relationships with democracy, the separation of powers and the rule of law. The Australian Bar Association described an independent judiciary as 'a keystone in the democratic arch' and warned 'that keystone shows signs of stress. If it crumbles, democracy falls with it.'[3] Judge Christopher Weeramantry, chairperson of the Judicial Integrity Group – comprised of Chief Justices and senior judges from a wide range of civil and common law jurisdictions – similarly observed that:[4]

> A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under law.

In its United Nations-ratified Bangalore Principles of Judicial Conduct ('Bangalore Principles'), the Judicial Integrity Group described judicial independence as 'a prerequisite to the rule of law'.[5] Similarly, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region ('Beijing Statement') – adopted at the 6th Biennial Conference of Chief Justices of Asia and the Pacific – said that judicial independence is 'essential to the attainment of [the judiciary's] objectives and to the proper performance of its functions in a free society observing the rule of law'.[6] Closer to home, former High Court Chief Justice Sir Gerard Brennan explained the relationship between judicial independence and the rule of law as follows:[7]

> The reason why judicial independence is of such public importance is that a free society exists so long as it is governed by the rule of law – the rule which binds governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its

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2 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, UN Doc A/CONF.121/22/Rev.1 (26 August to 6 September 1985) art 1 ('*Basic Principles*').

3 Australian Bar Association, 'The Independence of the Judiciary' [1991] (Winter) *Victorian Bar News* 17, 18 [2.2].

4 Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct*, UN Office on Drugs and Crime, Commission on Crime Prevention and Criminal Justice, (September 2007) 5 ('*Bangalore Principles: Commentary*').

5 Judicial Integrity Group, *Bangalore Principles of Judicial Conduct*, ESC Res 2006/23, UN ESCOR, 41st plen mtg, Agenda Item 14(c), E/RES/2006/23 (27 July 2006) 4, Value 1 'Independence' ('*Bangalore Principles*'). See, also: eg: New Zealand Law Commission, *Towards a New Courts Act – A Register of Judges*' *Pecuniary Interests?* (NZLC IP1, 2011) 4; Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (The Federation Press, 2003) 1, 2; Ralf Dahrendorf, 'A Confusion of Powers: Politics and the Rule of Law' (1977) 40 *Modern Law Review* 1, 9.

6 LAWASIA, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (28 August 1997) cl 4 ('*Beijing Statement*').

7 Gerard Brennan, 'Judicial Independence' (Speech delivered at Annual Symposium of the Australian Judicial Conference, Canberra, 2 November 1996) 2. This speech was quoted in the *Bangalore Principles: Commentary*, above n 4, 24. See, also: Julie Debeljak, 'Judicial Independence: A Collection of Material for the Judicial Conference of Australia' (Speech delivered at the Judicial Conference of Australia, Uluru, April 2001) 1–3.

> remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.

The importance of judicial independence is clear and uncontested. But what exactly does it mean and, perhaps more importantly, what does it require? Recent decades have seen the blossoming of 'an immense body of literature'[8] concerning judicial independence. As Stephen Parker has described:[9]

> Serving and retired senior judges have adopted it as a central theme in articles and addresses. Inquiries have been set up to assess its current state of health. Bodies have been formed to promote and protect it. Declarations have been made by Chief Justices at home and abroad … The initial impression is of considerable diversity in approach and formulation of these definitions and rationales.

Parker's comment is by no means an understatement. At national, regional and international levels the concept and content of judicial independence has received considerable attention. One particularly high profile instance of this took the form of the Bangalore Principles and their associated commentary and implementation guidelines.[10] Resulting from a series of expert colloquia convened by the Judicial Integrity Group, these instruments draw upon over thirty national codes and regional and international instruments to identify seven 'values' representing the standards that all judges are expected to uphold. These values are: independence, impartiality, integrity, propriety, equality, competence and diligence.

Similar themes and concerns arise in other instruments.[11] For instance, the Declaration of the Principles on Judicial Independence, issued by the Chief Justices of the Australian States and Territories in 1997,[12] focuses on the relationship between independence and appointment processes. The Beijing Statement, also released in 1997, similarly highlights the importance of appointments to judicial independence and was a strong influence on the Australian Chief Justices' Declaration. In addition to appointments, the Beijing Statement concerns broader issues relating to judicial independence, including: tenure and remuneration, judicial behaviour and objectives, immunities, and jurisdiction.

A range of other domestic, regional and international statements describe judicial independence in similar terms. The United Nations Basic Principles on the Independence of the Judiciary,[13] the International Bar Association's ('New Delhi Standards'),[14] the Universal

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8 ML Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995) 18, quoted in Parker, above n 1, 65.

9 Parker, above n 1, 65.

10 *Bangalore Principles: Commentary*, above n 4; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (22 January 2010) ('*Bangalore Principles: Implementation Measures*').

11 For a succinct discussion of some of these instruments, see: Lee and Campbell, above n 1, 7–10.

12 Chief Justices of the Australian States and Territories, *Declaration of Principles on Judicial Independence* (10 April 1997) ('*Chief Justices*' *Declaration*'), referred to in the *Bangalore Principles: Commentary*, above n 4, 10.

13 *Basic Principles*, above n 2.

14 International Bar Association, *Minimum Standards for Judicial Independence* (1982) ('*New Delhi Standards*').

Declaration on the Independence of Justice ('Montréal Declaration'),[15] the Syracuse Draft Principles on the Independence of the Judiciary drafted by the International Association of Penal Law and the International Commission of Jurists,[16] and the Commonwealth Latimer House Principles,[17] are just a few examples. It suffices to say that judicial independence has been the subject of considerable attention by groups well-equipped to elaborate upon its meaning.

As Parker identified, this expert attention has given rise to a number of definitional approaches. Sir Ninian Stephen also recognised this when he observed that, 'like most concepts that mankind debates, judicial independence conveys different shades of meanings to different minds'.[18] This reflects the closely entwined relationship between judicial independence and notions of democracy, the rule of law, the separation of powers, impartiality, integrity and propriety.[19] Having compiled an edited collection of resources on judicial independence for the Judicial Conference of Australia, Julie Debeljak observed that 'a wide degree of consensus' existed 'about the need for, and the essential elements of, judicial independence, albeit expressed in different terms.'[20] Some of the resources approach the question of judicial independence from distinct angles. Others build upon and evolve previous discussions and instruments.

Notwithstanding the diversity of concepts and terminology employed to give content to judicial independence, clear themes and essential elements arise. It is these that we harness in our analysis. At its most general level, judicial independence involves the protection and insulation of the judicature from improper pressures and influences.[21] As Sir Harry Gibbs put it, judicial independence means 'that no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions.'[22] Importantly, judicial independence not only concerns actual independence, but

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15 First World Conference on the Independence of Justice, *Universal Declaration on the Independence of Justice* (10 June 1983) ('*Montreal Declaration*').

16 International Association of Penal Law, International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, *Draft Principles on the Independence of the Judiciary* (29 May 1981) ('*Siracusa Principles*').

17 Commonwealth Secretariat et al, *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* (12 May 2004) ('*Latimer Principles*').

18 Ninian Stephen, *Sir Owen Dixon – A Celebration* (Melbourne University Press, 1986) 6.

19 Parker describes this as a 'bewildering inter-relationship': Parker, above n 1, 67. See, also: Lee and Campbell, above n 1, 6–7; Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 1.

20 Debeljak, above n 7, 4. See, also: Parker, above n 1, where he observes that: 'The initial impression is of considerable diversity in approach and formulation of these definitions and rationales, but it is difficult to identify whether these differences are merely linguistic, in that different words have been chosen to express the same idea, or semantic, in the strict sense that a different meaning is intended. The very uncertainty over whether substantive differences are intended illustrates the relative lack of theoretical and conceptual attention to what judicial independence is, and how it relates to other political or social values': 65.

21 Justice Society Committee on the Judiciary, *The Judiciary in England and Wales: A Report* (Justice Society, 1992) 4; Debeljak, above n 7; Lee and Campbell, above n 1, 6; RE McGarvie, 'The Foundations of Judicial Independence in Modern Democracy' (1991) 1 *Journal of Judicial Administration* 3, 6.

22 Cited in G Sturgess and P Chubb, *Judging the World, Law and Politics in the World's Leading Courts* (Butterworths, 1988).

the perception of it.[23] The third value contained in the Bangalore Principles, 'integrity', is explained with the clause: 'the behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.'[24] Some have suggested that perceived independence is in fact the core aim and most important aspect of judicial independence.[25] It is clear that judicial independence involves responsibilities being placed on judges and courts, as well as both obligations and prohibitions relating to the conduct of the legislative and executive arms of government.[26] The independence of the judiciary from the legislature is important, but independence from the executive branch is consistently highlighted as posing an especially difficult set of issues and as deserving of particular attention.[27]

We build upon these themes and synthesise the materials to identify four key indicators of judicial independence. It is against these that we assess the performance of Australian courts in asserting and strengthening their independence from the executive. These indicators lend themselves more easily to such analysis than, for example, the seven values arising from the Bangalore Principles.

Our four indicators of judicial independence are by necessity framed at a general level, reflecting their near-universal and exhaustive nature. The content of each is informed by commentary and resources of the kind listed above. We have not attempted to compile a comprehensive list of the many ways in which the instruments suggest independence might be protected. Rather we refer to the clearest themes that arise from the resources. In this way, these indicators reflect a first-principles conception of judicial independence capable of attracting a significant degree of consensus while also providing a valuable set of criteria for both conceptual and practical purposes.

Our first key indicator of judicial independence relates to the appointment, tenure and remuneration of judges. The remaining three indicators may be seen as facets of institutional independence. They are: operational independence, decisional independence, and personal

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23 Parker, above n 1; *Bangalore Principles: Commentary*, above n 4, 77; Lee and Campbell, above n 1, 6, 308–315; Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 34; Anthony Mason, 'The Courts and Public Opinion' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 94.

24 *Bangalore Principles*, above n 5, cl 3.2.

25 Parker, above n 1.

26 See eg: *Bangalore Principles: Implementation Measures*, above n 10, which is split into two Parts, one dealing with measures to be adopted by the judiciary, and a second, dealing with responsibilities of other parts of the state: 3.

27 See, Australian Bar Association, above n 3, 18 [2.6]–[2.7]; Brennan, 'Judicial Independence', above n 7, quoted in, *Bangalore Principles: Commentary*, above n 5: 'Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view to either earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever': 24.

independence. We discuss the content of each indicator below, before turning to the Australian case law in Part II.

A. Appointment, Tenure and Remuneration

Judicial appointment, tenure and remuneration are crucial to judicial independence, particularly from the executive government. These issues are the primary focus of most discussions on the topic, and have evolved both a larger body of work and greater international consensus than other aspects of judicial independence.[28]

Turning first to judicial appointments, the consensus suggests that the method of appointing judges must not risk the erosion of actual or perceived independence from the executive. Appointments ought to be based on merit[29] and be exercised in cooperation or consultation with the judiciary.[30] Similarly, any processes for promotion must be based on objective criteria.[31]

Once appointed, judges require security of tenure. Tenure ought to be guaranteed by law either for life, until a statutory age of retirement, or for a substantial fixed term without interference by the executive in a discretionary or arbitrary manner.[32] More specific principles may include that: a retired judge may be allocated judicial duties by a chief judge;[33] an acting judge may be appointed with the approval of a chief judge if special circumstances render it necessary;[34] an acting judge should not be appointed to avoid making a permanent appointment;[35] and part-time and probationary appointments should be treated with caution.[36] Moreover, a court should not be abolished simply to terminate a judge's

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28 See eg: Chief Justices' Declaration, above n 12; Beijing Statement, above n 6; Bangalore Principles: Impl*ementation Measures*, above n 10, Part Two 'Responsibilities of the State'; *Latimer Principles*, above n 17, 11.

29 *Beijing Statement*, above n 6, cl 11; *Basic Principles*, above n 2, art 10; *New Delhi Standards*, above n 14, cl 26; *Montreal Declaration*, above n 15, [2.11]–[2.14]; John Doyle, 'Court Governance and Judicial Independence: The South Australian Approach' (Speech delivered at the Australian Judicial Conference, 2006) 5; Parker, above n 1, 89.

30 International Commission of Jurists, *The Rule of Law and Human Rights* (1959–62), ch 5, I, [2]; *New Delhi Standards*, above n 14, cl 3; *Montreal Declaration*, above n 15, cl 2.14. See, also: Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion* (1997, Judicial Commission of New South Wales) 11; and Parker's recommendation for a judicial appointments commission in Australia: Parker, above n 1, 89.

31 *Beijing Statement*, above n 6, cl 17; *Montreal Declaration*, above n 15, cl 2.17; *Siracusa Principles*, above n 16, art 10-11.

32 *Bangalore Principles: Commentary*, above n 4, 36; *Bangalore Principles: Implementation Measures*, above n 10, 12, 14-15; *Chief Justices*' *Declaration*, above n 12, 1, 3; *Basic Principles*, above n 2, art 11-12; International Commission of Jurists, *The Rule of Law and Human Rights* (1959-62), ch 5, I, [3]; *Montreal Declaration*, above n 15, cl 2.19; *New Delhi Standards*, above n 14, cl 22; *Beijing Statement*, above n 6, cl 18-22; *Siracusa Principles*, above n 16, art 12; Doyle, above n 29, 4.

33 *Chief Justices*' *Declaration*, above n 12, cl 1(a).

34 Ibid cl 1(b).

35 Ibid cl 2.

36 *Montreal Declaration*, above n 15, cl 2.20; *New Delhi Standards*, above n 14, cl 23, 25. See, also: Michael Kirby, 'Independence of the Judiciary: Basic Principles, New Challenges' (Speech delivered at the International Bar Association Human Rights Institute, Hong Kong, 12 June 1998) 6-7.

appointment,[37] and in cases of court restructuring, previously serving judges should be re-appointed.[38]

The process for disciplining or removing judges from office should be limited to cases of serious misconduct or incapacity to discharge the duties of the office.[39] A decision to remove a judge on these grounds should be made by an independent body[40] of a judicial character.[41] If the decision to remove a judge is vested in the legislature, then it should preferably be exercised following a recommendation by a court or a similar independent judicial body.[42]

Finally, judicial independence requires financial security. Judicial salaries and pensions should be adequate and commensurate with the dignity of the office,[43] and should not be decreased during a judge's tenure.[44] They should also be established by law and not subject to arbitrary interference from the executive.[45]

B. Operational Independence

The daily operational processes and procedures of courts require freedom from executive interference. In essence, the executive should not control the courts, but should support them sufficiently to facilitate their effective and independent functioning. Thus, executive funding

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37 Mason, 'The Appointment and Removal of Judges', above n 30, 26.

38 *Montreal Declaration*, above n 15, cl 2.06(g); Kirby, 'Independence of the Judiciary: Basic Principles, New Challenges' above n 36, 10-11, referring to the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March1976) art 14.1. See, also: ibid 26-35; Michael Kirby, 'Abolition of Courts and Non-Reappointment of Judicial Officers' (1995) 12 *Australian Bar Review* 181; S Zeitz, 'Security of Tenure and Judicial Independence' (1998) 7 *Journal of Judicial Administration* 159; Commonwealth, *Tenure of Appointees to Commonwealth Tribunals*, Parl Paper No 289 (1989) [5.26]–[5.28]; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 ('*Quin*'), discussed below in Part III.A. For discussion of appointments of presidential members of the Conciliation and Arbitration Commission, see: Australian Bar Association, above n 3, 19–20, [3.2]–[3.6].

39 *Bangalore Principles: Implementation Measures*, above n 10, 15-16; *Basic Principles*, above n 2, art 17-20; *Montreal Declaration*, above n 15, cl 2.38; *New Delhi Standards*, above n 14, cl 30; *Beijing Statement*, above n 6, cl 22; *Siracusa Principles*, above n 16, art 12, 15. See, also: Mason, 'The Appointment and Removal of Judges', above n 30, 22-26.

40 *New Delhi Standards*, above n 14, cl 4(a);

41 International Commission of Jurists, *The Rule of Law and Human Rights* (1959-62), ch 5, I, [4]–[5]; *Montreal Declaration*, above n 15, cl 2.33(a); *New Delhi Standards*, above n 14, cl 4(b); *Beijing Statement*, above n 6, cl 25-27; *Siracusa Principles*, above n 16, art 13-15. Most notably, this 'judicial character' includes the right to a fair hearing: *Beijing Statement*, above n 6, cl 26.

42 *Montreal Declaration*, above n 15, cl 2.33(b); *New Delhi Standards*, above n 14, cl 4(c), 31; *Beijing Statement*, above n 6, cl 23-24; *Bangalore Principles: Implementation Measures*, above n 10, 16.

43 *Montreal Declaration*, above n 15, cl 2.21(b)-(c); *New Delhi Standards*, above n 14, cl 14-15; *Beijing Statement*, above n 6, cl 31.

44 Except as part of an overall public economy measure: *Montreal Declaration*, above n 15, cl 2.21(c); *Beijing Statement*, above n 6, cl 31; *New Delhi Standards*, above n 14, cl 14-15.

45 *Bangalore Principles: Commentary*, above n 4, 36; *Bangalore Principles: Implementation Measures*, above n 10, 12, 15; *Montreal Declaration*, above n 15, cl 2.21(a); *New Delhi Standards*, above n 14, 14-15; Doyle, above n 29, 4.

and other resourcing to the judiciary must be adequate to allow it to perform its functions,[46] and there should be no interference in respect of the assignment of judges, sittings of the court or court lists.[47] Any power to transfer a judge from one court to another should be vested in a judicial authority and preferably subject to the judge's consent.[48] Finally, the number of members of a nation's highest court should be rigid and not subject to change except by legislation.[49]

C. Decisional Independence

A facet of judicial independence that has been particularly controversial in Australia is decisional independence, that is, the independence with which a judge exercises his or her decision-making functions. Materials concerning decisional independence tend to be couched in general terms, leaving key concepts (for example, 'judicial matters') loosely defined.[50] Nonetheless, it is well recognised as a core aspect of judicial independence.

Decisional independence requires that courts have jurisdiction over all issues of a judicial nature, and that a court may decide conclusively its own jurisdiction and competence, as defined by law.[51] Decisional independence also requires that the powers of the judiciary not be controlled by,[52] or conflated with,[53] the powers of the other arms of government. Thus, mechanisms such as privative clauses[54] and the retroactive reversal of specific court decisions ought to be avoided.[55]

Whilst this study focuses on the independence of the judiciary from the executive branch, we note that decisional independence also has implications for parliaments and courts. For instance, a parliament ought not direct or pre-empt the judicial resolution of a dispute, or

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46 *Basic Principles*, above n 2, art 7; *Bangalore Principles: Commentary*, above n 4, 124; *New Delhi Standards*, above n 14, cl 10, 13; *Siracusa Principles*, above n 16, art 24; Anthony Mason, 'Judicial Independence and the Separation of Powers – Some Problems Old and New' in Geoffrey Lindell (ed), *The Mason Papers* (The Federation Press, 2007) 331, 332-335.

47 *Bangalore Principles: Commentary*, above n 4, 37; *Siracusa Principles*, above n 16, art 8; *Montreal Declaration*, above n 15, cl 2.16; *New Delhi Standards*, above n 14, cl 11(c).

48 *New Delhi Standards*, above n 14, cl 12; *Beijing Statement*, above n 6, cl 30, which allows transfers by the executive, but only 'after due consultation with the judiciary'; *Siracusa Principles*, above n 16, art 9; *Montreal Declaration*, above n 15, cl 2.18.

49 *New Delhi Standards*, above n 14, 24

50 See eg: ibid cl 8.

51 *Bangalore Principles: Implementation Measures*, above n 10, 12; *Basic Principles*, above n 2, art 3; *Montreal Declaration*, above n 15, cl 2.05; *New Delhi Standards*, above n 14, cl 8; *Beijing Statement*, above n 6, cl 3(b), 33.

52 *New Delhi Standards*, above n 14, cl 5.

53 ack Simson Caird, Robert Hazell and Dawn Oliver, 'The Constitutional Standards of the House of Lords Select Committee on the Constitution' (The Constitution Unit, University College London, January 2014) cl 3.1. 6.

54 Ibid 3.1.4. See, also: Select Committee on the Constitution, *Justice and Security (Northern Ireland) Bill*, House of Lords Paper No 54, Session 2006–07 (2007).

55 *Montreal Declaration*, above n 15, cl 2.08; *New Delhi Standards*, above n 14, cl 19; *Basic Principles*, above n 2, art 4; Caird, Hazell and Oliver, above n 53, cl 1.1.

frustrate the proper execution of a court decision,[56] and judges should be independent from their judicial colleagues in the conduct of their decision-making powers.[57]

D. Personal Independence

Personal independence has also received considerable attention in the Australian cases.[58] It requires that a judge not accept, nor should the executive require that he or she fill, extra-judicial roles that would be likely to interfere with his or her exercise of judicial power. This potential for interference should be assessed both in fact and according to public perception. Impermissible roles would include jobs at a high, policy-making level of the executive or legislative branch (for example, as special policy advisor on matters relating to reform of the administration of justice).[59]

The global resources also recognise a range of extra-judicial roles that a judge may be appointed to – provided that no inconsistency with his or her actual or perceived impartiality or political neutrality arises. For instance, a judge may be a member of a commission of inquiry,[60] represent the state on ceremonial or other similar occasions,[61] hold a position of administrative responsibility within a court (for a limited term and provided that the appointment is made by the court itself),[62] and be involved in certain executive activities after retiring as a judge.[63]

Personal independence further requires that judges are not rewarded or punished for the conduct of their judicial functions. Hence, any practice of the executive awarding, or recommending the award, of an honour to a judge for his or her judicial activity should be avoided. This kind of improper reward is contrasted with civil honours awarded by an independent body, and with awards given after the judge's retirement.[64] Judges also require

56 Bangalore Principles: Implementation Measures, above n 10, 12; Montreal Declaration, above n 15, cl 2.02, 2.06(d); New Delhi Standards, above n 14, 18; Peter Gerangelos, The Separation of Powers and Legislative Interference in Judicial Process (Hart, 2009) 3.

57 *New Delhi Standards*, above n 14, cl 46; Simon Shetreet, 'Judicial Independence and Accountability: Core Values in Liberal Democracies' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 3.

58 We note that Simon Shetreet equates 'personal independence' with the protections for security of tenure and terms of service. This is just one example of the kind of semantic diversity that is common in the resources concerning judicial independence: Simon Shetreet, 'The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act 1986*' (1987) *University of New South Wales Law Journal* 4, 7.

59 *Bangalore Principles: Commentary*, above n 4, 44.

60 Ibid 100; *New Delhi Standards*, above n 14, cl 36. However, as the *Bangalore Principles: Commentary* notes, the terms of reference of any inquiry should be prepared carefully. The *Montreal Declaration* couches this principle in different terms: 'Judges may not serve as chairmen or members of committees of inquiry, except in cases where judicial skills are required': above n 15, cl 2.27. For discussion and critique of the arguments for and against the appointment of judges as Royal Commissioners, see: George Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108.

61 *Bangalore Principles: Commentary*, above n 4, 102.

62 *Chief Justices' Declaration*, above n 12, 6.

63 *Bangalore Principles: Commentary*, above n 4, 102.

64 Ibid 45.

immunity from suit, punishment or retribution arising from judicial acts.[65] Security of person has a part to play in effectively maintaining judicial independence. The executive should ensure the physical protection of members of the judiciary and their families, especially in the event of threats being made against them.[66]

III. THE AUSTRALIAN CASES

The Australian federation is built upon respect for judicial independence and an awareness of the importance of insulating the judiciary from inappropriate interference from the executive branch of government. Protections for judicial independence contained in the *Act of Settlement 1701*[67] and in other Imperial laws and conventions carried into the Australian colonies.[68] Upon federation in 1901, judicial independence gained protection through the text and structure of the *Commonwealth Constitution*, which established a tripartite separation of federal governmental powers by vesting legislative, executive and judicial powers in distinct institutions.[69] The *Constitution* also provided direct protections for judicial independence in Chapter III by, for example, protecting the tenure and remuneration of federal judges.[70]

The *Constitution* provides the strongest means of protecting judicial independence. Important protections are also derived from a host of statutes (for example, the *Judicial Remuneration Act 2007* (Qld)) as well as from common law principles, such as those relating to judicial immunities from suit. Constitutional and political conventions also have a significant part to play. For example, it is by convention that governments provide courts with adequate funding and refrain from interfering in the assignment of judges to particular cases.

The courts of the states and territories are in many ways beyond the direct reach of the federal *Constitution*. These institutions have traditionally been subject to less stringent protections of their independence from the executive, though these protections have increased dramatically since the 1990s. In the absence of direct constitutional safeguards akin to those relating to federal courts, protections arising from statute, common law and convention have played a larger role in maintaining judicial independence in the states and territories.[71]

In this Part we focus on how each of the four key indicators of judicial independence have been interpreted and applied in the decisions of Australian courts. This analysis highlights the vital role of courts in reinforcing their own independence from the executive. It also reveals

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65 *Siracusa Principles*, above n 16, art 17; *Montreal Declaration*, above n 15, cl 2.24; *Basic Principles*, above n 2, art 16; Doyle, above n 29, 4; *New Delhi Standards*, above n 14, 43

66 *Bangalore Principles: Implementation Measures*, above n 10, 12; *Montreal Declaration*, above n 15, cl 2.23; *Siracusa Principles*, above n 16, art 27.

67 12 & 13 Will 3, c 2.

68 Susan Kiefel, 'Judicial Independence' (North Queensland Law Association Conference, 30 May 2008); Michael Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth' (1990) 13 *University of New South Wales Law Journal* 187, 189-191.

69 *Australian Constitution* ss 1, 61, 71.

70 Ibid s 72.

71 For example, by convention, a state judge's remuneration is not decreased: George Winteron, Australian Institute of Judicial Administration, *Judicial Remuneration in Australia* (1995) 23.

that in many key respects protections for judicial independence in Australia are incomplete or fragile.

A. Appointment, Tenure and Remuneration

Controversies around the appointment, tenure and remuneration of judges have emerged, but have tended not to give rise to litigation. For example, the removal of Justice Angelo Vasta by the Queensland Parliament in 1989 did not give rise to any legal challenge on separation of powers or judicial independence grounds.[72]

Protections for the appointment, tenure and remuneration of federal judges are directly provided for in s 72 of the *Constitution*. Section 72 says that federal judges: are appointed by the executive; may be removed (before reaching the compulsory retirement age of 70 years)[73] only 'by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'; and shall receive remuneration fixed by Parliament which cannot be diminished during their period in office. In these ways, s 72 provides a robust protection for the appointment, tenure and remuneration of federal judges, placing these aspects of judicial independence largely beyond the reach of legislative or executive interference. As a result of s 72, the federal government may not, for example, appoint acting judges to federal courts or remove judges in the course of court restructuring.

The level of protection provided in s 72 appears to satisfy the international standards for judicial independence. However, like many constitutional provisions, the section is framed broadly. The meaning and practical operation of the protections arising from s 72 – for example, what is meant by misbehaviour and incapacity, how these conditions may be 'proved', or the criteria on which the executive should appoint judges – have to date been resolved through legislation, policy statements or simply not at all.[74]

The appointment, tenure and remuneration of state and territory judges are usually governed by legislation and convention, and are therefore subject to change by ordinary Act of Parliament.[75] Protections contained in state or territory constitutions must be entrenched in order to resist direct or indirect alteration by subsequent Acts.[76] Some states have entrenched

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72 Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth', above n 68, 191-192.

73 This retirement age was added by the *Constitution Alternation (Retirement of Judges) 1977*.

74 See, eg: *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth); *Remuneration Tribunal Act 1973* (Cth); *Judges*' *Pensions Act 1968* (Cth); *Judges (Long Leave Payments) Act 1979* (Cth); Attorney-General's Department, 'Judicial Appointments: Ensuring a Strong and Independent Judiciary through a Transparent Process' (April 2010); Commonwealth Attorney-General Michael Lavarch, *Discussion Paper: Judicial Appointments — Procedure and Criteria* (1993).

75 Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth', above n 68, 189-190. For discussion of the convention that 'a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehavior or incapacity' see: *Quin* (1990) 93 ALR 1, 30 (Deane J).

76 Through a process of 'double entrenchment', by which both the provision itself and the entrenching clause are subject to entrenching provisions: *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, affirmed in *Attorney-General (NSW) v Trethowan* [1932] AC 526.

provisions relating to judicial independence, but such instances are rare.[77] The *New South Wales Constitution* provides the only example of a state Parliament entrenching protections for judicial tenure. The provisions of the *New South Wales Constitution* concerning the removal (directly or through the abolition of a judicial office), suspension and retirement of judges were entrenched by a constitutional amendment in 1995.[78] Accordingly, in New South Wales, a judge may only be removed 'by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity', [79] mirroring the protection afforded to federal judges in s 72(ii) of the Commonwealth *Constitution*. In addition, judicial officers in New South Wales may only be suspended by legislation and are entitled to remuneration during the period of suspension.[80] The retirement age of judges in New South Wales is set by legislation and judges are entitled to re-appointment in cases of court re-organisation or the abolition of a judicial office.[81] These provisions may only be altered by referendum.[82]

Across Australia, Supreme Court judges are appointed during good behaviour.[83] Every state and territory, except for Tasmania and the Northern Territory, require proven misbehaviour to warrant the removal of a judge from his or her office.[84] Queensland, New South Wales, Victoria and the ACT also allow for removal on the ground of incapacity.[85] In these four jurisdictions, a tribunal, committee or judicial commission finding is required before Parliament may act to remove the judge.[86]

As the appointment, tenure and remuneration of state or territory judges lacks explicit protection under the *Commonwealth Constitution*, these facets of judicial independence are susceptible to interference by the executive or Parliament (with the exception of in New South Wales due to the entrenched protections in its *Constitution*). Courts have recognised the vulnerability of protections for the tenure of state and territory judges in a number of cases. In the 1920 case of *McCawley v The King*,[87] the Privy Council upheld the short-term

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77 Kiefel, above n 68, 2.

78 *Constitution Act 1902* (NSW) s 7B(1) introduced by the *Constitution (Entrenchment) Amendment Act 1992 (1995 No 2)* (NSW). This section provides that any Bill that 'expressly or impliedly repeals or amends' those provisions 'shall not be presented to the Governor for Her Majesty's assent until the Bill has been approved by the electors in accordance with this section'. Crucially, s 7B(1) also provides that s 7B can only be amended by referendum, thus meeting the requirements of double entrenchment laid down in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

79 *Constitution Act 1902* (NSW) s 53.

80 Ibid s 54.

81 Ibid s 55-56.

82 bid s 7B(1).

83 *Supreme Court Act 1933* (ACT); *Supreme Court Act 1970* (NSW); *Supreme Court Act* (NT); *Supreme Court of Queensland Act 1991* (Qld); *Supreme Court Act 1935* (SA); *Supreme Court Act 1959* (Tas); *Supreme Court Act 1986* (Vic); *Supreme Court Act 1935* (WA).

84 Kiefel, above n 68, 2, citing *Constitution Act* (NSW) s 53(1); *Constitution Act 1975* (Vic) ss 77(4)(aaa), 87; *The* Constitution *Act 2001* (Qld) ss 60(1), 61; *Constitution Act 1934* (SA) ss 74, 85; *Constitution Act 1889* (WA) ss 54, 55; *Tasmanian Constitution Act 1934* (Tas) s 1.

85 Kiefel, above n 68, 2.

86 Ibid. See, also: Kathy Mack and Sharon Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 370, 392-394.

87 [1920] AC 691. For discussion see, Nicholas Aroney, 'Politics, Law and the Constitution in *McCawley's Case*' (2006) 30 *Melbourne University Law Review* 605.

appointment of Thomas McCawley to the Supreme Court of Queensland, despite the *Queensland Constitution* expressly granting life tenure. McCawley's appointment was linked to his Presidency of the Court of Industrial Arbitration, which was for a seven-year term. The High Court found McCawley's appointment to be invalid,[88] but this was reversed on appeal when the Privy Council affirmed that the life tenure granted by the *Queensland Constitution* was subject to both express and implied amendment by subsequent legislation.[89]

The power of state and territory governments to grant judges tenure for variable periods was affirmed in the 2006 case of *Forge v Australian Securities and Investments Commission*.[90] In *Forge*, the High Court upheld the appointment of acting judges to the New South Wales Supreme Court. It had been argued that the presence of acting judges on Supreme Courts undermined the institutional independence and integrity of those courts. This was rejected; though a majority of the Court left open the possibility that in particular circumstances an acting appointment may be invalid.[91] For instance, Gummow, Hayne and Crennan JJ identified that:[92]

> [T]he appointment of a legal practitioner to act as a judge for a temporary period, in the expectation that that person would, at the end of appointment, return to active practice, may well present more substantial [constitutional] issues. The difficulty of those issues would be intensified if it were to appear that the use of such persons as acting judges were to become so frequent and pervasive that, as a matter of substance, the court as an institution could no longer be said to be composed of full-time judges having security of tenure until a fixed retirement age. As was said in [*North Australian Aboriginal Legal Aid Service Inc v Bradley*], there may come a point where the series of acting rather than full appointments is so extensive as to distort the character of the court.

McCawley and *Forge* demonstrate that, unlike their federal counterparts, the duration of a state or territory judge's tenure may be determined by Parliament and may vary from a temporary 'acting' post, to a fixed term such as seven years, to life.

Where a government has sought to reduce a serving judge's tenure by removing him or her from judicial office, the courts have shown a greater willingness to constrain the exercise of governmental powers. However, this has been coupled with a reticence to second-guess the legitimacy of executive decisions in this area.

The 1990 case of *Macrae and Ors v Attorney-General (NSW)*[93] arose out of the abolition of the Court of Petty Sessions to make way for the introduction of Local Courts. In the course of this re-organisation, the New South Wales Attorney-General decided not to re-appoint five

88 *McCawley v The King* (1918) 26 CLR 9.
89 *McCawley v The King* [1920] AC 691.
90 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 ('*Forge*').
91 Anna Dziedzic, '*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges'(2007) 35 *Federal Law Review* 129, 133-134.
92 *Forge* (2006) 228 CLR 45, [47], citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 164 ('*Bradley*').
93 *Macrae and Ors v Attorney-General for New South Wales* (1987) 9 NSWLR 268.

magistrates to judicial positions in the new Local Courts.[94] The failure to re-appoint the magistrates was based on private allegations of their unfitness detailed in letters from Clarrie Briese, the Chairman of the Bench of Stipendiary Magistrates, to Attorney-General Paul Landa. These letters said, for example, that former Magistrate Eris Quin was 'rude, flippant, arrogant and authoritarian on the bench', 'bullies litigants and others in court' and 'lacks judicial temperament'.[95] The magistrates were never confronted with the allegations or presented with an opportunity to defend their positions.

The deposed magistrates challenged the decision that had effectively resulted in their removal. Kirby P, Mahoney and Priestly JJA of the New South Wales Court of Appeal unanimously upheld the magistrates' challenge, finding that they had been denied procedural fairness and were entitled to a fresh decision. Special leave to appeal to the High Court from this decision was refused and the magistrates were invited to apply for the positions in competition with other applicants.[96] The Court of Appeal thus confirmed that a court may exercise judicial review over an executive decision to abolish a court and selectively re-appoint its judicial officers.

Quin, one of the magistrates who was a party to the challenge in *Macrae*, claimed that his application for re-appointment (and those of the other magistrates) should be considered separately and not compared to the other applicants. This argument carried with Kirby P and Hope JA in the Court of Appeal,[97] however Quin was ultimately unsuccessful in the High Court. For Mason CJ, a finding in favour of Quin:[98]

> would require the Court to compel the Attorney-General to depart from the method of appointing judicial officers which conforms to the relevant statutory provision, is within the discretionary power of the Executive and is calculated to advance the administration of justice.

Similar sentiments underpinned the reasons of Brennan and Deane JJ.[99] As Kathy Mack and Sharon Roach Anleu observed, the High Court's decision in *Attorney-General (NSW) v Quin* demonstrates the 'reluctance of courts to intervene in the executive authority of judicial appointment and the genuineness of the plan of court reorganisation'.[100] Together, *Macrae* and *Quin* establish that a state magistrate is entitled to procedural fairness in circumstances of court re-organisation, but may be required to undergo a competitive process to be re-appointed to a judicial position.

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94 For a detailed coverage of the facts of this case, see: ibid 287-304 (Priestly JA).

95 Ibid 292 (Priestly JA).

96 For discussion, see: Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth', above n 68; Kirby, 'Abolition of Courts and Non-reappointment of Judicial Officers', above n 38, 190-193; Lee and Campbell, above n 1, 132-133.

97 *Quin v Attorney-General for and in the State of New South Wales* (1988) 16 ALD 550 (Mahoney JA dissenting).

98 *Quin* (1990) 170 CLR 1, 20 (Mason CJ).

99 Ibid 41 (Brennan J), 47 (Deane J).

100 Mack and Anleu, above n 86, 384. See, also: Mason CJ's comments in *Quin* (1990) 170 CLR 1, 18 (Mason CJ).

The reasons of the High Court in *Quin* do not appear to treat magistrates as attracting a different degree of protection to other judicial officers.[101] Thus, it would seem that a state judge may be required to re-apply for his or her position from time to time as courts are re-organised. In obiter dicta in *Quin*, however, Mason CJ identified a limit on the executive's capacity to remove judges in the course of court re-organisation. The Chief Justice acknowledged that that if the re-organisation of a court was not a 'genuine' exercise, but was instead a sham to effect the improper removal of justices, this would be subject to judicial review and may be void.[102]

Writing extra-curially, former High Court Justice Michael Kirby (who had upheld the Magistrates' challenges as President of the New South Wales Court of Appeal) strongly criticised the High Court's decision in *Quin*. For Kirby the decision erodes judicial independence by allowing the executive to require that justices re-apply for their judicial positions. He said:[103]

> Until reversed, [*Quin*] will continue to assist executive governments throughout Australia to erode judicial independence and tenure upon the asserted basis that this is being done to uphold 'quality' in courts, tribunals and other public offices. If regular resubmission of judicial appointees to a suggested test of 'quality' is permissible, whether directly or indirectly, we have shifted the basis of tenure in judicial and like appointments.

A passage from Deane J's judgment in *Quin* addresses a basic tension that underpins the differences in the views expressed by Kirby and the majority justices in *Quin*. Justice Deane identified that the magistrates' challenges called for the reconciliation of 'two basic tenets of the administration of justice', namely, the convention that a judge should only be removed in circumstances of proved misbehaviour or incapacity, and the norm that the executive ought to appoint only the best available candidate to a judicial office.[104] Kirby's approach places greater weight on the former tenet and emphasises the need for strong protections for judicial tenure. Other justices, such as Mason CJ, Brennan and Deane JJ, place greater emphasis on the latter tenet, and couple this with deference to the executive with respect to decisions as to the appointment of judicial officers. Both tenets have a role to play in ensuring that judicial independence is achieved. However, in the absence of clearer constitutional limits on executive interference with judicial appointments, tenure or remuneration, Kirby's approach would give more effective protection to state and territory courts from inappropriate executive interference.

Important developments in constitutional law since *Quin* hint at the possibility of stronger protections for the tenure of state and territory judges. Constitutional protections for the appointment, tenure and remuneration of these judges may arise from the 1996 case of *Kable v Director of Public Prosecutions.*[105] The *Kable* principle prohibits the conferral of functions

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101 Mack and Anleu, above n 86, 384.
102 *Quin* (1990) 170 CLR 1, 19 (Mason CJ).
103 Lee and Campbell, above n 1, 132.
104 *Quin* (1990) 170 CLR 142-43 (Deane J).
105 (1996) 189 CLR 51 ('*Kable*').

on state courts that are incompatible with judicial independence or institutional integrity.[106] In *Ebner v Official Trustee in Bankruptcy* the High Court recognised that the principle applies to all levels of both state and territory judicial institutions.[107] Chief Justice Gleeson has summarised the principle and its constitutional foundation as follows:[108]

> [S]ince the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.

Obiter dicta in some of the majority opinions in *Kable* hinted that the principle may have implications for the power of state Parliaments to abolish or regulate state courts.[109] This may require that the security of tenure of state judges who are capable of exercising federal judicial power meet heightened standards.[110]

In 1998, Spigelman CJ in a New South Wales Court of Appeal case indicated that he considered *Kable* to place limits on any attempt to restrict judges' security of tenure. *The Honourable Justice Vince Bruce v The Honourable TRH Cole, RFD and Ors*[111] concerned a challenge by Justice Bruce to the legality of a recommendation by the New South Wales Judicial Commission that he be removed for incapacity. Whilst the case was resolved on administrative law grounds, Spigelman CJ, with whom the other justices agreed, recognised that issues underlying the case were 'of the highest constitutional significance for the rule of law in New South Wales'. The Chief Justice said:[112]

> The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence. … The reasoning in *Kable*, in my opinion, indicates that the legislative power of the State may not be used to fundamentally alter the independence of a Supreme Court judge, or the integrity of the State judicial system.

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106 Ibid 103 (Toohey J), 82 (Dawson J). See, also: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ), 591 (Gleeson CJ) ('*Fardon*'); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 (French CJ); *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 579-581 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Kirk*').

107 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ('*Ebner*'). See, also: *Bradley* (2004) 218 CLR 146, [27]–[29].

108 *Fardon* (2004) 223 CLR 575, [15]. See, also: *Kirk* (2010) 239 CLR 531, [95]-[100] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

109 Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 408, citing *Kable* (1996) 189 CLR 51, 110–12 (McHugh J), 103 (Gaudron J), 139 (Gummow J). For discussion, see: Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 236-242; Mack and Anleu, above n 86, 382; Patrick Keyzer, 'Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the Constitution?' (2004) 32 *University of Western Australia Law Review* 30. Cf, *Wainohu v New South Wales* (2011) 243 CLR 181, 212 (French CJ and Kiefel J) ('*Wainohu*').

110 Mack and Anleu, above n 86, 381, citing *Kable* (1996) 189 CLR 51, 102, 107 (Gaudron J).

111 Matter No CA 40337/98 NSWSC 260 (12 June 1998).

112 Ibid [4].

This notion that the *Kable* principle has the potential to protect judicial appointments, tenure and remuneration has been reiterated in obiter dicta statements by justices of the High Court. For instance, Gummow, Hayne and Crennan JJ's reasons in *Forge*, quoted earlier, signified that the *Kable* principle places some limits on the power of state Parliaments to appoint acting justices.[113] Similarly, in *Bradley*, six of the seven justices of the High Court upheld provisions allowing the salary of the Chief Magistrate of the Northern Territory to be determined after two years of his appointment.[114] In reaching this conclusion their Honours interpreted the legislation to require that the Chief Magistrate's salary not be diminished over time.[115] In the course of their reasons, the justices emphasised that the *Constitution* requires courts to 'be and appear to be … independent and impartial',[116] thus indicating that the *Kable* principle operates as a limit on executive capacity to interfere in judicial appointments, tenure and remuneration in a manner that would erode public confidence in judicial independence.[117] Overall, the cases highlight the fragility of protections for judicial appointments, tenure and remuneration in the states and territories, as well as the potential for further development of the *Kable* principle to improve protections in this respect.

Chapter III of the *Constitution* has not proved to be the only limit on executive interference with judicial appointments, tenure and remuneration. Protection has also arisen from the federal nature of the *Constitution*. In 2003 the High Court struck down a Commonwealth superannuation tax scheme insofar as it applied to judicial officers in state courts. It reached this finding on an application of the *Melbourne Corporation* doctrine, which restricts Commonwealth power to single out states for special burdens or disabilities or to destroy or curtail states' continued existence or capacities to function.[118] In *Austin v Commonwealth*,[119] the High Court held that by regulating an aspect of judicial remuneration, the superannuation tax scheme impermissibly interfered with a state's freedom to determine the remuneration of its judges.[120] *Austin* had more to do with federalism than judicial independence. Indeed, its restrictions on executive interference in judicial remuneration could be circumvented if the federal and state governments acted together to achieve the same end.[121] Nonetheless, *Austin* has had the practical impact of causing the federal government to exempt state judges from certain taxes,[122] and affirms the broader principle that the federal government may not control the appointment, tenure or remuneration of state judges.

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113 *Forge* (2006) 228 CLR 45.

114 Gleeson CJ interpreted the legislation in a manner that did not require him to engage with the *Kable* argument: ibid 67 [40] (Gleeson CJ).

115 *Forge* (2006) 228 CLR 45, 80 [76] (Gummow, Hayne and Crennan JJ).

116 Ibid 76 [64].

117 2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See, also: *Ebner* (2000) 205 CLR 337, 363 (Gaudron J).

118 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

119 (2003) 215 CLR 185.

120 For discussion see eg: Graeme Hill, *Austin v Commonwealth*: Discrimination and the Melbourne Corporation Doctrine' (2003) 14 *Public Law Review* 80.

121 Chris Merritt, 'Judges, state politicians win exemption on pension' *The Australian* (Australia) 6 April 2013.

122 Ibid. Politicians were also excluded from these taxes, following a similar finding in *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

B. Operational Independence

Judicial independence requires restrictions on the ability of the executive to interfere in the operational aspects of a court. As former justice of the Supreme Court of Victoria RE McGarvie observed:[123]

> A court in which those responsible to the executive decide the way in which the operations of the court will be managed, the way cases will progress towards hearing and which cases will be heard by which judge at which time, is not likely to produce the impartial strength and independence of mind which the community requires of its judges.

Hence, aspects of a court's daily functioning such as the assignment of judges to particular cases, the transfer of judges between courts and the drafting of court lists should be insulated from executive interference. Operational independence also requires that the number of judges on the nation's highest court should be fixed by legislation – a guarantee provided for in s 71 of the *Constitution* – and that courts are properly resourced.

The operational independence of Australian courts is a central facet of their institutional independence, but remains wholly untested in litigation. The area is governed primarily by convention, as well as by legislation and delegated legislation.[124] On the whole, the executive has restrained itself from interfering in the operational workings of courts, at least in a manner that would give rise to legal disputes. That is not to say, however, that the operational independence of courts is immune from threat.

The fiscal autonomy of courts has attracted particular controversy. Funding and resourcing varies between courts and has been subject to debate and shifts in policy. The dependency of courts on the legislature and executive for funding has caused some judges to raise concerns in extra-curial statements over the impact that this may have on judicial independence.[125] Recently, on discovering that the High Court would be affected by a budget cut by way of an 'efficiency dividend', High Court Chief Justice Robert French wrote to the Prime Minister

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123 RE McGarvie, 'Judicial Responsibility for Operation of the Court System' (1989) 63 *Australian Law Journal* 79, 84, quoted in Julie-Anne Kennedy and Anthony Ashton Tarr, 'The Judiciary in Contemporary Society: Australia' (1993) 25 *Case Western Reserve Journal of International Law* 251, 262, in support of the proposition that 'judicial independence is also very largely dependent upon judges having administrative control of their own affairs'.

124 For example, many court processes are regulated by court rules. See eg: *Court Rules 2013* (NT); *Local Court Rules 2009* (NSW), made pursuant to the *Local Court Act 2007* (NSW); *Federal Court Rules 2011* (Cth) which are stated to be made by the Judges of the Federal Court under the *Federal Court of Australia Act 1976* (Cth).

125 See eg: TF Bathurst, 'Separation of Powers: Reality or Desirable Fiction?' (JCA Colloquium, Sydney, 11 October 2013): 'My basic point is this. The most crucial threat to the separation of powers today is, I believe, the increasing trend by governments to treat the courts as service providers and judges as public servants': 6

and the Attorney-General highlighting the constitutional independence of the Court and urging that it be exempt from the measure. He wrote:[126]

> [The High Court] is, as no doubt you well appreciate, not to be treated, for funding or for any other purposes, as analogous to an agency of the Executive Government … In particular, its funding should not be treated as an aspect of the deployment of funds within the executive branch of government. … I am writing to request that the Government consider not applying to the High Court a proposed efficiency dividend which would have a significant adverse effect upon the court's ability to provide the services it now does throughout Australia.

The Chief Justice went on to emphasise the importance of funding to the Court, and the dangers posed by inadequate or reduced funding:

> Historically, the court's appropriated revenues have not kept pace with unavoidable cost increases, particularly in building-related expenditure. Many of the court's administrative costs cannot be reduced. This means that increases in the efficiency dividend inevitably cut into core elements of the court's operations, such as registry and library staffing.

The letters did not result in federal courts being exempted from the efficiency dividend. However, following the publication of the Chief Justice's letters in national media, Prime Minister Tony Abbott agreed to limit the impact of the cuts by exempting the High Court from a 0.25 per cent increase to the dividend.[127]

Despite the centrality of court resourcing to judicial independence, and the concerns of the Chief Justice and other members of the judiciary on this issue, there have been no cases that identify or even suggest constitutional protections for the operational independence of federal, state or territory courts. Indeed, it is difficult to envisage a scenario in which a court, or some person or organisation acting on its behalf, could litigate its own operational independence. That said, potential constitutional protections for operational independence exist in the separation of judicial power derived from Chapter III of the *Constitution* and in the *Kable* principle derived from that separation. These principles provide a basis for broad constitutional protection. They could conceivably be interpreted to prohibit executive interference in the practical functioning of courts where that interference would erode the fundamental constitutional values of judicial independence or integrity. Moreover, in a series of cases the High Court has stated that the defining and essential characteristics of federal,

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126 Simon Cullen, 'High Court Chief Justice Robert French asks that the court be exempt from federal budget cuts', *ABC News* (online), 21 February 2014 <http://www.abc.net.au/news/2014-02-21/chief-justice-asks-abbott-for-budget-cut-exemption/5275358>; Sean Parnell, 'Chief Justice taken on Abbott over cuts', *The Australian* (Australia), 21 February 2014.

127 Nicola Berkovic, 'Razor 'won't spare' top court', *The Australian* (Australia), 27 February 2014. The 2014-2015 Budget does not list the entities that have been exempted from the 0.25% further increase to the efficiency dividend, see: Commonwealth, *Budget Paper No. 2 (Budget Measures), Part 2 (Expense Measures), Cross Portfolio* (2014), available at <http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-07.htm> (accessed at 25 May 2014).

state and territory courts must be preserved.[128] The Court has recognised that an exhaustive list of these characteristics is neither possible nor desirable, but has indicated that any such list would include features such as independence and impartiality and the provision of reasons for judicial decisions.[129] It might be argued that these essential and defining characteristics of courts include practical necessities such as court funding and staff. On this basis, these operational features of judicial independence might find constitutional protection.

On the other hand, courts have traditionally been subject to significant direction as to their operation. This means that the mere regulation of court fees, funding or case management, for example, is unlikely to transgress constitutional limits. Considering the deferential position of the courts to the executive – even in decisions affecting court re-structuring as considered in *Quin* – only extreme threats to operational independence may do so. Perhaps, for example, a refusal to provide *any* funding to a court might prompt judicial consideration of constitutional principles to protect that court's operational independence. However, even in such an extreme example the law provides no means of compelling Parliament to appropriate the necessary moneys for this purpose.

C. Decisional Independence

Judicial independence requires that the decision-making powers of courts be insulated from inappropriate interference by the executive government. One aspect of this is that courts should have jurisdiction over issues of a justiciable nature. Another is that the powers and processes of courts ought not be controlled by, or conflated with, those of the executive government. Each of these facets of decisional independence has given rise to a substantial and complex body of case law in federal, state and territory courts, each of which we consider in turn.

i. Jurisdiction

A key limit on the executive government's capacity to usurp federal jurisdiction arises from the 1918 case of *Waterside Workers' Federation of Australia v JW Alexander Ltd*.[130] In that case the High Court adopted the principle that, as s 71 of the *Constitution* confers judicial powers on federal courts, such powers may not be vested in bodies other than courts.[131] This prevents the executive from exercising jurisdiction over federal judicial matters, as this would amount to usurpation of judicial power. The principle in *Alexander's case* underpins the emphasis in administrative law on defining the competence of courts in reviewing

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128 See eg: in respect of state courts: *Forge* (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181, 208 (French CJ and Kiefel J) ('*Wainohu*'); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458, [67] (French CJ) ('*Pompano*'). As to the importance of federal courts maintaining the characteristics of courts, see eg: *Polyukovich v Cth* (1991) 172 CLR 501, 607 (Deane J); *Leeth v Cth* (1992) 174 CLR 455, 487 (Deane and Toohey JJ).

129 See eg: *Pompano* (2013) 87 ALJR 458, [67] (French CJ).

130 (1918) 25 CLR 434 ('*Alexander*').

131 Ibid 442 (Griffith CJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 ('*Boilermakers"*).

administrative action in terms of the 'declaration and enforcing of the law', while allowing the executive the power to review 'the merits of administrative action'.[132]

Courts have also interpreted the *Constitution* to preclude judicial determination of issues that are 'non-justiciable'.[133] Issues of this kind include inherently political decisions such as whom to appoint or dismiss from the Ministry.[134] In policing the boundaries of its own jurisdictional competence, the High Court has tended to refer to the proper functions of courts, of Parliament and of the executive as laid out or implicit in the *Constitution*.[135]

Similarly, Chapter III limits federal jurisdiction to 'matters'. This term has been interpreted to provide a significant constraint on the scope of federal courts' jurisdiction.[136] For instance, in *In re Judiciary and Navigation Acts*[137] the High Court held that the requirement that federal courts only have jurisdiction over 'matters' prohibited those courts from issuing advisory opinions.[138] In the more recent case of *Abebe v Commonwealth*[139] the High Court interpreted the word 'matter' in order to determine whether legislative restrictions on the review jurisdiction of the Federal Court under the *Migration Act 1958* (Cth) were valid. The High Court upheld the legislation by finding that the jurisdiction of a federal court (other than the High Court) could be limited to adjudicating less than the total controversy.[140] This finding accepts that parliaments have considerable control over the jurisdiction of federal courts, subject to the specific protections for federal jurisdiction arising from Chapter III of the *Constitution*.

The most significant such constraint is the entrenchment by the *Constitution* of a minimum scope of High Court jurisdiction.[141] This is contained in s 75, which confers original jurisdiction upon the High Court in a range of matters, including in s 75(v) where 'a writ of Mandamus or prohibition or an injunction is sought against an officer of the

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132 *Quin* (1990) 170 CLR 1, 35-36 (Brennan J).

133 See, *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 83 ALR 265, 284-86 (Gummow J); *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ); *Bennett v Commonwealth* (2007) 231 CLR 91, 122–4 (Kirby J) ('*Thomas*').

134 *Stewart v Ronalds* (2009) 76 NSWLR 99.

135 *Thomas* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ).

136 Leslie Zines, *Cowen and Zines*' *Federal Jurisdiction in Australia* (The Federation Press, 3rd ed, 2002) 122. See eg: *Commonwealth v Queensland* (1975) 134 CLR 298; *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289; *Croome v Tasmania* (1997) 191 CLR 119; *Abebe v Commonwealth* (1999) 197 CLR 510; *Wong v The Queen* (2002) 207 CLR 344.

137 (1921) 29 CLR 257.

138 For discussion see, eg: Helen Irving, 'Advisory Opinions, The Rule Of Law And The Separation Of Powers' (2004) 4 *Macquarie Law Journal* 105. Cf, eg: Canada where advisory opinions are common and accepted (for discussion, see: Peter Hogg, *Constitutional Law of Canada* (Carswell, 1996) 180).

139 (1999) 197 CLR 510.

140 *Abebe v Commonwealth* (1999) 197 CLR 510, 532 (Gleeson CJ and McHugh J).

141 The *Constitution* otherwise enables Parliament to define and confer jurisdiction on federal courts: *Australian Constitution* ss 73, 75-77.

Commonwealth'.[142] In the words of Gleeson CJ in *Plaintiff S157/2002 v Commonwealth*, this provision:[143]

> secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. … Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.

In a joint judgment, five members of the High Court in *Plaintiff S157* said that s 75(v) introduces 'an entrenched minimum provision of judicial review' and 'places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action'.[144]

State and territory courts tend to have jurisdiction over matters arising within the state or territory in which the court is constituted, and may also be vested with federal jurisdiction and the jurisdiction of other states and territories.[145] This broad jurisdiction is subject to few protections from interference. In Victoria the 'unlimited' jurisdiction of the Supreme Court 'in all cases whatsoever' has been protected through entrenched provisions of s 85 of the *Victorian Constitution*.[146] These provisions preserve the unlimited scope of the Supreme Court's jurisdiction even where aspects of that jurisdiction are conferred on courts, tribunals or other bodies.[147] Amendment of these provisions does not require a referendum (as with the entrenched provisions regarding judicial tenure in New South Wales, discussed earlier). Rather, the amending Act must make express reference to s 85 and the parliamentarian proposing the amendment must state the reason for the alteration to the Supreme Court's jurisdiction. In accordance with the requirements for the successful entrenchment of a provision in a State Constitution, s 18(2A) safeguards s 85 by further requiring an absolute majority of both Houses of Parliament to bring about an amendment to s 85. Thus, the jurisdiction of the Victorian Supreme Court is subject to a unique system of constitutional protection as compared to other Australian jurisdictions.[148]

In light of the integrated nature of the Australian judicial system, in particular the exercise of federal jurisdiction by state courts, the High Court has interpreted Chapter III of the *Constitution* to limit governmental capacity to interfere in the jurisdiction of state courts. The

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142 It is also been recognised that certiorari may issue as ancillary to the writs of mandamus and prohibition: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 per Gaudron and Gummow JJ.

143 (2003) 211 CLR 476, [103] (Gleeson CJ).

144 *S157* superseded the 'classical' approach to privative clauses established by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614 (Dixon J). For discussion, see: Nick Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University law Review* 870.

145 *Ebner* (2000) 205 CLR 337, 363 [81].

146 *Constitution Act 1975* (Vic) s 85.

147 bid s 85(8), which provides: 'A provision of an Act that confers jurisdiction on a court, tribunal, body or person which would otherwise be exercisable by the Supreme Court, or which augments any such jurisdiction conferred on a court, tribunal, body or person, does not exclude the jurisdiction of the Supreme Court except as provided in sub-section (5)'.

148 This scheme has attracted criticism, see: Carol A Foley, 'Section 85 Victorian Constitution Act 1975: Constitutionally Entrenched Right… or Wrong? (1994) 20 *Monash University Law Review* 110.

development of the *Kable* principle in the case of *Forge* (which concerned the appointment of acting justices to a Supreme Court) is important in this respect. In *Forge*, the High Court reasoned that a state court must meet the definition of a court, and so it must not be deprived of the essential or defining characteristics of a court.[149] In the 2010 case of *Kirk v Industrial Court of NSW*, the High Court recognised an entrenched minimum requirement of judicial review that applies to decisions at the state level.[150] The Court reached this decision by holding that legislation could not deny a Supreme Court its power to grant relief for jurisdictional error in regard to a decision of an inferior court or tribunal.[151] For the High Court, the supervisory jurisdiction of a State Supreme Court was 'one of its defining characteristics'.[152] In light of this decision, Nick Gouliaditis observed that [t]here is now therefore little value in including true privative clauses in federal or state legislation'.[153]

Whilst *Kirk* concerns the legislative branch's capacity to interfere with a state court's jurisdiction through privative clauses, the decision recognises the centrality of jurisdiction to the independent functioning of courts. The case also demonstrates that the exercise of federal jurisdiction by state courts has a role to play in extending Chapter III protections to those courts.

ii. Decision-Making Powers

The decisional independence of courts further requires that a court's decision-making powers and processes are not controlled by, or conflated with, those of the executive government. This facet of judicial independence is the most litigated aspect of the separation of judicial power in Australia. It is complex, multifaceted and has been the subject of rapid developments and dramatic shifts.

a. Federal Courts

At the federal level a great deal of emphasis has been placed on preventing any overlap between executive and judicial powers. The *Constitution* has been interpreted to provide a strict, formalist, separation of judicial power by which judicial and non-judicial powers may (as a general rule) not be mixed in the same institution. By preventing the intermingling of powers in this way, the control of judicial powers by the executive is also limited – for instance, when such control would amount to a usurpation of a court's powers or compromise its independence or integrity. Thus, the decisional independence of federal courts is achieved through the strict, definition-based separation of powers. This approach has given rise to a

[149] *Forge* (2006) 228 CLR 45, 76.

[150] (2010) 239 CLR 531; Wendy Lacey, '*Kirk v Industrial Court of New South Wales*; *Kirk v Work Group Holdings Pty Ltd v Workcover Authority of New South Wales (Inspector Childs)*: Breathing Life into *Kable*' (2010) 34 Melbourne University Law Review 641, 649.

[151] *Kirk* (2010) 39 CLR 531, 580–581 [97]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[152] Ibid 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[153] Gouliaditis, above n 144, 883. See, also: Stephen Gageler, 'The Constitutionalisation of Australian Administrative Law', speech presented at the University of New England, 14 March 2011; Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012) 19 *Australian Journal of Administrative Law* 127, 128; John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 273.

substantial body of jurisprudence regarding the nature of judicial powers. This focus on judicial powers rather than on the underlying principle of judicial independence has been criticised as technical and distracting.[154] However, it has also gone a considerable way towards protecting the decisional independence of federal courts.

Alexander's case established the principle that, as s 71 of the *Constitution* confers judicial power on federal courts, such powers may not be vested in bodies other than courts.[155] It was not until 1956, however, that the High Court determined whether courts could validly exercise non-judicial powers. In the *Boilermakers'* case the High Court and Privy Council drew upon the text and structure of the *Constitution* to hold that federal courts may only exercise judicial power and ancillary or incidental non-judicial powers.[156] In the 1992 case of *Chu Kheng Lim v Minister for Immigration, local Government and Ethnic Affairs*, Brennan, Deane and Dawson JJ summarised these constitutional protections for judicial independence as follows:[157]

> [I]t is well settled that the grants of legislative power contained in s 51 of the *Constitution* … do not permit the conferral upon any organ of the Executive government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

In this way, the principles arising from *Alexander's* and *Boilermakers'* go a significant way to achieving the decisional independence of federal courts by preventing the combination of judicial and executive power, or the control of judicial power by the executive. However, in practice the principles have been interpreted with great flexibility and are subject to a host of exceptions that undermine the strength of the protection actually afforded.

The strict federal separation of judicial power hinges on the concept of judicial power. The starting point for defining the meaning of judicial power in the *Constitution* is Chief Justice Griffith's 'classic' definition in the 1908 case of *Huddart Parker & Co v Moorehead*:[158]

> [Judicial power means] the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the

[154] *R v Joske; ex parte Australian Building Construction Employees and Builders Labourers Federation* (1974) 130 CLR 87, 90 (Barwick CJ); James Stellios, 'Reconceiving the Separation of Judicial Power' (2010) 22 *Public Law Review* 113; Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers*' and the Separation of Judicial Power in Australia' (2012) 31 *University of Queensland Law Journal* 265.

[155] *Alexander* (1918) 25 CLR 434, 442 (Griffith CJ); *Boilermakers*' (1956) 94 CLR 254, 270.

[156] *Boilermakers*' (1956) 94 CLR 254, 296, affirmed by the Privy Council in *Attorney-General (Cth) v The Queen (1957)* 95 CLR 529.

[157] (1992) 176 CLR 1, 27 (Brennan CJ, Deane and Dawson JJ).

[158] *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ). See, also: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374-375 (Kitto J).

> rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

As Chief Justice Griffith's definition suggests, judicial power is indicated essentially by the conclusive determination of a controversy about existing rights.[159] In later cases the High Court further identified that a judicial determination should be governed by legal and not political standards.[160] The presence of these indicia indicates that a function is judicial. The absence of any or all of these may indicate a power is non-judicial.

Defining judicial power has not proven to be a clear-cut exercise. Identifying a function as judicial or non-judicial involves an often unpredictable balancing exercise, weighing present indicia against absent or contrary ones. This exercise is also impacted by references to historical considerations and matters of principle and policy.[161] The High Court has repeatedly acknowledged the difficulty in defining judicial power with predictability and precision, observing that the concept defies abstract conceptual analysis.[162] The regular use of the qualifier 'quasi-judicial' to describe bodies like tribunals, and distinctions between core and primary functions, and incidental and secondary functions, demonstrate substantial areas of ambiguity and overlap in distinguishing judicial and non-judicial functions.[163] Some powers are even capable of being vested in multiple branches of government – reflecting the capacity for this strict separation to nonetheless result in a mixture of judicial and executive powers. These functions include innominate powers, which are dependent on Parliament for their ultimate characterisation, and so-called 'chameleon powers', which take their character from the body in which they are vested.[164]

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[159] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 220.

[160] See, eg: *Australian Boot Trade Employees Federation v Whybrow and Co* (1910) 10 CLR 266, 318 (Isaacs J); *Alexander* (1918) 25 CLR 434, 442-444 (Griffith CJ); *Brandy v Human Rights and Equal Opportunity Commission & Ors* (1995) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ) ('*Brandy*').

[161] Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12 *Deakin Law Review* 1, 9-10; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aitkin J); *R v Davison* (1954) 90 CLR 353, 366-367 (Dixon CJ and McTiernan J).

[162] See, *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 373 (Kitto J), 394 (Windeyer J); *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 188-189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Brandy* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ), 267 (Deane, Dawson, Gaudron and McHugh JJ); *Nicholas v R* (1998) 193 CLR 173, 219 (McHugh J), 207 (Gaudron J); Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate' (2005) 8 *Constitutional Law and Policy Review* 1, 5.

[163] Gerangelos, above n 162, 1.

[164] For discussion of these two classes of functions, see: Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2007) 136-143. In argument before the High Court in 2007, then Commonwealth Solicitor-General David Bennett QC argued that the recognition of chameleon powers 'removed much of [the *Boilermakers*' principle's] rigidity so that it does not matter much anymore': *Thomas* (2007) 233 CLR 307, 316. This argument was given short shrift by the dissenting members of the Court: 426 (Kirby J), 467 (Hayne J).

The principles arising from *Alexander* and *Boilermakers'* appear to place strict limits on the potential for judicial power to be combined with, or controlled by, executive power. However, the flexibility with which these principles have been interpreted risks such outcomes. This can be demonstrated by way of a few case examples.

The overlap of executive and judicial powers has been permitted where courts have traditionally exercised an apparently administrative function, or where the executive branch has traditionally exercised an apparently judicial function. In *R v Davison*, the High Court held that issuing bankruptcy sequestration notices was a judicial function on the basis of its performance by courts over a long period of time, despite the function lacking the characteristics of judicial power.[165] The exercise of judicial powers by military tribunals was upheld as constitutionally permissible on a similar historical basis in *White v Director of Military Prosecutions*.[166] In the later case of *Lane v Morrison*,[167] however, the High Court set down strict boundaries to the exercise of judicial powers by military tribunals when it struck down provisions creating the Australian Military Court. By creating an independent court outside the chain of military-command, the Military Court was held to go beyond the bounds of the Defence Force's capacity to exercise judicial powers.[168] As *Lane* suggests, when looking to history to justify the exercise of judicial power by the executive, the Court has been attentive to the need to preserve the separation of judicial power and the independence and integrity of courts. In this way, these cases show that the protections for decisional independence may be avoided by a careful reliance upon tradition, but that judicial independence remains even then a live constitutional concern.

One of the clearest instances of apparent overlap of executive and judicial powers in the same body occurs in administrative tribunals. These tribunals exist within the executive branch of government, but nevertheless hear disputes between parties, interpret law, resemble judicial proceedings and may be presided over by judges. Whilst the powers of these tribunals are regularly described as 'quasi-judicial',[169] the High Court has drawn clear boundaries between these powers and those of courts. In *Brandy v Human Rights and Equal Opportunity Commission*,[170] the High Court found that the Human Rights and Equal Opportunity Commission was impermissibly exercising judicial power. The basis of this decision was that the Commission's decisions attained the status of court orders automatically upon registration with the Federal Court and therefore, like judicial decisions, were binding, conclusive and

[165] (1954) 90 CLR 353.
[166] (2007) 231 CLR 570, applied in *Haskins v Commonwealth* (2011) 244 CLR 22.
[167] (2009) 239 CLR 230.
[168] *Lane v Morrison* (2009) 239 CLR 230, 237 (French CJ and Gummow J). See, also: *Haskins v Cth* (2011) 244 CLR 22, 39-40 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[169] See eg: Gerard Brennan, 'The AAT – Twenty Years Forward' (Opening Address to The Administrative Appeals Tribunal Twentieth Anniversary Conference, Canberra, 1 July 1996). Even the *Concise Australian Legal Dictionary* (Butterworths, 2nd ed, 1998) defines quasi-judicial be reference to 'administrative agencies and tribunals': 361.
[170] (1995) 183 CLR 245.

enforceable.[171] As Leslie Zines observed, following *Brandy*, it is 'clear that the enforcement of existing rights will be an extremely strong indication that judicial power is being exercised. Apart from anything else it makes it clear that all determinations of the tribunal are conclusive'. [172] Although the decision in *Brandy* cast doubt over the validity of other administrative decision-making schemes and gave rise to further challenges, the High Court has since distinguished *Brandy* and upheld other quasi-judicial arrangements.[173]

A number of avenues for flexibility whereby the boundaries between executive and judicial powers may be blurred are demonstrated in the 2007 case of *Thomas v Mowbray*.[174] In *Thomas*, a majority of the High Court upheld the issuing of anti-terrorism control orders by federal courts. The power involved a conclusive, binding and authoritative decision, but this decision created rather than determined the rights in issue and was performed on the basis of predictive, community safety-focussed criteria. Thus, the power conferred on the federal court resembled both judicial and administrative powers and processes. A majority of the High Court in *Thomas* reasoned that the creation of rights according to broad, predictive criteria was not antithetical to judicial power and was therefore capable of exercise by a federal court.[175] In this sense, the case demonstrated that the indicia of judicial power are not necessarily determinative of whether a power is in fact judicial. The case was subject to strong dissenting opinions from Kirby and Hayne JJ, and has attracted significant criticism.[176]

The power considered in *Thomas* was novel. However, the majority justices pointed to other powers exercised by courts to justify the identification of the power as judicial.[177] These 'analogous' powers involved the creation rather than determination of rights according to vague criteria. Chief Justice Gleeson referred to the issuing of apprehended violence orders, as well as orders for sentencing, bail and the preventive detention of serious sex offenders by state courts as supporting his conclusion that the power to issue control orders was judicial.[178] The Chief Justice also adopted a deferential position that appeared to accept that a function

[171] *Brandy* (1995) 183 CLR 245, 269-270 (Deane, Dawson, Gaudron and McHugh JJ). See, also, *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 110 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[172] Zines, above n 159, 236.

[173] See, *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83; *Luton v Lessels* (2002) 210 CLR 333; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

[174] (2007) 233 CLR 307.

[175] Ibid 329 (Gleeson CJ), 347 (Gummow and Crennan JJ).

[176] See eg: Christos Mantziaris, 'Commonwealth Judicial Power for Interim Control orders – The Chapter III Questions Not Answered' (2008) 10 *Constitutional Law and Policy Review* 65; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209; Andrew Lynch, '*Thomas v Mowbray*: Australia's 'War on Terror' Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182. In a unique step for an independent reviewer of legislation, Bret Walker SC, the Independent National Security Legislation Monitor, adopted a passage from Hayne J's dissenting judgment in his 2012 report and said that some of the key concerns raised by Hayne J were not dispelled by the majority justices' reasoning: Independent National Security Monitor, Australian Government, *Declassified Annual Report 20th December 2012*, (2013) 41-43.

[177] *Thomas* (2007) 233 CLR 307, 328-329 (Gleeson CJ), 347-348 (Gummow and Crennan JJ).

[178] Ibid 328-329 (Gleeson CJ).

that is not antithetical to judicial exercise (regardless of its characteristics) may be a judicial function simply because it is conferred on a court. He said:[179]

> Determining whether governmental power or function is best exercised administratively or judicially is a regular legislative exercise. If, as in the present case, Parliament decides to confer a power on the judicial branch of government, this reflects a parliamentary intention that the power should be exercised judicially and with the independence and impartiality which should characterise the judicial branch of government.

In sum, the legal principles developed in *Alexander* and *Boilermakers'* go a long way towards protecting the decisional independence of federal courts by strictly separating the judicial and non-judicial powers of government. The principles present a significant obstacle to the usurpation or control of judicial functions by the executive and, therefore, maintain a court's independent control of its decision-making powers. The interpretation of these principles has been guided by an underlying focus on judicial independence as a constitutional value. In these ways, the principles align with international standards for the protection of courts' decisional independence. The examples outlined in this section show, however, that this strong protection for decisional independence may be undermined by exceptions and by flexible, unpredictable applications of the principles. In particular, *Thomas* demonstrates the flexible way in which the characteristics of judicial power may be applied in a particular case, the weight that may be placed on imperfect historical analogies and the role that can be played in such cases by deference and exceptions.

b. State and Territory Courts

Before 1996, it was generally accepted that there were few restrictions on Parliaments' powers with respect to the courts of the states and territories.[180] The strict separation of judicial power arising from Chapter III of the *Constitution* did not extend beyond federal courts. In *Kable*, however, the High Court held that constitutional protections exist for the independence of state courts. The Court held that a state court could not be vested with powers that were incompatible with its constitutionally protected independence and integrity. This principle was extended to territory courts in *Ebner v Official Trustee in Bankruptcy*.[181]

Kable involved a challenge to legislation enabling the New South Wales Supreme Court to order the preventive incarceration of a named individual at the completion of his sentence for serious offences.[182] The scheme was struck down on the basis that it was incompatible with

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179 Ibid 327 (Gleeson CJ).

180 See eg: *S (a child)* (1995) 12 WAR 392; *Building Construction Employees and Builders*' *Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652; *Mabo v Queensland (No 1)* (1988) 166 CLR 186, 202 (Wilson J); Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227, 230; Rohan Hardcastle, 'A Chapter III Implication for State Courts: *Kable v Director of Public Prosecutions*' (1998) 3 *Newcastle Law Review* 13, 13.

181 *Ebner* (2000) 205 CLR 337, 363 [81].

182 *Community Protection Act 1994* (NSW).

the independence and integrity of the Supreme Court. This incompatibility stemmed from the Act's ad hominem nature as well as from the various ways in which the court proceedings departed from fair process.[183]

By focussing directly on the impact of governmental action on judicial independence, the *Kable* principle avoids the arguably distracting focus on distinguishing judicial and non-judicial powers that characterises the cases on federal courts.[184] The principle presents a direct obstacle to the conflation of executive and judicial power, and to the control of judicial power by the executive when these circumstances are at odds with judicial independence or integrity. As French CJ has observed, the *Kable* principle lends strong protection to decisional independence, as: [185]

> At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in court. ... Decisional independence is a necessary condition of impartiality.

Protections for the decisional independence of state and territory courts were further developed in *Forge*, which involved an unsuccessful challenge to the appointment of acting justices to a state Supreme Court. In *Forge* the High Court reasoned that state courts must answer the description of 'courts' in Chapter III of the *Constitution*, and therefore cannot be deprived of the essential or defining characteristics of courts. This approach overlaps with the *Kable* principle as it rests on a like acknowledgment of Australia having an integrated court system. In 2013, French CJ elaborated upon these characteristics and highlighted the inter-related nature of decisional independence, the characteristics of courts and institutional integrity:[186]

> The 'institutional integrity' of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies. The defining characteristics of courts include:
> - the reality and appearance of decisional independence and impartiality;
> - the application of procedural fairness;
> - adherence as a general rule to the open court principle;
> - the provision of reasons for the courts' decisions.
>
> Those characteristics are not exhaustive. As Gummow, Hayne and Crennan JJ said in [*Forge*], '[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of

183 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 106-8 (Gaudron J), 122-123 (McHugh J), 131, 132 (Gummow J); *Fardon* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ).

184 For critique of the *Boilermakers'* principle on this basis, see eg: Fiona Wheeler, 'The Rise and Rise of Judicial Power Under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review* 1, 6; Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 2, 5; Appleby, above n 154, 271-273; and broader discussion in, Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66, 73-80.

185 *Totani v South Australia* (2010) 242 CLR 1, 43 (French CJ) ('*Totani*').

186 *Pompano* (2013) 87 ALJR 458, [67] (French CJ), quoting *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

> the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so'.

The principles arising from *Kable* and *Forge* provide a basis for potentially far-reaching and substantive restrictions on government's capacities to usurp, control or improperly influence the decision-making powers of state and territory courts. The introduction of the *Kable* principle in 1996 certainly demonstrates the important role of courts in interpreting the *Constitution* in new, even unexpected, ways to protect judicial independence. However, a brief look at the case law in this area reveals that the potential for the *Kable* principle to provide robust protection for decisional independence has not always been borne out.

After *Kable*, the incompatibility limit on government powers with respect to state and territory courts was not applied until 2010, despite numerous attempts to do so. In an oft-quoted statement in 2004, Kirby J even suggested that the *Kable* principle might prove to be 'a constitutional guard dog that would bark but once'.[187] The minimal scope of the notion of incompatibility seemed to be confirmed when the High Court upheld a substantially similar preventive detention regime in the 2004 case of *Fardon v Attorney-General (Qld)*.[188] A key point of distinction relied upon to support the different outcomes in the two cases was that the scheme in *Kable* was ad hominem,[189] whereas the scheme in *Fardon* was of general application.[190] The substantial overlap in the facts of *Fardon* and *Kable* indicated, for McHugh J, that *Kable* was a decision of 'very limited application' and the combination of circumstances that gave rise to incompatibility in that case was 'unlikely to be repeated'.[191] Together, *Kable* and *Fardon* appeared to show that incompatibility is indeed reserved for extreme cases, such as the judicial implementation of ad hominem legislation or the appointment of a judge as Ministerial advisor.[192] Hence, until fairly recently it seemed that the *Kable* principle had been interpreted so narrowly that almost no effective restriction existed on the capacity of the executive to interfere in the decision-making powers of state or territory courts.

In recent years the *Kable* principle has attracted renewed attention as it has been applied to invalidate a number of state schemes. A brief consideration of these decisions shows that the principle may prevent executive control or usurpation of judicial powers, but it is less

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187 *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J).

188 *Fardon* (2004) 223 CLR 575; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

189 *Community Protection Act 1994* (NSW) s 3(3).

190 *Fardon* (2004) 223 CLR 575, 591 (Gleeson CJ), 595-596 (McHugh J), 658 (Callinan and Heydon JJ). Kirby J also acknowledged this distinction, referring to the Queensland Act as 'one of apparently general application', but said that it was 'unthinkable' that *Kable* was a 'stand-alone decision … limited to one case': 629.

191 Ibid 601 (McHugh J). See, also: *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 261 (Weinberg, Bennett and Edmonds JJ) ('*Hussain*').

192 See, critique of *Fardon* in: Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventative Detention Laws' (2005) 10 *Deakin Law Review* 177; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100.

effective at preventing more subtle compromises that nonetheless may undermine decisional independence.[193]

The first case after *Kable* in which the principle was applied, *International Finance Trust Co Ltd v New South Wales Crime*, concerned legislation allowing the New South Wales Crime Commission to dictate whether restraining order proceedings before the New South Wales Supreme Court would take place ex parte and without notice to the respondent.[194] The inability of the Supreme Court to remedy this direction indicated impermissible control of the court's decisional independence.[195] Similarly, in *South Australia v Totani*, incompatibility was established on the basis that South Australian control order legislation *obliged* the Magistrates' Court to issue an order upon finding an individual was a member of a declared organisation, the latter classification having been determined solely by the executive.[196] The High Court suggested that replacing the obligation on the Supreme Court with a discretion (that is, providing the court 'may' issue the order, rather than 'must') would have avoided incompatibility.[197]

In *Wainohu v New South Wales*, New South Wales' control order provisions were also challenged on Chapter III grounds.[198] The provisions compromised fair judicial process in a number of respects and were argued to severely impact public confidence in the impartial administration of justice. An organisation could be 'declared' by a judge, on the basis of undisclosed information, in administrative proceedings not governed by the rules of evidence.[199] Once an organisation had been declared, the Supreme Court was empowered to issue control orders imposing an array of restrictions and obligations on individuals associated with the organisation. Incompatibility in *Wainohu* was established solely on the basis of a provision removing the judge's duty to give reasons for his or her decision to declare an organisation.[200] The *Wainohu* scheme was distinct from the cases outlined above as the judge could have exercised his or her discretion to give reasons and thus avoid the provision from which incompatibility arose. Nonetheless, for a majority of the Court the giving of reasons was so fundamental to the judge's actual and perceived decisional

193 Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 8-9.

194 *Criminal Assets Recovery Act 1990* (NSW) s 10; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 355 (French CJ), 366-7 (Gummow and Bell JJ), 385-6 (Heydon J). Hayne, Crennan and Kiefel JJ dissented, adopting an interpretation of the *Criminal Assets Recovery Act* that preserved the discretion of the court to determine whether the proceedings occurred ex parte: 375 (Hayne, Crennan and Kiefel JJ).

195 Ibid 355 (French CJ), 364 (Gummow and Bell JJ), 385 (Heydon J).

196 *Serious and Organised Crime Control Act* 2008 (SA) s 14(1); *Totani* (2010) 242 CLR 1, 21 (French CJ), 67 (Gummow J), 153, 159-160 (Crennan and Bell JJ), 171-172 (Kiefel J).

197 Ibid 56 (Gummow J), 88–89 (Hayne J), 160 (Crennan and Bell JJ).

198 (2011) 243 CLR 181; *Crimes (Criminal Organisations Control Act) 2009* (NSW).

199 *Crimes (Criminal Organisations Control Act) 2009* (NSW) ss 8, 28, 29, 13(1).

200 Ibid s 13(2); *Wainohu* (2011) 243 CLR 181, 192 (French CJ and Kiefel J), 229-230 (Gummow, Hayne, Crennan and Bell JJ).

independence that the removal of the obligation was sufficient to create constitutional invalidity.[201]

Despite repeated acknowledgment that procedural fairness is a defining feature of a court and is protected under the *Kable* principle,[202] in a string of cases the High Court has upheld the use of secret evidence by the government in judicial proceedings.[203] In these cases the Court has hinged validity on the preservation of the judge's capacities to, first, review the classification of the information and, secondly, to exercise his or her inherent discretions (for example, to determine the weight to be placed on the material and to order a stay of proceedings for want of fairness). The High Court has repeatedly indicated that invalidity will only be established in instances where the executive has complete, unavoidable control of a key element of the court's decisional independence. For instance, in *Assistant Commissioner Condon v Pompano Pty Ltd*[204] the High Court upheld Queensland's organised crime control order scheme. The challenge focussed on the secret evidence provisions of the *Criminal Organisation Act 2009* (Qld). For the High Court, the provisions did not compromise the decisional independence of the Supreme Court because that Court was not obliged to accept the classification of the evidence, or to use it in a particular way – that is, the judge could decide to place less, or no, weight on the secret evidence.[205] Justice Gageler went so far as to say that the only option available to a judge to effectively remedy the damage to judicial independence caused by secret material could be to order a stay of proceedings.[206]

Ultimately, the cases show that the *Kable* principle prevents only clear usurpations or severe intrusions into the independence of the judiciary.[207] In those cases in which incompatibility has been established, the decision has rested on a single provision, in *Totani* on a single word, namely, that the court '*must'* make a control order if 'satisfied that the defendant is a member of a declared organisation'.[208] As a result, the executive and legislature are prohibited from exercising complete control over a crucial element of the judge's decision-making powers or compromising a defining feature of a court.

Judicial interpretations of the *Kable* principle have shifted considerably since 1996. The principle has been applied relatively few times and there is significant unrealised potential in its incompatibility standard. For instance, the *Forge* emphasis on the defining characteristics of courts has been favoured in many of the recent cases, such as *Wainohu* and *Condon*, and

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201 *Wainohu* (2011) 243 CLR 181, 192, 215, 213, 219-220 (French CJ and Kiefel J). Cf, Heydon J's dissenting views: 238-239 (Heydon J).

202 See eg: *Polyukovich v Commonwealth* (1991) 172 CLR 501, 703 (Gaudron J); *Pompano* (2013) 87 ALJR 458, [177] (Gageler J); and discussion in, Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

203 Such as, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181; *Pompano* (2013) 87 ALJR 458.

204 (2013) 87 ALJR 458.

205 Ibid [166]-[168] (Hayne, Crennan, Kiefel and Bell JJ), [88] (French CJ).

206 Ibid 503 (Gageler J).

207 Steytler and Field, above n 180, 238.

208 *Serious and Organised Crime (Control) Act 2008* (SA) s 14(1).

may give rise to further developments of principle in the future. To date, the principle has had mixed success in placing limits on executive capacity to interfere with the decisional independence of state or territory courts.

D. Personal Independence

The personal independence of judges from the executive is ensured by limiting the conferral of extra-judicial roles on judges. It also requires that judges are neither punished nor rewarded for the exercise of their judicial functions.

i. Judges and Extra-Judicial Roles

Limitations on the conferral of extra-judicial powers on judges personally do not arise from the text of the *Constitution* or from legislation. In fact, before the High Court's decision in *Grollo v Palmer* in 1995,[209] there were no recognised legal restrictions on the scope of powers that could be conferred on a judge in his or her personal capacity. The 'persona designata' doctrine is a long-standing exception to the *Boilermakers'* restriction on the permissible powers of the federal judiciary. This exception is based on the notion that the separation of powers does not bind federal judges in their personal capacities (as 'personae designatae' or 'designated persons'). By the 1980s, the persona designata doctrine was supported by extensive practice which, sometimes controversially, had seen serving judges appointed to administrative positions such as Ambassador and Royal Commissioner.[210] Despite prompting pointed criticism, no restrictions had been proposed on such appointments.[211] Rather, this practice of appointing serving judges to roles in the executive branch had been governed by convention, which had shifted and evolved over time.[212]

As the *Constitution* restricts the powers of federal courts, but allows federal *judges* to fulfil non-judicial roles, the question of whether a power is conferred on a judge 'as a judge' or on that judge as a qualified individual, is of crucial importance. A limited set of powers may be exercised by federal courts. But, a potentially unlimited set of powers may be exercised by federal judges as personae designatae. This distinction between a judge in his or her professional and personal capacities is, however, inescapably superficial. As observed by Mason and Deane JJ:[213]

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209 (1995) 184 CLR 348.

210 For a history of this practice and its controversy, see: AJ Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48.

211 George Winterton, 'Judges as Royal Commissioners' (1987) 10 *University of New South Wales Law Journal* 108; Fiona Wheeler, '"Anomalous Occurrences in Unusual Circumstances"? Extra-Judicial Activity by high Court Justices: 1903 to 1945' (2013) 24 *Public Law Review* 125; the doctrine was upheld in: *Drake v Minister for Immigration & Ethnic Affairs* (1979) 24 ALR 577; *Hilton v Wells* (1985) 157 CLR 57 ('*Hilton*').

212 See, Winterton, 'Judges as Royal Commissioners', above n 211; Brown, above n 210; Wheeler, above n 211.

213 *Hilton* (1985) 157 CLR 57, 84, citing *Medical Board (Vic) v Meyer* (1937) 58 CLR 62, 97. See, also: *Grollo v Palmer* (1995) 184 CLR 348, 377 ('*Grollo*'), later cited in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 12-13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) ('*Wilson*').

> To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as 'distinctions without differences' it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.

It is apparent that without limit the persona designata doctrine has the potential to overwhelm the *Boilermakers'* principle by allowing judges to exercise executive and legislative powers without restriction, provided those powers are conferred on the judge individually.[214] In *Grollo* – an unsuccessful challenge to provisions enabling telecommunication interception warrants to be issued by judges as personae designatae – the High Court identified two important limits on the persona designata doctrine. First, a judge must consent to an appointment and, secondly, 'no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.[215] The limits identified in *Grollo* protect the personal independence of federal judges in the manner envisaged by the international standards on personal independence. In line with those standards, the High Court in *Grollo* recognised that some extra-judicial roles undermine judicial independence and should be prohibited, whereas others should be capable of being vested in serving judges.

In *Grollo*, the High Court described three ways in which incompatibility may arise. First, the actual performance of the judge's judicial functions may be significantly compromised as a result of a non-judicial function. Secondly, the personal integrity of the judge may be compromised or impaired by the non-judicial function.[216] Neither of these first two bases of incompatibility was applied in *Grollo* (or in any subsequent case) despite the judge in question being required to excuse himself from the trial of Mr Grollo on the basis of his actions as a persona designata, without being able to give reasons to the parties. A majority of the High Court was satisfied that this conflict did not indicate incompatibility as it could hypothetically have been avoided by 'the adoption of an appropriate practice' prior to the proceedings that could have avoided the subsequent conflict of interest.[217] The third way in which incompatibility may arise is where the extra-judicial function is so repugnant to the judge's judicial office that it diminishes public confidence in the judicial institution as a whole. It is this form of incompatibility that has arisen in the key challenges. It also aligns with the *Kable* incompatibility test, discussed above, which limits the powers of state courts.[218] In *Grollo* a majority of the High Court was satisfied that the judge was exercising an independent function by determining whether to grant the warrant application. The

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214 *Wilson* (1996) 189 CLR 1, 43 (Kirby J), 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Grollo* (1995) 184 CLR 348, 376 (McHugh J); *Hussain* (2008) 169 FCR 241, [70] (Weinberg, Bennett and Edmonds JJ).

215 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

216 Ibid 364-365 (Brennan CJ, Deane, Dawson and Toohey JJ).

217 Ibid 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

218 *Wainohu* (2011) 243 CLR 181, 228 (Gummow Hayne, Crennan, Bell JJ).

preservation of the judge's independence maintained the constitutional validity of the warrant scheme.[219]

The incompatibility limit on the persona designata doctrine was applied to invalidate the appointment of a federal judge for the first (and to date, only) time in the 1996 case of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.[220] In *Wilson*, the appointment of Federal Court Justice Jane Mathews as 'reporter' to a federal minister on whether certain areas should be classified as Aboriginal heritage sites was held to be invalid on the basis that it involved functions so entwined with the executive as to diminish public confidence in the judicial institution as a whole.

In *Wilson*, a majority of the High Court suggested a three-stage process to determinate public confidence incompatibility. First, incompatible functions will be 'an integral part of, or closely connected with, the functions of the legislative or executive government'.[221] Additionally, incompatible functions will be indicated by either reliance upon non-judicial instruction, advice or wish, or the exercise of discretion on grounds not expressly or impliedly confined by law.[222] These indicators – looking to the integration, control or combination of executive powers and those conferred on the judge – reflect the strong emphasis the High Court has placed on protecting a judge's independence, whilst still accepting that the conferral of extra-judicial powers on judges as persona designata may be valid. The central focus in determining whether or not a judge may be vested with a function rests squarely on 'whether a particular extrajudicial assignment undermines the integrity of the judicial branch'.[223]

Following *Wilson*, the incompatibility rule has not been applied in respect of a federal judge, despite attempts to invoke it on a number of occasions.[224] In 2008 the Federal Court reflected that *Wilson* and *Kable* had come to 'represent the high point in the development by the High Court of the notion of incompatibility', a comment that remains true today, despite a resurgence in the application of the incompatibility test in the state court context.[225] Whilst *Grollo* and *Wilson* suggest robust constitutional protection for the personal independence of federal judges, it remains uncertain as to whether this will provide strong protection in practice.

State and territory judges are beyond the direct reach of the federal separation of powers. Moreover, the cases concerning the *Kable* principle did not extend that ruling to the judges of state and territory courts in their personal capacities. Therefore, it was believed that almost no restrictions existed on governments' powers to confer extra-judicial roles on state or territory

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219 *Grollo* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson, Toohey JJ).

220 (1996) 189 CLR 1.

221 Ibid 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

222 Ibid 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

223 *Mistretta v United States* 488 US 361 at 407 (1989), quoted in *Grollo* (1995) 184 CLR 348, 364-365 (Brennan CJ, Deane, Dawson, Toohey JJ)

224 See eg: *Hussain* (2008) 169 FCR 241, and discussion of other cases at: 271 (Weinberg, Bennett and Edmonds JJ).

225 Ibid 266 (Weinberg, Bennett and Edmonds JJ).

judges individually.[226] Support for this view could be found in the emphasis placed in *Kable* and other cases on the relationship between the *Kable* principle and the capability of state and territory courts to be vested with federal jurisdiction.[227] Because of this focus, it was not apparent that the principle would extend to the judges of those courts, incapable of being personally vested with federal judicial powers. It was not until 2011 that the High Court resolved this issue and determined that constitutional protections do exist for the personal independence of state and territory judges.

In *Wainohu* the High Court held that the *Kable* principle extended its protection to the independence and integrity of serving judges in the states. In other words, the Court recognised that Chapter III of the *Constitution* prohibits the conferral of powers on state judges that are incompatible with judicial independence or institutional integrity. As the *Kable* principle extends equally to the territories, and the justices in *Wainohu* referred to the territories in their reasons, this ruling indicates that Chapter III protects the independence and institutional integrity of judges in the territories as well.[228] For French CJ, Kiefel, Gummow, Hayne, Crennan and Bell JJ in *Wainohu*, the fact that a role was conferred on a judge personally rather than on a court simply formed a factor to weigh into the balancing exercise that characterises the *Kable* incompatibility analysis.[229] These justices referred to the three-stage test in *Wilson* in the course of their reasons, indicating that the notion of incompatibility developed in the federal persona designata cases of *Grollo* and *Wilson* were relevant to determining whether a power was capable of being conferred on a state or territory judge individually. However, their Honours ultimately grounded their decisions in a more general discussion of judicial independence.[230]

By looking directly to the impact of a power on actual and perceived judicial independence, the principles governing the personal independence of the judges of federal, state and territory courts align closely with the requirements laid out in the international standards discussed in Part II. However, with so few cases concerning personal independence, it is not clear how the compatibility test will be applied in a range of different scenarios. As the

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226 *Wainohu* (2011) 243 CLR 181, 212 (French CJ and Kiefel J). Support for this position could be found in McHugh J's equivocal statement in *Kable* that indicated incompatibility may invalidate the persona designata appointment of a State judge, but that this would be very rare (His Honour suggested the radical example of the appointment of a Chief Justice to Cabinet): *Kable* (1996) 189 CLR 51, 118 (McHugh J). This belief may also be reflected in some of the drafting techniques employed by State and federal legislatures, employing State judges in their personal capacity alongside retired judges and independent persons in controversial regimes. See eg: the conferral of functions on State judges persona designata by the Commonwealth in *Australian Security Intelligence Organisation Act 1979* (Cth) Pt 3 Div 3, discussed in Rebecca Welsh, 'A Question of Integrity: The Role of Judges in Counter-Terrorism Questioning and Detention by the Australian Security Intelligence Organisation' (2011) 22 *Public Law Review* 138, 146-149.

227 See, eg: *Fardon* (2004) 223 CLR 575, [15] (Gleeson CJ), [32] (McHugh J); *Forge* (2006) 228 CLR 45, [61]-[66] (Gummow, Hayne and Crennan JJ).

228 *Ebner* (2000) 205 CLR 337, 363 [81]; *Wainohu* CLR, 229 (Gummow, Hayne, Crennan and Bell JJ).

229 *Wainohu* (2011) 243 CLR 181, 212 (French CJ and Kiefel J), 228-229 (Gummow, Hayne, Crennan and Bell JJ). On the balancing exercise, or 'evaluative process', see *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [88] (French CJ).

230 *Wainohu* (2011) 243 CLR 1, 225-226 (Gummow, Hayne, Crennan and Bell JJ), 205-206 (French CJ and Kiefel J).

Federal Court observed in *Hussain v Minister for Foreign Affairs* in 2008, 'while the idea of incompatibility is familiar, its application to different factual situations is not'.[231]

The cases are too few to make many confident predictions or assessments in respect of the strength of personal independence protections for federal, state or territory judges. There is extensive scope for the appointment of judges in their personal capacities, as well as untested potential for the incompatibility tests to limit such appointments where they may undermine judicial independence or institutional integrity. In large part, advancements in this area will depend not only upon developments in the case law, but also the prudential discretion of judges in determining whether to accept particular appointments. The judiciary has traditionally played a strong role in asserting which extra-judicial appointments are appropriate and which place judicial independence at risk. Such practices will continue to play an important role in protecting the personal independence of judges.[232]

ii. Punishment or Reward

There are no legal principles and no cases in Australia concerning rewards or punishments being bestowed on judges by the executive for the performance of judicial work. This absence of litigation suggests that members of the executive are conscious and respectful of this facet of judicial independence. That said, it is not unusual for serving judges to receive an honour in the Order of Australia.[233]

Judicial immunity from suit is a crucial facet of personal independence. It has a long history in the common law[234] and is protected by legislation in a number of states and territories.[235] Statutory provisions concerning judicial immunities tend to be framed very broadly, reflecting the fact that these principles are traditionally dealt with under the common law. For instance, the *Judicial Officers Act* 1986 (NSW) simply states that:[236]

> The protection and immunity of a Judge of the Supreme Court (or a Judge having the same status as a Judge of the Supreme Court) performing duties as such a Judge extends to the Judge when performing ministerial duties as such a Judge.

The following section of the Act extends this protection to other 'judicial officers'.[237]

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231 *Hussain* (2008) 169 FCR 241, 261 (Weinberg, Bennett and Edmonds JJ).

232 On the role of judicial prudence in this context, see: Winterton, 'Judges as Royal Commissioners' above n 211; Wheeler, above n 211.

233 For example, of the present members of the High Court, French CJ, Hayne, Crennan, Kiefel and Bell JJ each were appointed Companions in the General Division of the Order of Australia since joining the High Court. These awards are made by the Governor-General on the recommendation of the Council of the Order of Australia.

234 AA Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Clarendon Press, 1993) ch 1.

235 See eg: *Judicial Officers Act* 1986 (NSW); *Magistrates Act 1977* (NT) s 19A; *Magistrates Court Act 2004* (WA) s 37; *Magistrates Court Act 1987* (Tas) s 10A; *District Court Act 1991* (SA) s 46; *County Court Act 1958* (Vic) s 9A.

236 *Judicial Officers Act* 1986 (NSW) s 44A.

237 Ibid s 44B(1).

Under general principles of judicial immunity, a judge enjoys immunity for acts done in the course of his or her judicial work, including administrative duties. Usually, judicial errors are capable of being corrected on appeal, and serious misbehaviour or incapacity on the part of a judge may lead to his or her removal from office.[238] A cause of action will rarely arise for those who claim to have suffered harm or loss in consequence of judicial misconduct or error.[239] In an extra-curial speech, Chief Justice Gleeson explained the issues surrounding judicial immunity in Australia as follows:[240]

> Judicial mistakes may have very damaging consequences. The common law confers on judges an immunity from civil liability. The basis of the immunity is the constitutional imperative of judicial independence. It is difficult to reconcile that immunity with some alternative system of administrative penalties or sanctions, falling short of removal for incapacity. Sanctions for misconduct falling short of misbehaviour that warrants removal are difficult to devise, in a manner that respects independence. Even more difficult are sanctions for error that falls short of demonstrating incapacity. This is a topic that is certain to produce tensions, especially with the increasing size of the judiciary, and the increasing range of judicial officers who are regarded as being entitled to full independence.

Whilst the existence of judicial immunity and its role in preserving the personal independence of judges are clear, the exact extent of its protections is not. As Australian statutes in this area are framed broadly, the common law rules become relevant.

Under the common law of England, judges of superior courts have traditionally enjoyed absolute immunity, extending even to acts done maliciously or in excess of jurisdiction.[241] Judges of inferior courts enjoyed a lesser, but still substantial, degree of immunity, encompassing liability only for acts done in purported exercise of their authority.[242] In the 1975 case of *Sirros v Moore*,[243] however, the English Court of Appeal held that the distinction between superior and inferior courts was unsustainable and that a uniform standard of judicial immunity applied to all courts. As HP Lee and Enid Campbell observed: '*Sirros v Moore*, if good law, extends the protections that are accorded to judges of inferior courts at common law, but qualifies and slightly diminishes the protections accorded to judges of superior courts'.[244]

The opinions of the judges of the Court of Appeal in *Sirros* differed as to the exact degree of immunity that should be afforded to judicial officers, specifically whether the immunity extended to acts performed beyond jurisdiction. These differences in opinion have created some uncertainty in common law countries. For Lord Denning, the judge would be granted immunity unless he or she *knew* that the act was beyond jurisdiction. For Ormerod LJ

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238 Murray Gleeson, 'The Right to an Independent Judiciary' (Speech to the 14th Commonwealth Law Conference, London, September 2005).
239 Lee and Campbell, above n 1, 216.
240 Gleeson, above n 238.
241 Lee and Campbell, above n 1, 216.
242 Ibid.
243 [1975] QB 118.
244 Lee and Campbell, above n 1, 217

immunity extended to acts performed with the *belief* that the act was within jurisdiction. Buckley LJ reasoned that a judge would not enjoy immunity for acts committed with a 'careless ignorance or disregard' of the relevant facts or law that contributed to his or her excess of jurisdiction.[245] Thus, in *Sirros*, the Court of Appeal reinforced the importance of judicial immunities and clarified that all judges prima facie enjoy the same immunities; however, the differences between the judgments have given rise to uncertainty as to the extent to which judges enjoy immunity for acts performed in excess of jurisdiction.

Sirros does not necessarily reflect the common law of Australia. However, it has been treated by the New Zealand Court of Appeal as stating the common law of that country,[246] and has been cited positively in obiter dicta in a number of Australian cases.[247] No case has yet resolved whether the pre-*Sirros* position distinguishing between inferior and superior courts, or the post-*Sirros* position providing a uniform degree of immunity, governs judicial immunity in Australia. One reason for this is that the federal, state and territory legislatures have enacted judicial immunity statutes that afford lower court judges the same protections as those enjoyed by Supreme or High Court judges.[248]

In all, the protections for judicial immunity for federal, state and territory judges have deep roots in the common law and align with the, albeit broadly framed, international standards on the personal independence of judges. However, the fact remains that these protections remain at the level of common law or statute. The courts have not yet explored the possibility that judicial immunities might find constitutional protection through Chapter III or the *Kable* principle.

IV. GAPS AND WEAKNESSES

Australia's judges have a well-founded reputation for independence. There is also a strong body of convention and law within Australia that respects judicial independence. Despite this, there are nonetheless significant gaps in the frameworks by which judicial independence is protected. Our analysis reveals that judicial development of constitutional principles has the potential to address many of these.

A clear theme arising from this review is that there are stark differences between the protections afforded to judicial independence at the federal level as compared to the states and territories. In a sense, our study concerns two distinct, but related judicial systems. The federal system is subject to robust constitutional protections for its independence. Chapter III of the *Constitution* provides express protections for many aspects of judicial independence. It also gives rise to a strict separation of federal judicial power from the other arms of

245 Ibid 217-218.

246 *Nakhla v McCarthy* [1975] 1 NZLR 291; *Harvey v Derrick* [1995] 1 NZLR 314; *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668.

247 *Gallo v Dawson* (1988) 82 ALR 401, 404; *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 (Gaudron J); *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1, 33 (McHugh J); *Fingelton v R* (2005) 2207 CLR 166, 185 (Gleeson CJ).

248 Mark Aronson, 'Misfeasance in Public Office: a Very Peculiar Tort' (2011) 35 *Melbourne University Law Review* 1.

government. The federal judicature need only look to the *Constitution*, as interpreted by the High Court, to discern a foundation from which to assert its institutional independence and immunity from undue interference.

On the other hand, state and territory judicial systems are subject to ad hoc, ambiguous and often weak protections for their independence. Until *Kable* was decided in 1996, it seemed that the powers of state governments with respect to their courts were virtually unlimited. Protections existed, but only at the relatively fragile levels of convention, common law and, to a lesser extent, legislation.[249] Only in New South Wales and Victoria have protections for judicial independence been entrenched.

Protection for judicial independence may be stronger at the federal level than in the states and territories, but in both cases important aspects of the concept are only partially protected. This is apparent from our analysis of such protections in light of our four indicia of judicial independence. At the federal level, constitutional protections for the appointment, tenure and remuneration of federal judges remain untested in the courts. Although these protections appear robust, they may not live up to their potential in practice (for example, by requiring minimal 'proof' of misbehaviour or incapacity for the removal of a judge, or by allowing judges to be appointed on the basis of patronage or nepotism).

The operational independence of federal courts is also open to executive interference and has received little attention despite the threat of, for example, funding cuts to the High Court that may impact upon its ability to properly fulfil its constitutional function. The decisional independence of federal courts is also vulnerable. The jurisdiction of federal courts, with the exception of the High Court's entrenched ability to issue constitutional writs, remains subject to removal. This strict separation of judicial power arising from Chapter III also focuses on the arguably distracting and technical question of whether a power can be aptly characterised as 'judicial', rather than on the underlying principle of judicial independence. Despite this, the jurisprudence has gone a considerable way to maintaining the decisional independence of federal courts.

The personal independence of federal judges enjoys protection through principles implied from Chapter III. These principles remain underdeveloped, having only been considered in the cases of *Grollo* and *Wilson*. Nonetheless the incompatibility limit on the persona designata doctrine that arises from those cases aligns with international standards on the extra-judicial service of judges. Similarly, judicial immunities from suit are provided for in a combination of statute and common law but, again, would benefit from further judicial attention. Protections for this aspect of the independence of federal courts and judges will undoubtedly continue to evolve.

In the states and territories, gaps in the protections for judicial independence are more apparent. One of the most fundamental aspects of judicial independence – the appointment, tenure and remuneration of judges – lacks constitutional protection in every state and territory

249 See, Kiefel, above n 68.

except New South Wales. Like their federal counterparts, the operational independence of state and territory courts is unshielded from executive interference. The decisional independence of courts in the states and territories was unprotected until *Kable*, with the exception of Victoria's unique entrenchment of the unlimited jurisdiction of its Supreme Court. The recognition in *Kable* and subsequent cases that the integrated national court system extends constitutional protections to the independence and integrity of state and territory courts revolutionised judicial independence in these contexts. Both the decision-making powers and the review jurisdiction of state and territory courts now enjoy constitutional protection. Likewise, the personal independence of state and territory judges is also protected through the *Kable* principle with respect to the conferral of extra-judicial roles on judges personally, and by statute and common law with respect to judicial immunities from suit.

Weaknesses in the protection of judicial independence at the federal, state and territory levels have sometimes been met through appropriate political practice and the development of conventions. Conventions might be further strengthened, though of course they are subject to breach without the prospect of an effective remedy. This suggests that protection for judicial independence will often be better realised through legislative and constitutional change or by further judicial development of legal and constitutional principle.

The courts have recognised judicial independence as a core constitutional value and a defining and essential characteristic of federal, state and territory courts. This recognition, developed through, for example, the *Boilermakers*, *Alexander's* and *Kable cases*, has the potential to extend constitutional protection to all aspects of judicial independence. Traditionally the principles developed in these cases have focussed on preserving the decisional independence of courts. More recently, these principles have been extended to protect the personal independence of serving judges.

Decisions such as *Kable* and *Boilermakers'* demonstrate the willingness and capacity of courts to interpret the *Constitution* in new ways that alter and enhance protections for judicial independence. This is reflected in the recent extension of Chapter III protections to the jurisdiction of state courts in *Kirk*, and to state judges in their personal capacities in *Wainohu*. Even the most highly developed facet of judicial independence – the decisional independence of federal courts – has attracted prolonged judicial attention and interpretation but remains in an ongoing state of controversy and evolution.[250]

Future cases could see existing constitutional principles interpreted to protect judicial immunities from suit or even to safeguard operational independence. For instance, if the executive took over responsibility for drafting court lists and assigning judges to particular cases, this might amount to an impermissible compromise of a court's essential and defining characteristic of independence. The *Kable* principle also has a recognised potential to protect the tenure of state judges – as Spigelman CJ suggested in *Bruce*. This might also be harnessed to enhance protections for the jurisdiction of state courts identified in *Kirk*.

[250] See eg: Appleby, above n 154; Welsh, above n 184; Stellios, above n 154.

The significant jurisprudential developments in this field in recent decades underscore the centrality of judicial independence to the *Constitution*, and reflect its capacity to shield federal, state and territory courts from executive interference. Future cases will provide opportunities for the judiciary to further assert its independence by interpreting the direct and implied protections arising from Chapter III.

This study also reveals the strong role played by judicial assertions of independence outside the courtroom. Judges bear a responsibility for emphasising the nature, importance and boundaries of judicial independence in extra-curial speeches, interviews, writings and by involvement in the organisations such as the judicial commissions. It is through these forums that the judiciary may draw community and government attention to aspects of judicial independence that remain un-litigated or beyond the scope of constitutional protection. For instance, it is difficult to imagine a scenario in which the High Court might litigate its own operational independence. Rather, Chief Justice French's letters to the Prime Minister and Attorney-General reveal how a chief judge may assert the operational independence of his or her court and seek to protect it from interference in the form of funding cuts. The release of these letters through freedom of information requests served the additional purpose of highlighting the importance of operational independence more broadly within the community.

Another example of judges effectively asserting their independence in these ways is seen in judicial reactions to the removal of justices. Following the cases of *Macrae* and *Quin*, judicial speeches and articles stressed the threat to judicial independence posed by the absence of strong protections for judicial tenure in the states and territories.[251] The *Constitution (Amendment) Act* 1992 (NSW) was introduced to entrench provisions regarding the tenure and removal of judges within a few years of these decisions, though the second-reading speech made no mention of these controversial cases.

The comments of judges in obiter dicta also have an important role to play in highlighting the importance of judicial independence and areas of potential development for the law in this field. Chief Justice Spigelman's obiter dicta comments in *Bruce* emphasised the seriousness of the issue at hand and strengthened prior indications from justices of the High Court that the *Kable* principle may have implications for judicial tenure.[252] A case has not yet arisen to directly test the capacity for *Kable* to protect the tenure of state and territories judges. Until it does, such statements by members of the judiciary will play a role in encouraging governmental prudence and respect for judicial independence.

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251 See eg: Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth', above n 68; Kirby, 'Abolition of Courts and Non-reappointment of Judicial Officers', above n 38, 190-193; Lee and Campbell, above n 1, 132-133. And, with respect to similar circumstances in Victoria see, eg: Saunders and Le Roy, above n 5, 1-2.

252 *Forge* (2006) 228 CLR 45, 80 [76] (Gummow, Hayne and Crennan JJ); *Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Ebner* (2000) 205 CLR 337, 363 (Gaudron J).

The protection of judicial independence in Australia is not suited to a 'one size fits all' approach. The complexity of Australia's judicial structure and the uncertainties associated with the interpretation of Chapter III of the *Constitution* require a continuing, nuanced evolution of such protections. The mechanisms developed will vary between jurisdictions and contexts, and the details of particular protections will evolve over time on a case-by-case basis. Within Australia, this scope for variation is reflected in the difference between the strict, definition-based separation principles that protect decisional independence at the federal level, and the more flexible *Kable* principle that protects judicial independence in the states and territories. Both of these approaches partially satisfy the international standards by protecting the decision-making powers of courts from usurpation, control or inappropriate interference from the executive branch. However, as we have discussed, they have their respective weaknesses and continue to develop. In consequence, courts have considerable room to move in interpreting the *Constitution* to protect judicial independence whilst adhering to global standards in this area.

V. CONCLUSION

In this report we set out, first, to develop a first principles set of indicators for judicial independence, and, second, to assess the actual protection of judicial independence against these indicators, particularly in regard to the role of the judiciary in asserting its independence from the executive branch.

The global resources concerning the nature and requirements of judicial independence are diverse. However, from these resources clear themes and essential elements arise, allowing us to identify an exhaustive set of four indicators of judicial independence. These indicators are: the appointment, tenure and remuneration of judges; operational independence; decisional independence and personal independence. Our analysis of the case law of federal, state and territory courts in respect of each of these indicators reveals that that judicial independence is only partially protected in Australia, and that state and territory courts are subject to far weaker and starkly less developed protections than their federal counterparts.

The appointment, tenure and remuneration of federal judges enjoy robust constitutional protection, whereas these aspects of independence are at risk in most states and territories. Only New South Wales has taken the step of entrenching protections for the tenure of its judges. The operational independence of federal, state and territory courts is un-litigated and unshielded. The decisional independence of courts, on the other hand, has attracted considerable judicial attention. Such independence of federal courts is strongly protected by constitutional provisions regarding aspects of federal jurisdiction, as well as by the strict separation of federal judicial powers. In the states and territories the recent case of *Kirk* extended constitutional protection to the review jurisdiction of these courts, and the *Kable case* enhanced actual and potential protections for the independence with which state and territory judges exercise their decision-making powers. Finally, the personal independence of all Australian judges is now protected by a constitutional limitation on judges being vested with powers that are incompatible with judicial independence or institutional integrity. The

punishment and reward of judges remains subject only to protections through common law, statute and conventional practice.

Our study has revealed the strong role played by judges in effectively asserting judicial independence from the executive – both through judicial decisions and extra-curial activity. In doing so, it is also important to acknowledge that judges are, in this regard, constrained in what they can do. Alexander Hamilton identified this in 1788 when he described the crucial importance, but also the fragility, of judicial independence:[253]

> [T]he judiciary is beyond comparison the weakest of the three departments of power; … it can never attack with success either of the other two; and … all possible care is requisite to enable it to defend itself against their attacks.

But, he continued, it was this lack of institutional clout that rendered an independent judicature so vital to the preservation of liberty, justice and 'public security':

> [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.

Today, courts continue to grapple with this predicament. On the one hand, judicial independence enjoys near-universal recognition as a necessary attribute of a society that claims to adhere to the rule of law. On the other hand, courts are restricted to the impartial resolution of disputes according to law and judges traditionally, and properly, refrain from criticising government law or policy. Common law protections are subject to statute, and a court must wait for a case to arise before it can develop legal protections for its institutional independence. In light of these factors, this study highlights how judges can guard the judicial institution from inappropriate interference from the executive branch, whilst staying within the bounds of proper judicial conduct.

Despite the strengths of the Australian legal system in preserving the independence of its judges and courts, the judicature cannot afford to be complacent about even the most fundamental aspects of its independence. Ongoing vigilance is required to ensure that judicial independence is maintained, and that the gaps in the existing frameworks do not give rise to problems. There exists a very real possibility that judicial independence will be eroded by a series of minor incursions or larger interferences. It is with such concerns in mind that Australia's judges must continue to support and develop appropriate protections for judicial independence.

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253 Alexander Hamilton, The Federalist No. 78 'The Judiciary Department' *Independent Journal* (Saturday, June 14, 1788).