THE EVOLUTION OF STATE ADJUDICATIVE POWER AS AN ALTERNATIVE TO STATE JUDICIAL OR ADMINISTRATIVE POWER

Peter Johnston* and Peter McNab[#]

In Memoriam

Peter Walter Johnston (1942 - 2015)

Peter Johnston died in Perth on Australia Day 2015, after a short illness, aged 72.

The public law community both here and overseas mourn the passing of a great friend, teacher, academic and barrister. We record our condolences to his family, friends and colleagues knowing that his influence will live on in his many writings (including those published in this Journal) and also through the influence of his many students.

T S Eliot in his poem 'The Hollow Men' uttered the memorable statement: 'Between the Idea / And the reality / Between the motion / And the act / Falls the shadow.'

In this essay Peter McNab and I set out to explore the landscape of state administrative tribunal adjudication with a view to foreshadowing prospects for potential advances in related areas; namely, the kinds of functions that such bodies might undertake in the future and, also, novel structural forms and procedures of adjudication that could be developed as part of an evolutionary program of building on existing models.[1]

But, as T S Eliot reminds us, it is one thing to conceive bold new ideas for exciting projects to advance the frontiers of tribunal adjudication; it is another thing entirely to achieve the realities and conditions necessary for their creation.

What, one may ask rhetorically, stands in the road to inhibit such progressive developments? In this paper, we embark on the task of evaluating one particular 'lion in the path' that casts its shadow over the enterprise. It is the potential impact of what one might broadly define as the *Kable-Kirk* implied limitations[2] flowing from Chapter III of the Commonwealth Constitution (referred to hereafter as '*Kable-Kirk*').

Kable-Kirk restated

Although an extensive jurisprudence has developed in the wake of *Kable* over the last two decades,[3] with the latecomer *Kirk* trailing in that respect,[4] the combined effect of the two cases for the purposes of this analysis can be shortly summarised as follows:

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* *A paper presented at the 2014 National Administrative Law Conference 'Innovations in Administrative Law', University of Western Australia, Friday 25 July 2014. Dr Peter Johnston, (1942-2015) Professorial Fellow at the University of Western Australia; Senior Fellow at Monash University; barrister, Perth; a former Deputy President of the Commonwealth Administrative Appeals Tribunal and Inquiry Commissioner for the Commonwealth Human Rights Commission; member of the WA Attorney General's Taskforce that proposed and designed the State Administrative Tribunal of Western Australia.*

† *Peter McNab, B Juris, LL B (WA), LL M (Melb), Senior Member, State Administrative Tribunal of Western Australia. The views expressed here are the author's opinions and do not represent the views of the State Administrative Tribunal.*

> Each State must maintain, to the purpose of exercising the judicial power of the Commonwealth under Chapter III of the Constitution a system of state courts that are independent and impartial, in the sense of not being subjected to direction, control or influence by the executive and legislative arms of the state government, and further and in particular, a Supreme Court of the State that retains the core jurisdiction to judicially review and supervise the conduct and decisions of inferior state courts and other state adjudicative bodies; also state government officers, departments and authorities.[5]

At stake is whether the constitutional constraints imposed upon states' legislative power by these doctrines are likely, upon further elaboration and extension, to produce a symmetrical and rigid convergence that results in the virtual assimilation of state adjudicative bodies to the Commonwealth dualist system of split judicial and merits review, founded on the *Boilermakers* principles.[6] Does *Kable-Kirk* represent a constitutional straitjacket thwarting prospects of sensible but ostensibly divergent forms of dispute resolution in the field of public law?[7]

Translated into practical day-to-day political terms, the central issue for our determination is: to what extent can the states create non-judicial bodies that do not need to comply with Chapter III standards of impartiality and independence that would otherwise deny them the capacity to exercise the judicial power of the Commonwealth?

Whether such an extension of the role of the principal state administrative tribunals is politically desirable or even feasible is another question. The same is true regarding the related issue of whether, in expanding state tribunals' roles beyond their present frontiers those tribunals, in accordance with the *Kable* principle, would cease to be 'courts' for the purpose of Chapter III of the Constitution. The latter is only relevant, however, if such tribunals attempt to exercise federal jurisdiction actually (or potentially) vested in them by virtue of the *Judiciary Act 1903* (Cth).

It is of course true that the problems generated by the *Kable-Kirk* doctrines, and the fragile basis in both logic and precedent attending each case,[8] have already formed the basis of much academic commentary, as have the related topics of the *constitutionalisation* of Australian administrative law, particularly through the agency of judicial review under s 75(v) of the Constitution.[9]

Two topics especially have occupied recent discourse; first, a postulated convergence or assimilation between the principles and foundations of judicial review in the Commonwealth and state spheres; secondly, the unifying effect of High Court authority concerning judicial review, resulting in an Australian administrative law exceptionalism, in effect isolating or 'Balkanising'[10] it from jurisprudential developments in other common law countries including the United Kingdom, Canada, the United States and New Zealand. The *Kable-Kirk* phenomena can be seen as part of that process. Given the number of recent academic contributions addressing these issues, what justification is there for yet another exploration of even a small part of that terrain?

It is not too much to claim that the implications of *Kable-Kirk* have not yet been worked through to produce a coherent and logically satisfying rationale of the system of Australian administrative justice as it operates in both the Commonwealth and state context.[11] It is this latter aspect, namely, the relatively unstable and unresolved state of the constitutional-administrative law nexus that is the justification for this article.

In addressing these conundrums, we argue that the High Court should exercise caution before it extends the principles emanating from the *Kable-Kirk* doctrine to State courts in ways that are likely to impose on them the rigidities previously constraining only federal courts and federal judges. We also contend that the category of 'courts' of the states that fall within the penumbra of *Kable-Kirk* should not be extended without strong justification.

The potential effect of *Kable-Kirk* on state general administrative tribunals

To start with, we confine our analysis to a very particular aspect of the overall phenomena. We are concerned with examining the foundations for the operations of general state administrative tribunals,[12] and the scope for innovative expansion in their jurisdictions and adjudicative methodologies. In that regard, we use the SAT (WA) as the primary exemplar.

Importantly, to the extent that the *Kable-Kirk* doctrines cast a shadow over such innovations we first question whether the concerns about their inhibitive effect are *not well founded* and even possibly overstated. More positively, we seek to make out a case that *Kable-Kirk* should be given a *very limited scope* as solely or quintessentially concerned with crime or community-safety related matters (affecting the liberties and property of subjects) that are properly the subject of curial adjudication in bodies that can properly be called 'courts of a State', with the states' supreme courts as the paradigm example. That entails, necessarily, some attention to both the kind of 'judicial power' exercised in that quasi-criminal jurisdiction, and the characterisation of the bodies exercising it. This, we maintain, requires a fresh look at problems associated with the definitions of 'judicial power' (both state and Commonwealth), proceeding on an assumption that there is a difference between the two. It also requires, as we see it, a re-evaluation of the purpose of defining and categorising state adjudicative bodies as state 'courts'.

This requires us to question whether a distinction can still be drawn between what has been described as a judicial power of the State as against the judicial power of the Commonwealth. The distinction is becoming blurred in the wake of *Kable* and *Kirk* due to the overlay between the notion of a single common law and an integrated judicial system in Australia, giving rise to the proposition that the principles of public law are undergoing a *process of convergence* or assimilation.

Again, more positively, we contend that the starting point for the analysis both for characterising the respective nature or natures of judicial power and that of state courts has been misplaced and has distorted, or at least left unresolved, the logical outcome expressed in some of the High Court authorities on the topic. As part of exploring these problems we suggest that some further linguistic clarification is necessary and that it will be more useful, in some respects, to substitute our preferred concept of adjudication in place of the universal resort to the term 'judicial power'.

We submit that formulating the operation of state tribunals in terms of adjudication rather than judicial or administrative power transforms the nature of the jurisdiction and transcends the constraining effect of the otherwise pervasive, fixed and artificial notion of Commonwealth judicial power. This still requires the act of distinguishing between the different senses in which the original concepts of judicial power have been formulated. Identifying a more encompassing integration of the kind of tasks performed by state administrative tribunals does not obliterate the senses in which judicial power can be used. Instead, a reformulation in terms of adjudication arguably renders redundant and unnecessary conflicts between the two notions of judicial power that arise from non-correspondence or inherent inconsistencies giving rise to contradictions as between the original notions. That in turn arguably radically reduces the potential for *Kable-Kirk* to colonise an adjudicative territory wider than its proper bounds. If our analytic project in mapping the topography of *Kable-Kirk* yields the conclusion that it has a relatively confined ambit, the way is commensurately open to state parliaments to legislate to create the kinds of imaginative tribunal adjudication that state governments see as desirable.

The search is for greater conceptual clarity and to identify the spaces that are still available within which states can exercise their creative licence to fashion dispute resolution in a more

flexible way that can accommodate contemporary modes of adjudication and new or novel (if there is a difference) methods, such as the adoption of the United States' 'administrative judge' model as well as developing substantive principles such as proportionality and the mixing and amalgamation of merits and legal review as part of the process of adjudication.

The conjecture

Because, in our opinion at least, the principles attending the *Kable-Kirk* doctrines have yet to be satisfactorily settled, we can at this stage only offer what might be called a conjecture (something halfway between a speculation and a thesis) about the nature of the functions performed by state administrative tribunals, and the constitutional location of such tribunals within the spectrum of traditional courts and surrogate decision-makers.[13] The traditional classical understanding of the role of state courts is postulated on the distinction between 'state judicial power' and 'the judicial power of the Commonwealth'. In dealing with each, courts have also sought to apply a further distinction between powers and functions that are 'judicial' as against 'non-judicial'.

The existence of state judicial power as something separate from Commonwealth judicial power has been accepted, largely unquestioned, by the High Court in cases such as *Re Wakim*,[14] although Kirby J in that case seems more appreciative of the problems of differentiation, perceptibly denying any possible 'divorce' between the two kinds of judicial power and noting the different constitutional foundations for the separate judicial systems of the various polities.[15] In his view, the notion of Commonwealth judicial power was to be understood solely in the context of Chapter III.[16]

One of the few detailed discussions on the nature of *state judicial power* within the Federal polity is that of Isaacs J, dissenting as to the result, in *Le Mesurier v Connor*.[17] His Honour acknowledges that the expression 'Court of the state' is an organ constituted by the state to exercise some portion of the judicial power, which he treats as a generic term expressing a totality used in its strict sense. At the same time, he maintains that a state court becomes an integral part of the Commonwealth 'Judicature' by virtue of s 71 of the Constitution, adding that the distribution of that power among the courts is, subject to definite constitutional provisions, left to Parliament. By way of contrast, his Honour further recognises that besides this mass of judicial power belonging to the established courts, there is a considerable portion of power, in its nature judicial and quasi-judicial invested from time to time by legislative authority in individuals, separately or collectively, for a particular purpose and limited time. This distinction in respect to judicial power, he saw as running through the administration of all governments. Problematically, in his exposition of the relationship of state judicial power to that of the Commonwealth, Isaacs J tends to fudge the relationship of the two, seeming to treat the judicial power as a single entity.

It is often taken as axiomatic that *state judicial power* is the natural counterpart of the judicial power of the Commonwealth, although the relationship between the two is rarely, if ever made explicit.[18] Treating the former as it were an organic extension of the latter is based on the assumption that although in some ways different (not usually explained) the two 'judicial powers' share a common basic meaning and content. In that regard, both are taken to embrace a wide sense of the judicial power.[19]

Critique of ambiguities in the usage of judicial power

In some schools of philosophy, a name or term can have *more than one meaning* (its sense), by reason of having *more than a single point of reference* (its object).[20] Correspondingly, the same object can have different senses. What we seek to show is that the expression 'judicial power' as it has been employed in the *Kable-Kirk* dialogue is capable

of more than one universal, abstract meaning, depending on whether it is used in conjunction with state-provided means of resolving controversies or as manifested in the Commonwealth constitutional context in terms of 'the Judicial Power of the Commonwealth'.[21]

We see the inherent ambiguity in the way that courts have approached this dichotomy as contributing to the confusion and obfuscation underpinning the proper application of *Kable-Kirk* to adjudication by state tribunals. By subjecting the basal assumption to closer analysis we aspire to point the way forward to a more satisfying and convincing resolution of contradictions inherent in those terms. This leads us to proffer the suggestion that, apart from the narrow specific jurisdiction in which state courts engage in determining criminal guilt or the consequences thereof, it is more sensible and fruitful (in terms of opening the way to future developments), instead of referring to state judicial power, to speak in terms of a 'state adjudicative power' in which the distinction between state-conferred judicial and non-judicial, administrative powers is largely eliminated.

If one starts, however, from the premise that the jurisdiction and powers of state courts and other adjudicative bodies are not to be defined by reference to Commonwealth judicial power (whatever that is) a completely different vista is opened. Rather than seeking to establish a further dichotomy between state judicial power and non-judicial power, replicating the Commonwealth model, a much broader *adjudicative capacity* can be attributed to state determinative bodies.

This in turn has logical repercussions as to the kind of taxonomy that applies to state adjudicative bodies. A strict distinction between state 'courts' and 'tribunals' as adopted in *Craig v South Australia*[22] tends to dissolve, freeing such tribunals to perform novel functions. These could include developing *policy guidelines* (in the absence of a prescribed government policy) in furtherance of more consistent administration when deciding cases in large volume jurisdictions or providing *advisory statements* that inform state administrators about the proper and sensible interpretation of contentious provisions. This is consistent with a role for tribunals to go beyond being simply adjuncts to civil administration and enhance and enlarge the 'integrity arm' of government.[23]

Admittedly, in seeking to dissolve the strict dichotomy between state and Commonwealth judicial power and the division of state adjudicative bodies into 'courts' and 'non-courts' (or 'arbitral/administrative bodies other than-courts'), we are offering a reductionist model that may turn out to bypass rather than eliminate the contentious problems that have attended the application of *Kable-Kirk* to date. We accept that at the end of the day our analysis may fall short of providing conclusive answers about the relationship between state and Commonwealth judicial power but, as Socrates famously observed, the philosophic task is directed not to finding *the answers,* but rather to *asking the right questions.*

The importance of maintaining Federal spaces within the constitutional polity

One of the long-recognised virtues of the Federal system is the potential for political innovation at both levels of government. Federalism leaves space for regional variations in which each state can engage in experimentation. This allows freedom to devise solutions to deal with new problems presented by Australia's rapidly changing society when it is obvious that the old models are inadequate or no longer working.[24] This framework for diversity within national unity can be especially justified when there are significant differences between individual states such as Western Australia and Queensland, where, for example, there is a need to develop, relevantly to this discussion, models, often informal, to accommodate the needs of remote, predominantly sparse rural communities with large

indigenous groups. The question is: To what extent does *Kable-Kirk* represent a disincentive for such developments?

The shoals of *Kable-Kirk*

Before that question can be answered it is necessary first to identify both the current and potential reach of *Kable-Kirk.* To do that one must understand the logical and conceptual basis on which it has been constructed. To do that comprehensively is beyond the scope of this paper but the central propositions on which the *Kable-Kirk* doctrine rests are:

(a) Any 'court' established by a state ('a court of the State') that is capable of being invested with, and exercising, 'the judicial power of the Commonwealth'[25] (also described as, though not necessarily always coincidental with, the notion of 'Federal jurisdiction') under s 77(iii) of the Constitution, must exhibit and manifest a basic degree of impartiality and independence from the other arms of the state government;

(b) That degree of judicial and curial impartiality and independence is an '*essential*' feature and attribute of those state courts capable of exercising vested federal jurisdiction;

(c) To meet that requirement of impartiality and independence, state legislation must not confer upon a state court 'non-judicial' functions[26] that compromise, impair or detract from the minimal standards of independence necessary to maintain the 'institutional integrity'[27] of that court;

(d) (In the case of state Supreme Courts) each state must maintain a Supreme Court, one feature of which must be its continuing to have jurisdiction to exercise, impartially and independently, judicial review over inferior state courts and tribunals to prevent them committing 'jurisdictional error'.[28]

The underlying requirement of an integrated court system

These propositions are founded on several key constitutional premises. First, that to effectuate the Commonwealth Parliament's power to invest state courts with federal jurisdiction such courts impliedly must exist and be available.[29] Secondly, federal and state courts *structurally* form part of a *single integrated judicial system* in which the states' Supreme Courts are vehicles through which appeals to the High Court, as the ultimate apex of the Australian judicature, are required to be channelled.[30] Thirdly, there cannot be *two grades of judicial power* within that system in which a higher standard is prescribed for federal courts and a lower standard for state courts. This latter contention, however, is compromised by an element of self-contradiction in so far as the High Court has acknowledged that the requirements of impartiality and independence mandated by the Constitution for state courts is not of the same strict quality as prevails under the *Boilermakers* principles with respect to federal courts.[31] Finally, there is a single common law of Australia, which is administered and developed, as part of the integrated judicial system, by both state and Federal courts.[32] One practical conclusion drawn from these structural foundations is that the consequence (namely, that a state law cannot impair the exercise of the judicial power of the Commonwealth) cannot be avoided by notionally segregating the courts of the States into a distinct and self-contained stratum within the Australian judicature.[33]

The unifying concept that has come to dominate the *Kable-Kirk* discourse and which undergirds the propositions set forth above is the need to maintain the 'institutional integrity' of state courts to effectuate that purpose.[34] The attributes of impartiality and independence impliedly required for state courts thus translate into an 'essential characteristic' of courts that may be invested with federal jurisdiction. This is bolstered by giving content to the linguistic terms, 'courts' as in s 77(iii) and 'Supreme Court' in s 73 by reference to the historical nature of colonial courts at the time of Federation.[35] Reliance on such extra-constitutional sources in order to extract extended meanings from simple terms such as

'court', however, runs the risk of reaching beyond the text and structure of the Constitution as the source of implication.[36]

Two further conditions are implicit in the above propositions; first, that if a state court or a state tribunal that can be characterised as a 'court of the State' exercises a non-judicial function that is *incompatible* with maintaining its impartiality and independence it will transgress the *Kable* standard on the prevailing orthodox model.[37] This requires an assessment to be made whether any function or power of such a court is to be classified as judicial or non-judicial. That engages the wider question of whether the appellations 'judicial' or 'administrative' are prescriptive and appropriate in relation to the exercise of what we call 'state adjudicative power'.

Secondly, as part of that evaluation, it is necessary to distinguish between bodies that are 'courts of the State' in the true constitutional sense[38] and other adjudicative bodies that are not.

It is at this point that closer scrutiny of the High Court's pronouncements on the nature of judicial power and the kind of state courts in which it may be invested is called for. This directs attention to two issues: The characterisation of a state adjudicative body's judicial power, and the characterisation of particular state adjudicative bodies as 'courts of the state'.

First major issue: the nature and characterisation of judicial power as exercised by state adjudicative bodies

The confusions in the current discourse about the nature of judicial power'

Defining the 'judicial power of the Commonwealth' has proven an elusive undertaking. It was early recognised by Griffith CJ in *Huddart Parker and Co Pty Ltd v Moorehead*[39] that the concept defies exhaustive 'definition'.[40] Instead, approximations or resemblances based on some of its constituent elements can be formulated to indicate its essential characteristics. Notably, these include generally, but not always, the notion of settling a dispute as between persons, or persons and government by means of applying law, the facts found as part of the judicial process, leading to whichever court or tribunal is taking a dispute giving an authoritative ruling about the legal rights of those engaged, and making such orders or providing such remedies as are necessary to effectuate the court's or tribunal's determinations.[41] In *Fencott v Muller*[42] Mason, Murphy, Brennan and Deane JJ referred to judicial power as the power of a sovereign authority to decide controversies between its subjects or between itself and its subjects. Their Honours continued:

> The unique and essential function of the judicial power is the quelling of such controversies (that is, controversies between the subjects of a sovereign authority or between the authority and its subjects) by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.

It may fairly be said that the indeterminate nature of judicial power and imprecise 'tests' devised for it rely more on judicial impression than linguistic analysis or logical implication. This was acknowledged to some extent by French CJ and Kiefel J in *Wainohu v New South Wales*[43] where, recognising that such questions require evaluative judgments and are unlikely to be answered by the application of precisely stated verbal tests, they said:

> That conclusion is consistent with the imprecise scope of the judicial power, which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown. It is also consistent with the shifting characterisation of the so-called 'chameleon' functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a court. Assessments of

> constitutional compatibility between administrative and judicial functions are not to be answered by the application of a Montesquieuan fundamentalism.[44]

Significantly, however, neither the Commonwealth nor the state constitutions speak of or otherwise recognise a correlative entity 'The judicial power of [a State]'.

As Gleeson CJ recognised in *Re Wakim* the concept of the judicial power of the Commonwealth is one that can only be expressed in terms specifically of 'matters' of the kind indicated in ss 75 and 76 of the Constitution.[45] Chapter III is accordingly an exhaustive statement of the kind of Commonwealth judicial power that can be conferred on both Commonwealth courts and, by virtue of s 77(iii), on state courts.[46]

Re Wakim is an instructive authority in another regard. The purpose of embedding and providing for the exercise of the judicial power of the Commonwealth under Chapter III shapes the understanding of that concept. It is the particular expression, as formulated within the terms of Chapter III, that both informs and limits its nature. It is seen to be crucial to the separation of *Commonwealth* governmental powers and functions. It operates to impose a systemic delimitation on the kind of courts that are capable of exercising it as well as the way in which it can be exercised.

In that respect, no relevant distinction can be made between the kind of matters that are embraced in the judicial power of the Commonwealth under ss 75 and 76, on the one hand, and on the other, its content so far as it can be invested in 'other courts' under s 77. Further, Chapter III as the fountain of Commonwealth judicial power does not distinguish between the High Court and other federal courts. That leaves open the logical possibility, however, that while its content may be constant, the nature of state courts in which it can be invested under s 77 need not be the same as the High Court or Federal courts in terms of their 'essential' characteristics.

In the case of *Re Judiciary and Navigation Acts*,[47] for example, it was held that the determination of questions of law on a reference to the High Court for an advisory opinion was clearly a '*judicial*' function but the court could only respond if the reference engaged the judicial power of the Commonwealth under Chapter III. It was further held that the determination of such hypothetical questions, when they do not arise in a legal proceeding where there is some immediate right, duty or liability to be established by the determination of the Court, does not fall within the judicial power for which Chapter III provides.[48] From this, it may be deduced that judicial power in a broad sense is not co-extensive with the limits of the judicial power of the Commonwealth.

Adding to this ambivalence, in *Kable* Brennan CJ, without articulating any basis for distinguishing between Commonwealth and state judicial power, did contemplate the latter as having different attributes that depended upon the state's constitution and legislation for their content. In the context of New South Wales, his Honour noted that there was a long history of both courts and other adjudicative bodies exercising both judicial and non-judicial power.[49]

That then leaves open the question: Is the concept of the judicial power of a/the State simply an extension of the notion of the judicial power of the Commonwealth, in terms of sharing the same notion of a single 'judicial power', which is predicated on the basis that its source and foundation is rooted in state statutory, prerogative and common law? Alternatively, should the concept of 'judicial power' be understood differently when it is applied to adjudication on Commonwealth 'matters' and how it functions in relation to non-Commonwealth matters that arise in state jurisdiction?

Underlying the task of differentiating state and Commonwealth judicial power(s) is an unarticulated confusion as between a *monist* formulation that assumes each concept has a degree of substantive correspondence and a formal *dualist* approach that treats, at the extremes, each as a mutually exclusive opposite of the other.

Some, though not necessarily all, of the conceptual relationships between the two generic classes of judicial power, Commonwealth and state, can be depicted by use of the diagrams or circles, as indicated below.[50] It should be acknowledged, however, that such a depiction is probably overly simplistic in so far as it assumes that there is a common notion of a genus, 'judicial power' which can be subdivided into two other categories of 'Commonwealth judicial power' and 'State judicial power'.

Figure 1

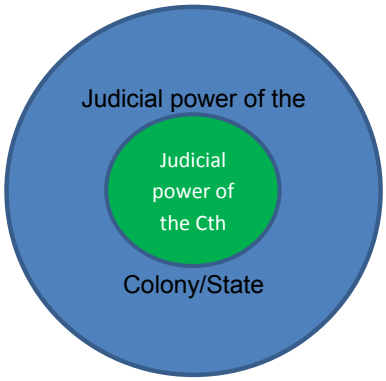

Figure 2

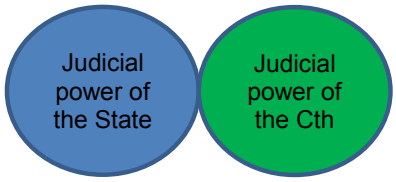

Figure 3

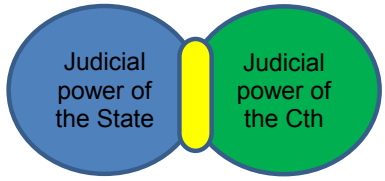

Figure 1 postulates that there is in fact a single entity of judicial power that originally could be identified with the common law and statutory law prevailing in each of the Australian colonies. In due course, following Federation, when some of the matters giving rise to controversies came to be regulated by Commonwealth laws some parts of the pre-existing judicial power came to be constitutionally assigned to what was designated the judicial power of the Commonwealth. Adjudication in relation to such matters then fell to be determined according to the scheme established by Chapter III. Accordingly, while Commonwealth judicial power is a subset of and located within the notion of 'judicial power' it is exclusive of State judicial power, carving out the constitutional space of its own.

In Figure 2 the entities, judicial power of the states and judicial power of the Commonwealth are predicated on the assumption that they are different kinds of jurisdiction,[51] based on a different origins, which may have a 'family' resemblance but are in fact discrete though not dissimilar.

In Figure 3 the assumption is that, irrespective of their origins, the two kinds of judicial power basically share common features and while each may be the subject of separate judicial proceedings, there is nevertheless a potential for overlap and correspondence. In the latter event, as is recognised in cases such as *Fencott v Muller*,[52] to the extent that there is an

intersection between state laws that regulate the outcome of the dispute on Commonwealth law, the jurisdiction is federalised. In such instances, whether adjudication is by a court of the State or a federal court, the relevant court will be exercising the judicial power of the Commonwealth.

Unresolved issues tending towards incoherence in the High Court's treatment of 'state judicial power'

As foreshadowed above, attempting to delineate the boundaries of each kind of judicial power by seeking to map the juristic fields in which they operate arguably blurs and obscures some of the logical disconnections and contradictions inherent in the several models. At the extreme, one possibility is to deny outright the constitutional, though perhaps not the legal, existence of a judicial power that may be said to reside in the 'State'. Certainly, as stated above, there is no constitutional recognition of an entity known as the judicial power of the State. Legally, although having no constitutional entrenchment, one can metaphorically and perhaps circuitously allude to the judicial power of the State referentially as the kind of non-Commonwealth jurisdiction that is exercised by state courts. Likewise, it is a fallacy, in our submission, to seek to identify the judicial power of the Commonwealth and then to analogise the judicial power of the states to it.

The topic has engaged the attention of the Court on only a few occasions and then, has not been analysed with close attention to its specific relationship with the judicial power of the Commonwealth. In *Kable* itself Dawson J, in dissent, noted that the New South Wales Constitution nowhere provides that 'the judicial power of the State' is vested in the state judiciary.[53] He further observed that, although the NSW Constitution had been amended by the insertion of Part 9 ('The judiciary') dealing with matters such as judicial tenure to protect the independence of the state judiciary, the amendments 'clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested. Had [Part 9] attempted such an exercise it would have cut across a long history of the exercise of non-judicial power by the courts and the exercise of judicial power by bodies exercising non-judicial functions'.[54]

In the same case, McHugh J makes only a passing reference to judicial power of the State in the course of one of the seminal judicial statements concerning the interrelationship of state and Commonwealth jurisdiction under Chapter III. Given its centrality and importance, although lengthy, it bears repetition. In *Kable,* His Honour observed:

> The [New South Wales Constitution] is not predicated on any separation of legislative, executive and judicial power although no doubt it assumes that the legislative, executive and judicial power of the State will be exercised by institutions that are functionally separated. Despite that assumption, I can see nothing in the New South Wales Constitution nor the constitutional history of the State that would preclude the State legislature from vesting legislative or executive power in the New South Wales judiciary, nor judicial power in the legislature or the executive. Nor is the federal doctrine of the separation of powers - one of the fundamental doctrines of the [Commonwealth] Constitution directly applicable to the State of New South Wales. Federal judicial power may be vested in a State court although that court exercises non-judicial as well as judicial functions. Moreover, when the Parliament of the Commonwealth invests the judicial power of the Commonwealth in State courts pursuant to s 77(iii) of the Constitution, it must take the State court as it finds it. This is because the Constitution recognises that the jurisdiction, structure and organisation of State courts and the appointment, tenure and terms of remuneration of judges of State courts is not a matter within the legislative power of the federal Parliament.[55]

His Honour noted that nevertheless the Constitution required and implied the continued existence of a system of state courts with the Supreme Court at its head. Justice McHugh also went on to hold that implied in the authorities of the Commonwealth Parliament, under Chapter III, to invest state courts with federal jurisdiction, the freedom of the states to confer judicial and non-judicial functions on their courts was not absolute. The states were

constrained by the limitation that they could not confer on a state court a function or procedure that impaired their impartiality and independence. He stated that a State court when it exercises federal jurisdiction 'is not a court different from the court that *exercises the judicial power of the State* …' adding: 'The judges of a State court who *exercise the judicial power of the State* are the *same judges* who exercise the judicial power of the Commonwealth invested in their courts pursuant to s 77(iii) of the Constitution.[56] In making these observations, it is significant that his Honour made no attempt to explicate the nature of the judicial power of the State.

The logical incoherence of attempting to define judicial power by reference to something that it is not

Several points may be made about the way that the Justices of the High Court in these few scant allusions have referred to state judicial power. First, in virtually every case the reference is made *en passant* without elaboration about the content of the notion. Secondly, to the extent that there is something to give sense or meaning to the notion it is '*defined*' negatively by *something that is not*. That is, it is represented as a kind of judicial power. It derives its meaning from not being the judicial power of the Commonwealth. Thirdly, it is treated, in so far as it is exercised by state courts or tribunals, as distinguishable from state *non-judicial* power as if the dichotomy relevant to Commonwealth dispute-resolution, mandated by the *Boilermakers* principles, is necessarily inherent in state adjudication.

Logicians and philosophers, such as Hegel,[57] have long identified the problems of attempting to define something in terms of its *non-identity*.[58] The project starts to collapse into contradiction and inconsistency when one attempts to give content to a notion such as state judicial power by reference to the way in which it is constituted by elements or characteristics that are not commonly shared with its counterpart notion, in this case Commonwealth judicial power. At best, it only presents an illusion of commonality.[59]

From both a practical and pragmatic point of view, a more complete if not wholly satisfying understanding of the relationship between state and Commonwealth judicial power can be developed by considering them as context-dependent where the context is enlarged to embrace the total constitutional universe represented by the composite states-Commonwealth arrangement, including the function performed by s 106 of the Constitution[60] and the roles played by courts and tribunals within it.[61]

One consequence (and arguably an advantage) of so doing is to restore a more balanced, federally oriented construction of the constitutional disposition of adjudicative power as it affects the states. It tends to mitigate the disequilibrium brought about by giving dominant effect to Chapter III of the Constitution exerting its 'gravitational pull'[62] towards effecting an alignment or convergence between state and Commonwealth systems of dispute resolution.[63]

In fact the judicial power of the states and the judicial power of the Commonwealth do not relate to each other in some kind of abstract symmetry where *different notions become assimilated* (or, more generally, produce *a contradiction of some kind*). Nor are they in fact two separate and unrelated expressions, each with its own discrete universal application. The differences between the two cannot be reconciled by reference to a common nature (ostensibly a shared notion of a single 'judicial power') alone. As stated above, to reconcile their differences it is necessary to reposition the debate by reference to something *outside of them*. That point of reference is to be found in the different *origins* of each judicial power in the state constitutions and the Commonwealth Constitution, respectively.[64] That being the case, the kinds of restrictions on state legislative power imposed under the *Kable-Kirk* doctrines should be seen as extending no further than achieving the protective purposes

implicit in Chapter III of the Constitution.[65] The application of the principle of 'Occam's razor'[66] as well as the principle of legality espoused by the High Court demand that any further expansion of *Kable-Kirk* must be supported by clear and convincing justifications.

Relocating the point of reference to the broader constitutional perspective also gives effect to the valuable Jainist insight that no single point of view can reveal the complete truth.[67] Given the plurality of various modes of existence and qualities, none of which can be completely perceived in all of its manifestations and aspects, a more nuanced understanding can be developed which, while acknowledging the complex and multifaceted nature of the task of constitutional construction, recognises the contingent, although not absolute, validity of interpreting constitutional terms or concepts from a relative point of view in history and time (and having regard to other variables), including new forms of the way in which the Australian constitutional system functions. In other words, the relationship between state and Commonwealth judicial power is so complex that no single proposition can fully express its nature.

Such an approach admits that many interpretative disputes arise out of confusion resulting from adopting a singular standpoint such as, in this instance, attributing a fixed meaning and content[68] to the concept 'the judicial power of the Commonwealth', with all its concomitant implied restrictions, when attempting to map the boundary lines (assuming that such a demarcation is possible[69]) between it and the ostensible 'judicial power of the States'.

The notion of adjudication as a possible means of synthetically reconciling contradictions and conflicts inherent in the different concepts of judicial power

On the analysis outlined above, the better view is that there is, as depicted in Figure 3 (above), a common area of overlap between the notions of state and Commonwealth judicial power but that, properly appreciated, the correspondence only exists, where the function of a state court or tribunal directly duplicates the functions of federal courts when exercising the judicial power of the Commonwealth (in its confined and narrow sense). Beyond that, in what has loosely been described by the High Court under the rubric of 'the judicial power of the State' there is an assortment of functions and procedures that are aimed at settling disputes between citizens, and citizens and government, but which are of an indeterminate and amorphous nature when compared with the 'matters' enumerated in Chapter III. To attempt to distinguish these by reference to whether they are judicial or non-judicial or judicial and administrative serves no constitutional purpose. Accordingly, we propose to refer to these truly innominate functions in terms of the broad concept of 'adjudication'.

To do so is broadly consistent with the oft-repeated contention that the separation of powers doctrine,[70] so far as it is predicated on a distinction between judicial and administrative powers, has no application to state constitutions.[71] Whether it dissolves entirely the distinction between state judicial and non-judicial powers is another question. However, for the purposes of the *Kable* doctrine there may be an exceptional and narrow core meaning of state judicial power which is attracted whenever a state adjudicative body, court or tribunal, engages in an exercise of determinative power which involves finding and declaring *the guilt* of a person, resulting in *punishment* by *deprivation of liberty or property*, or in a wider context, in the exercise of *coercive power* by a state body that otherwise affects *the liberty of the subject or renders their property* liable to confiscation.[72]

The notion of an adjudicative function exercised by determinative bodies is well known in Australian law. It is, in one special sense, recognised in the Constitution. As extensively discussed in the *Wheat Case* (*New South Wales v the Commonwealth*) in 1915,[73] Part IV of the Constitution, dealing with Finance and Trade envisages the establishment of a body designated as the Inter-State Commission. It is specifically provided, by virtue of s 101, with

such powers of *adjudication* and *administration* as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of the Constitution relating to trade and commerce. On its establishment in 1912, the Commission was empowered to investigate disputes relating to violations of s 92 of the Constitution (guaranteeing freedom of interstate trade) and to grant remedies akin to judicial orders of injunction. The High Court held by majority that the Commission was not one of the three kinds of courts enumerated in s 71 of the Constitution and could not therefore exercise the judicial power of the Commonwealth in so far as it involved issuing what are effectively judicial orders of injunction. Griffith CJ provides some guidance as to the meaning of adjudication by noting that is not true that the function of adjudication is either by common law or by statute confined to courts. For many years in the UK and the Australian colonies and States quasi-judicial powers which could be equated with adjudication had been conferred upon administrative bodies as well as courts. In such cases, it was appropriate to use the word 'adjudicate' to denote the determination of the matter.[74]

Barton J, although dissenting in the result, was on common ground in agreeing that the function of adjudication is not confined to courts nor confined to bodies that are not courts. In short, he held that 'adjudication is a function common to Courts and many other bodies, whether existing under the common law or under legislation.'[75] To this Isaacs J added that in 1900, when the Constitution was framed, the word 'adjudication' was extensively used to denote decisions of a *quasi-judicial character*, a meaning that had continued, though not enlarged, since that date and the position of persons so adjudicating could be either 'judicial' or 'quasi-judicial' although in each case the body was bound to act *judicially*. Notably, focusing on the use of the word 'adjudication' in s 101 he stated that it was necessary to look beyond the word itself and to determine the *character* of the body (in that case the Inter-State Commission) exercising the power.[76] Rich J observed that the word 'adjudication' might be wide enough in some contexts to include judicial power in the strict sense. However, in the context of Chapter IV the term was not to be assimilated with the judicial power of the Commonwealth and hence did not permit the Commonwealth Parliament to invest the Inter-State Commission, a body not mentioned in Chapter III, with that power.[77] Although discussed in the specific constitutional context of Chapters III and IV these dicta recognise the wider concept of adjudication as embracing both judicial and administrative powers. To similar effect, McTiernan J in the *Tasmanian Breweries Case*[78] remarked that the function of the Trade Practices Tribunal in determining whether a monopolistic trade practice was contrary to the public interest was engaged in a quasi-judicial enquiry that involved adjudication. The concept of adjudication, which includes the ascertainment of facts and a pronouncement of their consequences by the application of some rule or standard, was not distinctive of judicial power exclusively and its exercise was not necessarily inconsistent with executive or administrative action. His Honour recognised that adjudication was a very wide concept embracing a function that could be common to each kind of body, court and tribunal.

It is not necessary when dealing with adjudication by a state body to determine whether a power is judicial or non-judicial. That distinction has been imported into state constitutional law as part of the canon of Chapter III principles founded on the *Boilermakers* doctrine. The constitutional rationale and policy derived from s 77(iii) is sufficiently realised by restricting the *Kable* doctrine to state laws that detract from or impair the independence of state adjudicators who are part of a state 'court' capable of exercising Federal jurisdiction.

Second major issue: the characterisation of particular state adjudicative authorities as 'courts of the state'

To this point, we have addressed the issue of how far the *Kable-Kirk* doctrine potentially inhibits extensions in tribunal adjudication by squeezing an expansive notion of State

adjudication into a narrow mould of State judicial power. If it be accepted that, apart from the restricted category of jurisdiction where a state adjudicative entity, court or tribunal, is concerned with determining issues of criminal guilt and punishment or imposing other restrictions on the liberty of the subject or the liability of their property to confiscation in the criminal context, there appears to be no logical reason why a strict dichotomy between state judicial power and non-judicial power should relevantly restrict the *kind* of function that can be conferred upon such a body.

The second part of the equation to be addressed is delineation of the boundaries of *Kable-Kirk* and the barriers it presents for innovative extensions of tribunal adjudication, and to determine whether a particular state adjudicative body is to be classified as a 'court of the State' capable of exercising the judicial power of the Commonwealth.[79] If it is not, arguably, it then stands freely outside the shadow of *Kable-Kirk* and can be reshaped and developed as the state government and Parliament see fit.

The High Court has approached the notion of a court of a State by reference to what have been described as its 'defining characteristics'. Formulated in non-exhaustive terms, Chief Justice French in *Totani* identified the 'defining characteristics' of a court within the meaning of Chapter III with the attributes of impartiality, fairness and adherence to the open court principle, to which might be added the capacity to administer the common law system of adversarial trial, observing that it is not possible to expound a single all-embracing definition statement of those characteristics.[80]

Conversely, state legislation which embroiled the court in the implementation of government policy, confining its adjudicative process so that it is directed or required to implement legislative or executive determinations without following ordinary judicial processes is liable to deprive the court of those defining characteristics of impartiality and independence, rendering the court an unsuitable repository of federal jurisdiction.[81]

Logical problems with the notion of 'defining characteristics'

The assumption that the nature of something can be defined in terms of its essence can be traced back as far as Aristotle, who drew a distinction between what a word or phrase *means* (its nominal meaning) and its real nature, as manifested in the world.[82]

Increasingly, under analytic assault from various schools of modern and contemporary philosophy, the classical model based on definition in terms of a thing's essential nature has been shown to be vulnerable to logical objection. This is partly due to the complex nature of notions that have composite and often pluralistic components which often makes it impossible to develop a universal airtight axiomatic system founded on fixed and unchangeable predicates.[83]

In such instances, discerning the core or internal features of a concept is best approached by employing a notion of conceptual 'clustering'. This still entails classification of the features (or 'bundles' of shared properties) that are associated with a given term by grouping them together into a class by reference to their similarities, but is more amenable to accommodating variations by way of things that may not be present in some manifestations of the concept or additional features that do not detract from the basic model.[84] Rather, 'definition' is equated with approximations of the basic phenomenon most famously on 'family resemblances' in which there can be varying degrees[85] of 'fitness'. Such a process of conceptual clustering shares features with fuzzy set theory which accepts that a concept can be blurred at its boundaries but may be open to a classification depending on judgment and grading similarities by the degree to which they correspond between examples within the same group.

Arguably, these considerations are relevant when deciding whether the High Court has arrived at a satisfactory 'definition' by reference to the *essential characteristics* of a court of the State. Rather than apply a template or computer program consisting of a list of specific properties and attributes, all of which must be present to satisfy a fixed definition of a 'court', the task of identification and classification should be directed to a cluster of features which, when present, predominantly permit the conclusion that the body is, within approximate boundaries, such an institution.

The boundary line between courts and tribunals, so-called, is both uncertain and elusive.[86] Drawing that distinction is not necessarily an easy exercise, as recognised by the plurality in *Kirk* who stated:

> Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.[87]

Accordingly, we advocate that the High Court, in determining whether a particular state adjudicative body is a court for Chapter III purposes should approach the issue in a 'relaxed' way that has broad regard to the composition of the body, the kind of functions that it performs, the process and procedures by which it does so, while allowing a wide margin of difference between courts strictly so called and other administrative bodies.

The most extensive discussion of the content and extent of the notion of a court of the state is the High Court's exploration in *K-Generation*[88] of the issue whether the South Australian Licensing Court[89] (which was empowered to grant or deny liquor licences to persons depending on whether, on broad criteria that embraced public interest considerations, they were fit and proper persons to sell liquor) was a court of the State that, in particular respects violated the *Kable* principle. As part of its determination, the Licensing Court could close hearings to the applicants and deny them (contrary to the rules of procedural fairness requiring that a person whose livelihood was at stake be made adequately aware of the case against them in order to have a proper opportunity to reply to adverse information) access to 'criminal intelligence' materials furnished by the South Australian Commissioner of Police to the Court. As a step in deciding whether the procedures of the Court[90] infringed the *Kable* doctrine it was necessary to decide whether the court was a court of the State capable of exercising Federal jurisdiction.

The High Court concluded that it was such a court although it then went on to decide further that *Kable* had no application insofar as the procedures of the Court, although modifying the rules of procedural fairness, did not unduly interfere with the character of the Court so as to undermine its integrity as an impartial tribunal independent of and standing at arm's length from the executive arm of the state Government.

In coming to their conclusion, the High Court had to deal with the following contentions:

- If the restriction on access to the criminal intelligence were found to be inconsistent with the Licensing Court having the character of a court for constitutional purposes, then the consequence would be that the Licensing Court would not be a court of a State capable of being invested with federal jurisdiction pursuant to s 77(iii) of the Constitution, in which case it would follow that it would not be one of the 'several Courts of the States' invested with federal jurisdiction by s 39(2) of the *Judiciary Act 1903* (Cth);
- The broad public policy function of the Licensing Court in granting or withholding licences was *administrative* in nature, and hence indicative that the Court did not answer the description of a court of a State exercising judicial power for the purposes

> of s 77(iii) of the Constitution. It followed that no question of the effect of the procedural restrictions on its fitness as a repository of federal jurisdiction could arise.

The High Court rejected the first proposition that if a State altered the nature of a state court in a way that rendered it unfit to exercise federal jurisdiction then the only consequence was that the body became a tribunal in which the judicial power of the Commonwealth could not be vested. In addressing that proposition, the plurality judgment stated:

> [C]onsistently with Ch III, the States may not establish a 'court of a State' within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court.[91]

As their Honours saw it, the consequences of a measure, which has the constitutional vice, attributed to the offending evidentiary provision in that Act were quite different. The correct position is that such a provision would be invalid and questions of severance from the remainder of the Act might arise, but the Licensing Court would retain its character as a 'court of a State'.[92]

The conclusion that the Licensing Court was relevantly a court of the State was founded on the following propositions. First, the High Court rejected the submission that if the procedural restriction on access to evidence had the effect which the Licensing Court contended, it would cause the Licensing Court to cease to be a 'court of a State' which might exercise federal jurisdiction. Secondly, it held that whether a particular body fell within the latter description depended on whether it exhibited the *defining characteristics* of a state court, and institutional integrity was not distorted, in this instance procedurally, by the power to limit and the applicant's access to evidence. The latter process did not subject the Licensing Court to direction by the executive or any administrative authority.

In the event, it was not necessary for the High Court to rule on the submission that the broad discretionary nature of the functions of the Licensing Court rendered it an administrative tribunal rather than, in its essential nature, a court. This was because the conclusion was clearly that, both in terms of its function of authoritatively deciding whether a person should be granted a statutory right in the form of a liquor licence and in terms of the procedural powers and orders that it could make, the Licensing Court qualified as a court of the state for the purposes of Chapter III.

Implicit in that conclusion, members of the High Court pointed to the fact that there were a number of ways in which Federal jurisdiction under Chapter III and s 39 of the *Judiciary Act* could be engaged. One instance is where the Commonwealth itself could be a party to proceedings (such as if a Commonwealth authority occupying adjacent premises sought to object to the grant of a liquor licence), or if a person resident in another State sought to intervene in the proceedings; these instances would give rise to a matter under s 75(iii) or (iv) of the Constitution.[93]

One can question the basis on which federal jurisdiction is said to arise in the latter circumstances. Certainly, one can concede that if there is a property occupied by a Commonwealth authority such as a defence recruiting office adjacent to premises that are the subject of an application to the Licensing Court, the Commonwealth may have an interest in the outcome of the application on whether the licensee-applicant is a fit and proper person. The Commonwealth could, on that basis, seek to become a party to the proceedings. Similarly, if the adjacent owner is a person residing in another State who leases the adjacent premises commercially to someone else, the adjacent owner could seek to intervene and what is known as the diversity jurisdiction exercisable by a court is invoked. But in each instance it can be objected that the federal government is only incidentally (and

perhaps in Dixonian terms, 'accidentally'[94]) involved and does not, by virtue of the ostensible federal connection, *directly* change the nature of the state jurisdiction in terms of the state law applying to the issue before the state court. For example, the fact that an issue may arise under s 109 of the Constitution, such as where a state planning tribunal may make a decision that could be inconsistent with the law of the Commonwealth, should not prevent the tribunal from determining the matter on policy grounds so long as the state law empowering the tribunal does not seek to make its decision final and authoritative. In the circumstances, it seems strained and even strange[95] to say that the whole adjudication becomes federalised as an exercise of the judicial power of the Commonwealth. It rather seems a case of the *Kable*-tail wagging the constitutional dog. It also seems discordant with the High Court's current more sympathetic inclination to maintain the underlying objectives of federation.[96]

In cases where a Commonwealth or Federal interest arises it is certainly incontrovertible that the tribunal may not finally rule on any question of constitutional validity or whether state laws are inconsistent with a Commonwealth law. But, consistent with the decision of Brennan J in *Re Adams and the Tax Agents' Board,*[97] the tribunal could proceed to determine the matter, including forming an opinion on the relevant law, and including issues of constitutional validity, in order to 'mould' its decision to conform to those limits.[98] Given that in such cases the Supreme Courts of the states, as well as the High Court itself, retain the authority to exercise judicial review with respect to the decision, any wrong conclusions or opinions expressed by the tribunal will be subject to correction.[99]

Some less significant observations can be made about the High Court's treatment of other issues in *K-Generation*. In the first place, and uncontroversially, members of the court observed that some indication of the State Parliament's intentions relating to the nature of the body, naming it as a 'Court,' provided some aid to interpretation.[100] That conclusion could be bolstered by having regard to the nature of the judges who comprise the body. If they are officers of an existing judicial institution, that lends weight to the conclusion that the body is a state court. However, no Justice was prepared to express an opinion about whether the constitution of a court or tribunal by such people as retired judges, acting members and short-term appointees, or even totally by non-judicially qualified members would deprive the body of the constitutional attribute of a court of the state.

Kirby J took a more stringent view of the application of the *Kable* doctrine, virtually eliminating the distinction between state courts and tribunals.[101] He rejected the contention of one of the states that the *Kable* principle only applies to the purported imposition, by state law, on the Supreme Court of the state of functions incompatible with the exercise by that particular court of federal jurisdiction. Similarly, he did not accept the contention that a departure from standard judicial procedures should not be evaluated by a criterion of incompatibility equivalent to that applicable to federal courts regarding the concurrent exercise of the jurisdiction of federal courts. Accordingly, in relation to the less rigid standard applicable to State courts there was no offence to the *Kable* principle when a State court performed an administrative, not a judicial, function. In that regard, without assimilating and treating as symmetrical the standards applicable to federal and state courts respectively, his Honour, rightly in our submission, looked more to the disabling effect of a procedural departure from normal process rather than whether the court's function should be classified as administrative or judicial. That is consistent with our view that the nature of state adjudication does not call for such rigid dichotomies but rather the issue is whether the execution of the function affects the liberties of the subject in a way that removes, at least with respect to adjudications entailing criminal elements and the like, the necessary safeguards of impartiality and independence from executive, arbitrary dictation or influence.

Observations on the status of stated adjudicative bodies as 'courts' in light of *K-Generation*

The question in the end for state legislators is how much leeway is permissible in creating new tribunals or refashioning existing courts and tribunals. It is important to appreciate that so far *Kable-Kirk* has only operated restrictively to affect state 'courts', like the Licensing Court in *K-Generation*, bodies that can be readily classified as such. So long as the High Court in future cases adopts a relaxed view of the kinds of state laws that can be taken to violate the *Kable- Kirk* doctrines state parliaments will enjoy a wide margin of appreciation, not shared by federal courts, in terms of the kind of functions that can be conferred on state inferior courts and tribunals, the way that they are constituted, and the evidentiary methodology and procedures that they employ.[102]

The fact that state courts and judges are not subject to all the separation of powers requirements that apply to federal courts serves to maintain the differentiation between the two kinds of adjudicative bodies.[103]

Central to the High Court's decision in *K-Generation* is the fact that the Licensing Court was authorised and required to exercise what was clearly judicial power upon justiciable issues (the fitness of applicants for licences) involving interests in property that were susceptible to judicial determination. That the Court was engaged in applying a broad-based, public policy discretion, not dissimilar to deciding whether something is unreasonable or inequitable, did not detract from the conclusions that it truly was a 'court'. Accordingly, the Licensing Court was bound to observe the *Kable* standards. The Court was not performing purely administrative and non-judicial functions. The High Court found it unnecessary to address whether it still could have been classified as a 'court' if it had, although Kirby J tentatively indicated that there would be no reason not to extend the *Kable* principle to bodies performing non-judicial, administrative functions in the course of their duties.

There is, so far, no instance where the High Court has actually had to consider a state adjudicative body that is located in the fringe, borderline region where the nature of its functions, whether judicial or administrative, would prevent it from being vested with the judicial power of the Commonwealth pursuant to s 77(iii).[104]

Hence, with little else to go on by way of guidance, we take the Licensing Court in *K-Generation* as the paradigm for our conjecture. Applying the analysis that emerges from that and other cases, a primary division between relevant decision-making bodies (courts and non-courts, usually tribunals) can be proposed having regard to factors such as:

- (Pre-eminently) the degree of the body's impartiality and independence from governmental influence or direction;
- How the body is constituted (by judges or non-judicial members);
- Its functions (to decide legal issues as against making policy determinations, administrative decisions in lieu of officers of the executive government, or non-binding recommendations, as in the case of a commission of inquiry);
- Its methods of fact-finding, including its procedures and the extent to which the traditional rules of evidence apply (for example, classically neutral, adversarial adjudication as against agency-initiated investigation of issues).

To which may be added:

- The degree of formality and capacity to waive procedural technicalities;
- The body's reliance on alternative modes of dispute resolution.

As an alternative formulation, in a recent contribution to the debate French CJ extra-judicially noted[105] (but did not resolve) a number of competing views about whether state administrative tribunals were to be regarded as State courts. His Honour postulated[106] the following indicative, non-exhaustive list of factors:

- The conferring upon the court of judicial power – that is to say the authority and duty to decide controversies and to discharge functions traditionally regarded as a subject of judicial power or analogous to such functions.
- The reality and appearance of decisional independence from the Executive and from the legislature.
- Adherence to procedural fairness effected by:
  (i) impartiality, in reality and appearance;
  (ii) observance of the hearing rule.
- Adherence to the open court principle.
- Accountability for decisions effected by publication of reasons.
- Whether the tribunal can enforce its own orders …;[107]
- Whether the tribunal is a body composed of judges whose terms and conditions of appointment are not inconsistent with decisional independence;
- Whether the body is one whose members enjoy decisional independence from each other ...[108]

In light of the above analysis, does the WA SAT and other similar state general tribunals and Courts fall within the description 'courts of [the] State[s]' and come within the meaning of s 77(iii)?

The status of the Western Australian State Administrative Tribunal regarding whether it is a Chapter III 'court of a State': Reflections on other adjudicative bodies[109]

The High Court has not specifically considered the judicial status of general state tribunals.[110] One should therefore have regard to a number of State Supreme Court decisions that have addressed the issue. Importantly, in 2013, QCAT (SAT's Queensland equivalent) was held to be a court of the State for constitutional purposes.[111] The Court of Appeal had regard to specific factors, including whether it was a court of record; whether the rules of evidence apply; its limited powers to deal with contempt; the limitations on removal from office; the proportion of judges (number of judges compared to members); the lack of continuing tenure; and the administrative functions of the Judge-President. On those factors, SAT arguably compares 'equally or better' with QCAT, except for the 'court of record' status[112] conferred under QCAT's parent statute. Thus, under that analysis SAT is also likely be regarded as a court.

While not determining its constitutional status, SAT has been held to be a court at common law. In *Re Carey; Ex parte Exclude Holdings Pty Ltd*[113] Martin CJ regarded SAT as 'anomalous' and performing a function analogous to that performed by an inferior court, noting that:

> The process of characterisation which is to be undertaken to determine the extent of a body's jurisdiction is distinct from, but nevertheless has some similarity to the question of whether a body is a 'court of a State' within the meaning of [the] Constitution of the Commonwealth. In both exercises, the critical questions are those of function and purpose, not nomenclature …[114]

Applying what de Jersey CJ in *Owen v Menzies* called an 'appropriately broad, overall assessment' it would seem that, on the type of factors considered in that case and in *Re Carey*, SAT is a court for Chapter III purposes.[115]

Moving away from general administrative tribunals the position becomes more opaque. One considers emerging new styles of courts designed to meet particular social needs, such as 'drug courts'. Sarah Murray in her recent work, *The Remaking of the Courts*,[116] has concluded that, in respect of State Drug Courts, despite extraordinary provisions (such as losing the right to appeal and the right to challenge punitive sanctions), such bodies nevertheless remain courts of a State for constitutional purposes. In her view, despite the significant transformation that they bring to the judicial officer's role they do not offend the institutional integrity of State courts mandated by *Kable*.

On a more cautionary note, French CJ in his paper referred to above appears to be ambivalent about trends such as 'therapeutic jurisprudence' (of which perhaps Drug Courts are a paradigm example), emphasising the 'need for careful consideration of the long-term consequences of devaluing' the 'special character of public adjudication'.[117] But, if Murray's overall analysis is broadly correct then such developments are less of a concern for specialist courts and tribunals and are unlikely to jeopardise their status as courts of integrity.

The Hegelian synthesis: Freeing state adjudicative power from the shackles of *Kable-Kirk*

The grand conjecture

Given that the influence of Chapter III on state adjudicative bodies, as mediated by *Kable* and *Kirk*, is essentially restrictive, we contend, first, that the *Kable-Kirk* doctrines should be strictly limited to bodies that have a very close family resemblance, in terms of composition, function and procedures, to federal courts.

Secondly, on our analysis, the *Kable-Kirk* doctrines need and should only apply with respect to bodies that are capable of, and may be called upon to exercise 'judicial power' in its most classical and narrow sense, namely where issues of criminal guilt, detention, punishment, imposition of 'super liabilities', including suspension from professional practice, restriction or confiscation of property rights, and matters falling within the penumbra of those matters are directly engaged.

Thirdly, the *Kable-Kirk* strictures should only apply to a state court or tribunal where the nature of its jurisdiction necessarily, or is likely to, *directly engage* federal jurisdiction rather than indirectly or incidentally. If the circumstances arise that a federal interest is only an incidental aspect of the determination, such as where the Commonwealth is a party or objector, that should not prevent the tribunal exercising its jurisdiction in its normal manner, including performing functions which would on the classical *Boilermakers'* model be regarded as non-judicial.[118]

Restricting the ambit of *Kable-Kirk* also offers some prospect for resisting the ostensible trend towards convergence within the gravitational field generated by the integrated judicial system under Chapter III and the 'unifying' effect of a single common law.

The scope for adjudicative innovation

If *Kable-Kirk* were so limited then the vast range of adjudicative functions that a State might see fit to regulate through its courts or tribunals would remain vacant for innovation, experimentation and evolutionary expansion in terms of their subject matters and methodologies. The prospect for the States undertaking adjudicative initiatives is therefore not totally dismal.

If the boundaries of *Kable-Kirk* are restricted to their present narrow compass, as we contend, there will be ample terrain for further extensions and expansion of the existing state tribunal systems. There would be no need to distinguish between state judicial and non-judicial functions. Treating determinations of state courts/tribunals as exercises in adjudication would suffice. This could have an important bearing in relation to such jurisdictions as integrity supervision over state government executive bodies and officers, formulation of policy plans and frameworks (both environmental and for resource and urban development strategies and programs), and commercial and professional disciplinary regimes entailing both judicial and non-judicial regulation.

This would be consistent with both the non-application of a broad doctrine of the separation of powers to state governments and the maintenance of federal values preserving state autonomy. It would also prevent the colonisation of state judicial systems by subjugating them to the Chapter III model of strict separation between the judicial and other arms of government, except to the extent that, for the purposes of dealing with matters affecting the liberties and property of subjects, distance is preserved between the judicature and the executive and legislative organs of government. This would mean that the degree of independence and impartiality presently required for state courts and tribunals exercising coercive power would be maintained in close, though not exact, approximation with that required of Commonwealth courts. To operate by reference to such a template needs no further resolution of the logical contradictions inherent in, although camouflaged by, the current *Kable-Kirk* jurisprudence.

So far as the state's freedom to change its present adjudicative systems, courts and tribunals is concerned the proposition that a state cannot abolish or reconstruct any adjudicative body that it has established, with the exception of the Supreme Court, is problematic. The same is true of the proposition that in creating any new courts the states must ensure they are capable of exercising the judicial power of the Commonwealth. The logical flaw in each is exposed if one has regard to the fact that any constitutional mandate that a court of the state must be capable of being vested with the judicial power of the Commonwealth requires Commonwealth legislation to give effect to it. The extent to which the Commonwealth Parliament avails itself of the facility of s 77(iii) of the Constitution is in the end dependent on policy considerations and political discretion. As such, a cautionary approach should be taken to extending *Kable-Kirk* and its present parameters.

Testing the conjecture by hypothesis: a case study, using the State Administrative Tribunal, on adjudication with significant judicial involvement in actual law-making

In Western Australia, a town planning scheme (TPS) may authorise its textual amendment by the adoption of Structure Plan or an Outline Development Plan (ODP), instruments approved by the relevant Local Government itself. A TPS has the force of law. These sub-instruments are of a legislative character, albeit brought into effect by an executive act (ie a decision to approve or to make an ODP).[119]

The SAT has, under the TPS, jurisdiction to fully review decisions concerning such executive 'acts' and, consequentially, the resulting legislative instruments. Thus, the jurisdiction in effect extends to the 'rewriting' of a TPS by the Tribunal on review. This review jurisdiction could be exercised by a part-time, non-legally qualified Member. (None of this would be possible for a federal court, but a federal judge, *persona designata*, could presumably do the same thing, sitting as, say, a Commonwealth Tribunal with respect to an analogous Commonwealth instrument.)

Further, such exercises may be internally reviewed by a Judicial Member of SAT. That review jurisdiction appears to rule out remittal (by not providing for it[120]). A successful review

seems to require the Judicial Member to go on and determine the matter. Hence, a Judge may be required to or may rewrite a legislative instrument, perhaps even, as mentioned, sitting with respect to a federal territory, and thereby ultimately exercise jurisdiction derived from a federal law.

Arguably, no state or federal law authorising the Tribunal to execute such a function is rendered invalid by operation of Chapter III since the integrity of the State Administrative Tribunal, assuming that it is a relevant court, remains unaffected, despite the legislative task given to it. Further, the Tribunal's jurisdiction does not touch upon matters of punishment, detention or deprivation of property or interests such that it would place the matter in the heartland of *Kable-Kirk.*

Different considerations regarding the Tribunal's perception of independence may operate if the State Parliament required SAT to be involved in the approval (including the formulation) of all such ODPs, even assigning such a task to its original jurisdiction. However, this task may still not impair its institutional integrity.

If the Executive government actually rewrote such instruments itself and SAT was *required* to more or less mechanically endorse them, then presumably, even if it remained a relevant court, its institutional integrity might then be endangered and *Kable-Kirk* might then apply. The question would then be: Would Chapter III render the whole legislative scheme invalid or would the effect be simply to immunise SAT from exercising that jurisdiction? While that latter outcome is preferable, the precise effect of *Kable-Kirk* in such circumstances is ambivalent in the light of *K-Generation*, and must remain speculative.

Thankfully, such a proposal is one that can only be distantly viewed on the far horizon and need not to be answered at this stage.

Conclusions

We have sought to survey and map some clear boundaries within which the *Kable-Kirk* doctrine can be confined so as not to inhibit the freedom of state parliaments to take innovative initiatives with their administrative tribunals. The jurisprudence emerging from *Kable-Kirk* constitutes a 'work in progress' from which, in due course, a coherent theory of judicial functions, both Commonwealth and state, will emerge con-jointly under the Commonwealth and state constitutions.

It remains to be seen to what extent the limitations on state legislative power mandated by Chapter III operate to constrain state legislative initiatives beyond the classic 'court-like' institutions and specific *Kable-Kirk* territory. The conceptual mix of variables, including what kind of adjudicative bodies fall within the description of a court capable of exercising federal jurisdiction, the range of deliberative and determinative functions, judicial or administrative, non-judicial and, more comprehensively, 'adjudicative', that can be conferred upon them, and the types of procedures, both adversarial and inquisitorial, with which they can be endowed, entail an infinitely complex set of possible institutional arrangements that defy either a simple or absolute constitutional categorisation.

We propose that one theoretical (and sensible) rationale of *Kable-Kirk* as it presently stands would be to confine it strictly to situations arising in the immediate region entailing the interrelationship of Commonwealth and State courts (properly so called) where there is a *real potential* for the exercise of jurisdiction conferred upon a State court to adversely affect the *human and democratic rights of the subject*.[121] This would be consistent with the fundamental constitutional objective of protecting persons against arbitrary governmental action that is shared by State courts exercising a judicial review function under state

constitutions as well as maintaining their capacity to exercise conferred federal jurisdiction. It would, for the most part, produce a closely assimilated order in which the judicial power of the Commonwealth, and to the extent that it is federalised, the judicial power of the states, can be exercised with the necessary degree of integrity without unduly trenching on the independence of those institutions to undertake other adjudicative and administrative functions.

We can only hope that the High Court will produce in due course a more coherent adjudicative theory along these lines, based on Chapter III, which will redraw the present limits of the *Kable-Kirk* doctrine.

Endnotes

1 For an overview of the growth, diversity and functions of tribunals see, for example, Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Federal Law Review* 403; and Robin Creyke, 'Tribunals and Access to Justice' (2002) 2 *Queensland University of Technology Law and Justice Journal* 64.

2 Although in terms of their individual holdings *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*) and *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 (*Kirk*) can be treated as dealing with different aspects of the attributes essential to maintaining state court systems for the purposes of Chapter III of the Constitution, and hence as separate 'doctrines', the two cases can be viewed, for the purposes of this paper, as twin-authorities founded on the constitutional requirement that state courts be independent of influence or direction by the executive and legislative arms of the states.

3 This includes such cases as *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Baker v The Queen* (2004) 223 CLR 513; *North Australian Legal Aid v Bradley* (2004) 218 CLR 146; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *A-G (NT) v Emmerson* (2014) 88 ALJR 522 and *Pollentine v Bleijie* (2014) 88 ALJR 796.

4 So far *Kirk* has spawned little off-spring, *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* (2012) 249 CLR 398 being one exception.

5 This is the authors' summary.

6 This concern was the basis of submissions by Victoria and Queensland in *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 564 where they urged caution before the High Court extended the *Kable* principle to State courts in a way that might impose upon them the rigidities previously accepted only in relation to federal courts and federal judges.

7 While most of the general state tribunals that currently exist also provide for the resolution of disputes between individuals (such as in a small claims jurisdiction) it is the potential for conflict between subjects and the arms of state government that forms the basis of the *Kable-Kirk* principles.

8 The theoretical basis on which these cases rest has been subjected to considerable academic scrutiny, not always approving. For a sample, see Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397; Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641; Oscar Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35 *Sydney Law Review* 781; Alexander Vial, 'The Minimum Entrenched Supervisory Review of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531' (2011) 32 *Adelaide Law Review* 145; Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1; 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; Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216; Peter Johnston, 'State Courts and Chapter III of the Commonwealth Constitution: Is *Kable's Case* Still Relevant?' (2005) 32 *University of Western Australia Law Review* 211; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 160-65; Tarsha Gavin, 'Extending the Reach of *Kable*: *Wainohu v New South Wales*' (2012) 34 *Sydney Law Review* 395, and Nicholas Gouliaditis, 'Privative Clauses: Epic Fail Critique and Comment' (2010) 34 *Melbourne University Law Review* 870.

9 Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5; Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399; Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305; Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012)

19 *Australian Journal of Administrative Law* 127, 128–9; Suri Ratnapala and Jonathon Crowe, 'Broadening the Reach of Chapter III: the Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175; Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67; and Zach Meyers, 'Revisiting the Purposes of Judicial Review: Can There Be a Minimum Content to Jurisdictional Error?' (2012) 19 *Australian Journal of Administrative Law* 138.

10 The expression 'Balkanising' was coined by Robert French in 'Judicial exchange - Debalkanising the Courts' [2005] *FedJSchol* 13 (Federal Court of Australia) in the context of a progressive partial integration of state and Commonwealth courts that commenced when the six Australian colonies became States at Federation in 1901, a pattern which has continued since resulting in what has been called in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 'one system of jurisprudence'. Australia's pluralistic judicial system has not yet, however, reached a state of complete unification, integration and rationalisation. *Kable-Kirk* while contributing to that trend has not reached the end point of that process.

11 Regarding the concept of 'administrative justice', see Robert French, 'The Equitable Geist In the Machinery of Administrative Justice' (2003) 39 *Australian Institute of Administrative Law Forum* 1; Robin Creyke, 'Administrative Justice - Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; Sir Anthony Mason, 'Delivering Administrative Justice: Looking Back With Pride, Moving Forward With Concern' (2010) 64 *Australian Institute of Administrative Law Forum* 4; and John McMillan, 'Ten Challenges For Administrative Justice' (2010) 61 *Australian Institute of Administrative Law Forum* 23.

12 The State Administrative Tribunal (WA) (SAT), the Victorian Civil and Administrative Tribunal (VCAT), the Queensland Civil and Administrative Tribunal (QCAT), the ACT Civil and Administrative Tribunal (ACAT), the NSW Civil and Administrative Tribunal (NCAT), the South Australian Civil and Administrative Tribunal (SACAT) and the Northern Territory Civil and Administrative Tribunal (NTCAT).

13 We are conscious of the danger of overreaching by attempting to solve too many conundrums in order to propound a 'theory of everything'.

14 (1999) 198 CLR 511, [6]-[16] (Gleeson CJ); [31]-[34], [50]-[56] (McHugh J); [110], [121]-[122] (Gummow and Hayne JJ).

15 Ibid [189]; [201]-[203].

16 Ibid [227].

17 (1929) 42 CLR 48.

18 See above n 14.

19 To the extent that members of the High Court have spoken about the nature of judicial power, they have done so in terms of its core constituent elements. Thus, McHugh J in *Solomons v District Court (New South Wales)* (2002) 211 CLR 119, [49] speaks of the paradigm case of an exercise of judicial power as involving the making of binding declarations of rights in the course of adjudicating disputes about rights and obligations as a result of the operation of the law upon events or conduct that have or has occurred.

20 See, eg the entry on the philosopher, and Gottlob Frege (1848-1925) scholar, Michael Dummett in *The Internet Encyclopedia of Philosophy*, c ii: 'Frege and the Origins of Semantics', <http://www.iep.utm.edu/>.

21 We capitalise the latter term to emphasise it as a separate entity in its own right.

22 (1995) 184 CLR 163. There is extensive academic commentary on *Craig*.

23 See, Bruce Topperwien, 'Separation of powers and the status of administrative review' (1999) 20 *Australian Institute of Administrative Law Forum* 32. But cf the Chief Justice of Western Australia's critical views on this 'branch' of government found in his Whitmore Lecture 2013, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government'. (Hon Wayne Martin AC, Chief Justice of Western Australia, 1 August 2013, Sydney).

24 See Kirby J in *NSW v Commonwealth* (2006) 229 CLR 1, [534] referring to the important advantages of choice and diversity in institutions and approach, inventiveness in standards and entitlements, and scope for appropriate innovation associated with the federal form of government enshrined in the Constitution.

25 While s 77(iii) of the Constitution provides the authority for the Commonwealth Parliament to vest the judicial power of the Commonwealth in such courts of the state as it chooses, the vesting has actually been effected by s 39 of the *Judiciary Act 1903* (Cth). Federal jurisdiction is thereby conferred generally upon all state courts capable of exercising that jurisdiction, not classes or individually designated courts.

26 While the *Kable* line of cases focuses on the *nature* of various *non-judicial* functions conferred on state courts, logically the flaws and defects that attract the application of *Kable* equally apply to the exercise of *judicial* functions, including the kinds of procedures and evidentiary rules under which they operate.

27 As stated by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63]: 'It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.'

28 See also Luke Beck, 'What is a "Supreme Court of a State"' (2012) 34 *Sydney Law Review* 295.

29 *Fardon v A-G (Qld)* (2004) 223 CLR 575, [66] (Gummow J); *K-Generation* (2009) 237 CLR 501, [235]-[236] (Kirby J).

30 *Kable* (1996) 189 CLR 51, 114-115 (McHugh J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, [32] (McHugh J); *K-Generation* (2009) 237 CLR 501, [208]-[210] (Kirby J).

31 The reference to 'two grades of judicial power' first appears in *Kable* (1996) 189 CLR 51, 82, where Dawson J rejects the contention that the impossibility of there being two standards of justice requires an integration

of state and Commonwealth judicial power to the extent that a state court could not exercise non-judicial powers. McHugh J,115, however, maintains that there are not two grades of federal judicial power such that the Constitution draws no distinction between the exercise of federal judicial power by the State courts and its exercise by federal courts.

32 Thus McHugh J in *Kable* (1996) 189 CLR 51, 114, stated that the system of state courts under a Supreme Court with an appeal to the High Court under s 73 of the Constitution was an essential part of the machinery for implementing that supervision of the Australian legal system and maintaining the unity of the common law. Regarding the significance of the High Court's recognition of the unifying effect of the common law see Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337. For the reciprocal relationship, see Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131.

33 Gummow J in *Kable* (1996) 189 CLR 51, 143.

34 See *Fardon v A-G (Qld)* (2004) 223 CLR 575.

35 See *Kirk* (2010) 239 CLR 531.

36 To do so would violate the injunction of the High Court in *McGinty v Western Australia* (1996) 186 CLR 140, 168, 182-183, 231, 284-285 that implications drawn from outside the textual structure of the Constitution are impermissible. See further, Brendan Lim, 'Attributes and Attribution of State Courts – Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31.

37 Regarding the constitutional notion of incompatibility as applied in *Kable*, see, for example, *South Australia v Totani* (2010) 242 CLR 1.

38 That is, as the term functions for the purpose of Chapter III of the Constitution.

39 (1908) 8 CLR 330.

40 In fact, the notion of a non-exhaustive definition is a contradiction in terms.

41 This is a collocation of various pronouncements of the High Court seeking to distil the essential features of the concept drawn from such cases as *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Federated Saw Mill Timberyard & General Woodworkers Employees' Association v Alexander* (1912) 15 CLR 308; *A-G (Cth) v The Queen* (1957) 95 CLR 529 (PC) and *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 (HC); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, and other more recent decisions such as *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; and *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542. It does not seek to accommodate exceptional or otherwise anomalous cases such *as R v Davison* (1954) 90 CLR 353; *Luton v Lessels* (2002) 210 CLR 333, and *Thomas v Mowbray* (2007) 233 CLR 307.

42 (1983) 152 CLR 570.

43 (2011) 243 CLR 181.

44 (2011) 243 CLR 181, [30], citing the observation of Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [104], that critical notions like repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes. They added that the exigencies of government make it necessary to address issues of interpretation such as the separation of powers *flexibly and practically* as a matter of *sensible approximation.*

45 (1999) 198 CLR 511, [6]; [10]. Although delivered in dissent this general proposition is arguably true and incontestable.

46 Interestingly, to the extent that prior to the abolition of appeals to it from state courts, the Privy Council, which could hear appeals from both state supreme courts and the High Court of Australia, and hence was part of the judicature of each of them, could be said to entertain 'matters' that fell outside the concept of Commonwealth judicial power under Chapter III. Arguably, the same is true of matters that are within the jurisdiction of state courts that lack any federal element.

47 (1921) 29 CLR 257.

48 (1921) 29 CLR 257, 264, see also *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273, 277 (Barwick CJ).

49 *Kable* (1996) 189 CLR 51, 67. Brennan CJ was in dissent in the result, but his observation has a more general import.

50 With acknowledgment to the Swiss mathematician Leonhard Euler (1707-83).

51 The term 'jurisdiction' is notoriously imprecise and can be used in a variety of senses which depend on the particular statutory context: see *Kirk* (2010) 239 CLR 531, [62]-[64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

52 (1983) 152 CLR 570.

53 *Kable* (1996) 189 CLR 51, 78 (Dawson J).

54 Ibid.

55 *Kable* (1996) 189 CLR 51, 109 (McHugh J) (emphasis added) (citations omitted). His Honour was of course only dealing with the situation under the Constitution of NSW. It is arguable that where *some* State constitutions entrench a judicial review function in their Supreme Courts (as in s 73(6) of the *Constitution Act 1889* (WA)) there is a 'mini-version' of a State-based separation of judicial power mandating the same independence and impartiality as is the case under the *Kable* principle. That proposition was rejected by the WA Full Court in *S (a Child) v The Queen* (1995) 12 WAR 392, 401, but that decision was prior to both *Kable* and *Kirk* and may require reconsideration.

56 *Kable* (1996) 189 CLR 51, 114 (McHugh J) (emphasis added).

57 Georg Wilhelm Friedrich Hegel (1770-1831).

58 That is, defining A, expressed logically as ***e***, in terms of something that is not-A (logically **–*e***) – which is not the same as stating that A is not B (something else).

59 In the Hegelian analysis, this was known as the problem of *negative-presence*. The logical consequence is that given the impossibility of identifying the boundaries of one concept by reference to negative features that do not correspond with its counterpart, irreconcilable contradictions and inconsistencies prevent any unified resolution so long as the comparison is sought to be made *internally* and exclusively within the universe of the two comparative notions. A reconciling synthesis can only emerge if one gets the frame of reference to a viewpoint outside or above the singular location of the twin-notions in comparative juxtaposition. Viewed from the perspective of the Hegelian principle of non-identity, and as a generalisation from Gödel's theorem (Kurt Gödel, 1906-1978) that consistency and completeness cannot be immediately present at the same time, the contradictions between the two notions can only be reconciled by shifting the analysis to a broader context.

60 The role of s 106 of the Constitution as it affects the relationship between the Commonwealth and state constitutions, receives some consideration, *en passant*, in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 547 (Mason CJ, Wilson and Dawson JJ); *Kable* (1996) 189 CLR 51, 65 (Brennan CJ); 102 (Gaudron J); 140 (Gummow J); *McGinty v Western Australia* (1996) 186 CLR 140, 171-173 (Brennan CJ); and 207-210 (Toohey J); *Yougarla v Western Australia* (2001) 207 CLR 344, 375-380 (Kirby J); *A-G (WA) v Marquet* (2003) 217 CLR 545, [67]-[70], [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [190], [205]-[206], [216] (Kirby J) and *Totani* (2010) 242 CLR 1, [64] (French CJ); [206] (Hayne J). For commentary, see Christopher Gilbert, 'Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts' (1978) 9 *Federal Law Review* 348; Peter Johnston, 'Tidying up the Loose Ends: Consequential Changes to fit a Republican Constitution' (2002) 4 *The University of Notre Dame Australia Law Review* 189, 193; Anne Twomey, 'State Constitutions in an Australian Republic' (1997) 23 *Monash University Law Review* 312, 316; Geoffrey Lindell, 'Why is Australia's Constitution Binding? - The Reason in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 40 and Neil Douglas, 'The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution' (1990) 20 *University of Western Australia Law Review* 340. It would also raise the question of the (arguably variable) constitutional meaning(s) of a 'State' and in particular, given the oft repeated mantra that there is no doctrine of separation of powers as such applicable to state constitutions, whether it is meaningful to divide the notion of a state polity into its atomic elements such as its legislative, executive and judicial components, except as necessary to give content to a specific in concrete constitutional expression such as the Parliament of a State (Constitution, s 15) or a 'court of the State' (Constitution, s 77(iii)).

61 There are a number of deeper issues that could be explored at this point, if time permitted, particularly concerning the vexed interrelationship of state and Commonwealth constitutions and the role of both covering clause V of the *Commonwealth of Australia Constitution Act 1900* (UK) and s 106 of the Constitution. The notion of 'a Constitution of the State' as constituent elements for the purpose of s 106 would also require exploring the different notions of a 'State' (and its component entities, parliament, executive government and courts).

62 James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

63 The tendency towards 'convergence' exerted by the gravitational pull of Chapter III has been explored by Stephen McLeish, 'The Nationalisation of a State Court System' (2013) 24 *Public Law Review* 252 and Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of Jurisdictional Error Review in Australia' (2000) 11 *Oxford University Commonwealth Law Journal* 117.

64 Seeking to differentiate the two kinds of judicial power by reference to their *constitutional origins* is open to debate. As Windeyer J said in *Felton v Mulligan* (1971) 124 CLR 367, 393, (approved by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* (1983) 152 CLR 570, 606): 'The existence of federal jurisdiction depends upon the *grant of an authority* to adjudicate rather than upon the *law to be applied* or the subject of adjudication.' (emphasis added). However, if by 'grant of an authority' their Honours meant *constitutional sources*, this statement is not inconsistent with the proposition that we have put forward.

65 The *protective* objective of the *Kable* principle is enunciated by Kirby J in *K-Generation* (2009) 237 CLR 501, [232], His Honour held that once a body is characterised as a 'court of the State' within s 77(iii), it is part of the integrated Judicature of the Commonwealth and attracts the *Kable* standards to protect the litigants who invoke its jurisdiction.

66 William of Ockham (c 1285- c 1349); ie, paring all assumptions to the minimum.

67 See, eg, *The Internet Encyclopedia of Philosophy* entry: 'Jain Philosophy – 2 Epistemology And Logic', <http://www.iep.utm.edu/>: 'Underlying Jain epistemology is the idea that reality is multifaceted … such that no one view can capture it in its entirety; that is, no single statement or set of statements captures the complete truth about the objects they describe.'

68 Such words (meaning and content) are often used interchangeably (see, for example, *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ), however we mean 'denotation' (meaning) and 'composition or nature' with reference to content.

69 Perhaps the concept of judicial power is so amorphous that no 'boundary line' or marker-pegs can delineate the respective fields; perhaps any boundary lines that can be suggested are so porous that they admit exceptions that largely render this attempt to distinguish the two concepts as effectively meaningless or inutile.

70 Although the absence of a separation of powers under state constitutions has long been acknowledged (see the cases and authorities cited by French CJ, n 37, in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, including Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 344–349) it should be noted that the denial of such a doctrine in state constitutional law has been directed to the specific kind of *separation of judicial power* as mandated by Chapter III. This is to be distinguished from the different requirements of an implied impartiality and independence of courts under the *Kable* doctrine which, although derived from specific provisions in Chapter III, are confined to the limited universe of ensuring that state courts borrowed for the purpose of exercising the judicial power of the Commonwealth retained, as the core attribute, the requisite degree of impartiality and independence. To the extent that Justices such as Dawson J, in *Kable*, (see at 77-78) have stated that there is no equivalent doctrine of separation of powers operating in the constitutional sense in New South Wales, his Honour's observations should be confined to New South Wales specifically and not extrapolated to those other Australian states whose constitutions entrench the judicial review function of their Supreme Courts.

71 See Kenny J in *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172, [24]-[27] (FC) in which her Honour distinguishes the notion of state executive power from that exercised by the Commonwealth under s 61 of the Constitution, as is discussed in *Williams v The Commonwealth* (2012) 248 CLR 156.

72 On analysis, the High Court cases where *Kable* has been invoked (above n 3) can be distributed among four broad categories, the first three of which concern criminal proceedings where preventative detention of a person, over and above any prison sentence, is authorised for the protection of the community (*Kable*, *Fardon* and *Baker,* for example); a person, by reason of his or her connection with the group declared to be unlawful association, is subject to restrictive constraints on their liberty and freedom of association (*Gypsy Jokers*, *K-Generation*, *Totani* and *Wainohu*) or the property of the person is legislatively confiscated upon conviction of repeated offences (*Emmerson*). These are all concerned with the nature of the function performed by the court or the procedures required to be observed. The fourth category, which for analytic purposes need not be considered further, is exemplified by *Forge* where the *Kable* challenge was directed *not* to what the court is *required to do* but rather *how it is constituted* in terms of its judicial membership. Since formulating these categories in our initial draft we note that Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, also argue that these decisions including *Kirk* can be placed into four interrelated categories; the first dealing with the constitution of state courts in the strict sense of the term; the second concerning impermissible grants of jurisdiction to state courts or judges as *personae designatae*; the third, dealing with impermissible withdrawal of jurisdiction from state courts and the fourth concerning itself with procedural guarantees associated with the doctrine of institutional integrity. Even if these categorisations are variations within the same theme, our basic contention is that the *Kable-Kirk* doctrines can be conceptually confined within a relatively restricted class involving the classic exercise of judicial power in circumstances where the liberty or property of the subject is entailed.

73 *Wheat Case* (1915) 20 CLR 54.

74 See, *Wheat Case* (1915) 20 CLR 54, 64 (Griffiths CJ) citing *Leeson v General Council of Medical Education* (1889) 43 Ch D 366, 379 (Cotton LJ) that the word 'adjudication' is well known to lawyers, and regarded as apt to describe the functions of an *administrative body entrusted with quasi-judicial pow*ers.

75 *Wheat Case* (1915) 20 CLR 54, 70.

76 *Wheat Case* (1915) 20 CLR 54, 83; 87.

77 *Wheat Case* (1915) 20 CLR 54, 109-110.

78 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371.

79 As Mark Leeming, 'The Riddle of Jurisdictional Error' (2014) 38 *Australian Bar Review* 139, 141 indicates the distinction between courts and administrative tribunals, at the state level, is not straightforward since, although in *Kable* and *Kirk* there is much discussion of the 'essential features' of courts of the state there is in fact no unmistakable hallmark to identify a court. In *Kirk*, [68], the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) identified the distinction between courts and administrative tribunals as the lack of authority of an administrative tribunal to finally determine questions of law. What is essential and what goes to the existence of judicial power are highly contestable questions that are dependent upon the relevant state law. Certainly, some state general administrative tribunals closely resemble courts in terms of their procedures and the capacity to interpret the law and determine rights but that those features alone might be illusory. The distinction is 'blurred' by the fact that a tribunal may be a court for one purpose but not necessarily for the purpose of s 77(iii) of the Constitution.

80 *Totani* (2010) 242 CLR 1, [62]-[68] (French CJ).

81 *K-Generation* (2009) 237 CLR 501, [82].

82 *Posterior Analytics*, Bk 1 ch 4.I. Determining the essential nature of something involves a comparative exercise distinguishing between those features that the expressive model shares in common with other phenomena of the *same* kind as well as differentiating the features that are not inherent as between those phenomena. This necessarily entails a deductive process of categorisation requiring some classification of their salient attributes. As part of that process, Aristotle distinguished between the terms that we give to a subject, defining the kind of thing it is *in itself*, as against those attributes, described as its properties, which are inherent in it. According to the classical view, categories should be clearly defined, mutually exclusive

and collectively exhaustive. This way, any entity of the given classification universe belongs unequivocally to one, and only one, of the proposed categories.

83 See, Seibt, Johanna, 'Process Philosophy', in *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), <http://plato.stanford.edu/archives/fall2013/entries/process-philosophy/>.

84 Again, Aristotelian analysis distinguishes between essential properties which had to be present in order to characterise a particular theme 'is' and accidental properties which could be present or absent without detracting from that essential nature. It also accommodates an overlap between corresponding features of different models where ***p*** is a feature common to both but where the two models might share overlapping characteristics [***p and q***] and still be classified as 'the same'.

85 Fuzzy logic, like the cognate concept of probability, addresses the problem of *definitional uncertainty*. Fuzzy logic, given the indeterminacy of a class definition, asks *how much* a variable property or quality is in a set of characteristics (either entirely, partially or not in the set). The degree to which the 'defining characteristics' are present in the set can be conveyed, linguistically, by '*hedge*' adverbs such as 'very' or 'largely'. Fuzzy set theory stands in contradistinction to the precise, exact true/false distinctions of classical Aristotelian logic.

86 Regarding the different natures of tribunals and courts, see Allan Hall, 'Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal' (1994) 22 *Federal Law Review* 13; Enid Campbell, 'The Choice Between Judicial and Administrative Tribunals and the Separation of Powers' (1981) 12 *Federal Law Review* 24 and Duncan Kerr, 'State Tribunals and Chapter III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622.

87 *Kirk* (2010) 239 CLR 531, [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Regarding this observation, Matthew Groves, 'Reforming Judicial Review at the State Level' [2010] *UMonashLRS* 5 comments: 'In [*Kirk* at [69]] the High Court noted that the distinction between courts and tribunals "may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution." This cryptic passage might be interpreted as an acceptance of the blend of judicial and administrative functions that has arisen in some State tribunals.'

88 *K-Generation* (2009) 237 CLR 501.

89 The *name* given to the institution, whether a court, commission or tribunal, is not determinative: see *Forge* (2006) 228 CLR 45, [61] (Gummow, Hayne and Crennan JJ).

90 Set forth in s 28A of the *Liquor Licensing Act 1997* (SA).

91 *K-Generation* (2009) 237 CLR 501, [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). In maintaining this submission that if the procedural restriction so altered the character of the Licensing Court as to render it no longer a 'court of a State' which might exercise federal jurisdiction, two of the intervening States further contended that this was not inconsistent with the implied requirement under s 77(iii) that the states maintain a system of courts capable of being invested with federal jurisdiction. That was because the creation or abolition of any single court, other than the Supreme Court, was entirely a matter for the state concerned. There is some sense in this proposition if one regards s 77(iii) as operating distributively and in an ambulatory way upon the state courts that do exist at any one time without taking the first step that a state cannot abolish or alter any such a court. Given that vesting jurisdiction requires statutory intervention by the Commonwealth, as is the case with the enactment of s 39 of the *Judiciary Act 1903* (Cth), s 77(iii) has only a contingent and temporary operation. To assert that once the *Judiciary Act 1903* (Cth) came into operation it rigidly fixed the nature of particular state courts so that they could not be altered would seem to contravene the *Melbourne Corporation* doctrine as reformulated in *Austin v New South Wales* (2003) 215 CLR 185.

92 Ibid [154].

93 These possible issues capable of attracting Federal jurisdiction are noted in *K-Generation* (2009) 237 CLR 501, [222]. For example, where a State planning court was involved with a Commonwealth authority, see *Defence Housing Australia v Randwick City Council* [2013] NSWLEC 59 (DHA, a party, was there held to be the 'Crown in right of the Commonwealth').

94 Reflecting their counterparts in Aristotelian logic, Dixon CJ employed the distinction between essential, accidental and incidental, notably in the *Boilermakers' case* itself: *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 275-276 as well as other cases such as *Greutner v Everard* (1960) 103 CLR 177, 185-186 and *Hall v Braybrook* (1956) 95 CLR 620, 626; 635.

95 That is, indifferent or alien to the *purpose* of s 39(2) of the *Judiciary Act 1903* (Cth) in vesting Federal jurisdiction in a state court.

96 This respect for the original objectives of the Federation is evident in such recent cases as *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth (*2012) 248 CLR 156, and *Williams v Commonwealth* (2014) 88 ALJR 701, where the High Court held that there were limits on the capacity of the Commonwealth government to fund directly projects in the States outside the heads of Commonwealth legislative power by relying on the executive power of the Commonwealth under s 61 of the Constitution to expend Commonwealth moneys. The Court held instead that in such cases payments to the intended recipient should be channelled via the states as grants of financial assistance under s 96 of the Constitution. In that regard there is a parallel between ss 77(iii) and 96. In restricting the scope of the Commonwealth spending power under s 61 by reference to the constitutionally-provided means in s 96 the Court seems to have treated the latter as a *constitutionally embedded* provision, without taking into account that s 96 is vulnerable to *legislative repeal* under s 51(xxxvi) of the Constitution. Is there then some analogy with

Chapter III in so far as the vesting of state courts with federal jurisdiction is not *constitutionally entrenched* but is still contingent on the exercise of legislative power by the Commonwealth Parliament? Repeal of s 39 of the *Judiciary Act 1903* (Cth) or its amendment to operate in only very specific circumstances, such as vesting particular nominated state court with relevant jurisdiction, reveals the truly transitory and very fragile basis on which the edifice of *Kable* has been erected. The same is not true, however, as to the entrenched nature of the supervisory jurisdiction of state Supreme Courts as declared to be the case in *Kirk*. The constitutional basis for that entrenchment is the constitutionally preserved jurisdiction exercised historically by colonial supreme courts in the 19th century as an essential characteristic of those supreme courts.

97 (1976) 1 ALD 251 (AAT). The extent to which a body like the SAT can make rulings based on prohibitions derived from the Commonwealth Constitution has not been determined by the High Court. As a matter of practice there are examples where state tribunals have proceeded to do so: see, eg *Treby and the Local Government Standards Panel* (2010) 73 SR (WA) 66 (Pritchard DCJ) ruling on whether the implied freedom of political communication applied in relation to an alleged breach of local government conduct rules. Likewise, what jurisdiction is being exercised when a Tribunal invokes s 109 of the Constitution to resolve conflicts of laws? See, eg, *Adi Limited and Commissioner for Equal Opportunity* [2005] WASAT 259 (Equal Opportunity exemption application); and *Lenzo and Executive Director, Department of Fisheries (WA)* [2005] WASAT 218 (applicable fisheries laws). *Shaboodien and Dental Board of Western Australia* [2008] WASAT 102 required Barker J to examine the Mutual Recognition arrangements between the States and the Commonwealth flowing from both statute and the Constitution.

98 Ibid 253-255 (Brennan J); Robin Creyke & John McMillan, *Control of Government Action,* (LexisNexis Butterworths, 3rd edition, 2012) 280.

99 This would include determining issues of validity of the kind considered in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

100 Cf *K-Generation* (2009) 237 CLR 501, [83]-[85] on establishment as a 'court of record' (French CJ); see also *Forge* (2006) 228 CLR 45, [61] (Gummow, Hayne and Crennan JJ).

101 Ibid [157]; [202].

102 See also, Enid Campbell, 'What are Courts of Law?' (1998) 17 *University of Tasmania Law Review* 19.

103 In *Kirk,* at [69], the plurality stated: 'Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.' Similarly, Kirby J in *K-Generation* (2009) 237 CLR 501 stated, [229]: 'There is substance in the submission advanced by Victoria regarding the well-established principle that State courts and judges are not subject to all of the separation of powers requirements as have been held to apply to federal courts and judges. Any statement of the *Kable* principle therefore needs to reflect appropriately that differentiation.'

104 The proposition that a body cannot be vested with the judicial power of the Commonwealth if it performs non-judicial functions inimical or antithetical to its capacity to exercise such federal jurisdiction is logically circular if it rests upon the foundation of the state law empowering it disqualifying it from being a 'court'.

105 Robert French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (2013) 23 *Journal of Judicial Administration* 3.

106 Ibid 11, citing *Totani* (2010) 242 CLR 1 that 'perhaps the most important of the characteristics of a court is its *decisional independence* from the Executive and from other external influences'.

107 This was held not to be essential in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

108 The significance of decisional interdependence in multi-member courts at intermediate or final appellate level would no doubt arise for consideration if a state law were passed requiring such courts to produce only one majority judgment and prohibiting the publication of dissenting judgments, testing the boundaries of what is and is not essential to the characterisation of a decision-making body as a court.

109 See also, David Rowe, 'State Tribunals Within and Without the Integrated Federal Judicial System' (2014) 25 *Public Law Review* 48.

110 Although it has considered special function bodies like the NSW Industrial Relations Commission in *Kirk* and the SA Licensing Court in *K-Generation*.

111 *Owen v Menzies* [2013] 2 Qd R 327(CA); [2013] HCATrans 18. Special leave to appeal was refused: n 371. The views of the Federal and NSW courts on this same issue are discussed in this case. Now see *Qantas Airways Ltd v Lustig* [2015] FCA 253 (Perry J) holding the opposite to the Queensland position with respect to VCAT. Curiously, *Owen v Menzies* was, apparently, not cited to her Honour.

112 Cf *Lane v Morrison* (2009) 239 CLR 230 (military justice and courts of record). Cf above n 100.

113 (2006) 32 WAR 501, [115].

114 See also *Mustac v Medical Board of WA* [2007] WASCA 128 (the extent to which the State Administrative Tribunal was bound by court precedents); *BGC Construction and Vagg* [2006] WASAT 367 (SAT awarding interest under statute as a 'court').

115 Cf *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142 (VCAT as a judicial organ of the State for commercial arbitration purposes), but cf the cases cited [73] n 49 (Beach JA). See also, Maya Narayan, 'Creature of Statute, Beast of Burden: The Victorian Civil and Administrative Tribunal and the Heavy Lifting of Human Rights' (2011) 66 *Australian Institute of Administrative Law Forum* 1. Now see also, *Qantas Airways Ltd v Lustig* [2015] FCA 253 (Perry J) holding that VCAT is not 'a court of a State' for Chapter III purposes.

116 (Federation Press, 2014), see ch 6.
117 (2013) 23 *Journal of Judicial Administration* 3, 5.
118 We do not address here issues such as whether the Commonwealth would be constitutionally bound by the relevant state law or whether it should be taken to submit itself to that law. Similarly, we do not address the question of whether the Commonwealth Parliament could legislatively reduce the impact of *Kable-Kirk* by amending s 39(2) of the *Judiciary Act 1903* (Cth) so that, say, it only vests the judicial power of the Commonwealth in specified state courts (such as if prescribed by regulation from time to time).
119 Under applied Western Australian law, such state jurisdiction could potentially exist with respect to a federal territory, by reason of a Commonwealth law. See *Gaseng Petroleum (Christmas Island) and Shire of Christmas Island* [2005] WASAT 208 (a town planning case on review, from Christmas Island).
120 *Planning and Development Act 2005* (WA), s 244 (internal review by a Judicial Member only on a question of law as to non-legally qualified members' planning decisions). This is very much a truncated and summary procedure, done on the papers. Although remittal orders have been made by SAT's Judges, it would appear that an express grant of statutory authority to do the same is required. Cf *State Administrative Tribunal Act 2004* (WA) s 105(9)(c), powers of the Supreme Court on appeal from SAT, and cf *Linou v Mason and Workers Compensation Appeal Tribunal* (1992) 59 SASR 117, 122-123 (FC); *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 69, [5] (Mildren J); *Hewett v Medical Board of Western Australia* [2004] WASCA 170, [230] (Miller J); *R v Dodds; Ex parte Smith* [1990] 2 Qd R 80 (FC), all of which cases have held that an express power to remit is needed. Further, the summary nature of the review may be frustrated by finding an implied power of remittal.
121 In such cases, which bear a strong element of criminal jurisprudence, it is imperative to keep the courts, both federal and state, at arms' length from the executive (a kind of constitutionalisation of the procedural fairness/bias rule) or to strike down state laws that impermissibly mandate draconian procedures egregiously departing from traditional common law, adversarial standards, such as where the legislature dictates a given outcome (representing a constitutionalisation of the 'fair hearing' rule). To apply such an implied limitation to state laws as the essence of *Kable-Kirk* is arguably consistent with the High Court's direction that implied prohibitions should only be recognised *to the extent that they are 'necessary'*.