

# GIVING CHAPTER III BACK ITS CONSTITUTIONAL MOJO? – LESSONS FROM STATE COURTS AND BEYOND

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*The High Court's approach to Chapter III of the Commonwealth Constitution has, since the case of *Boilermakers*,<sup>1</sup> frequently been the subject of criticism. This paper explores whether there might be scope to revisit this 'over-constitutionalised' approach using some recent decisions, including *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*, as an exemplar for the analysis.*

## I INTRODUCTION

The constitutional case of *R v Kirby; Ex parte Boilermakers' Society of Australia*,<sup>1</sup> although far from uncriticised,<sup>2</sup> has arguably contributed more than any other decision to the development of Australia's federal ch III jurisprudence. The High Court and Privy Council judgments confirmed that Commonwealth judicial power could only be exercised by the courts listed in s 71 of the *Commonwealth Constitution*, and added the qualification that non-judicial Commonwealth powers could not be exercised by such judicial bodies. This article traces the constitutional shortcomings of the second limb of *Boilermakers*, and argues that the decisions of *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*<sup>3</sup> and *Magaming v The Queen*<sup>4</sup> hint at the potential for revisiting constitutional orthodoxy. The paper proposes a new contextual incompatibility approach to ch III of the *Constitution* that would, to some extent, collapse the *Boilermakers*' test and the state approach from *Kable v DPP (NSW)*.<sup>5</sup> This reformed approach would iron out some of the constitutional wrinkles plaguing the interpretations of ch III, and provide a more functional and transparent means of assessing the constitutional validity of functions while allowing variable applications across federal and state courts.

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1 (1956) 94 CLR 254 ('*Boilermakers*'), aff'd *A-G (Cth) v The Queen; Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

2 See heading III below.

3 (2013) 295 ALR 596 ('*TCL Air Conditioner*').

4 (2013) 302 ALR 461 ('*Magaming*').

5 (1996) 189 CLR 511 ('*Kable*').

## II THE BOILERPLATE OF *BOILERMAKERS*'

The implications of ch III of the *Constitution*'s conferral of federal judicial power were set down by the High Court in the pivotal case of *Boilermakers*,<sup>6</sup> and later affirmed by the Privy Council.<sup>7</sup> By majority,<sup>8</sup> the High Court in *Boilermakers* held that the Commonwealth Court of Conciliation and Arbitration was not constitutionally able to coalesce its exercise of arbitral functions with Commonwealth judicial functions. The case set out two ch III limitations. First, as confirmed in earlier cases,<sup>9</sup> the judicial power of the Commonwealth could only be given to a court listed in s 71 of the *Constitution*. Second, that it is unconstitutional for the Commonwealth to confer non-judicial (non-incident) power on a ch III court.<sup>10</sup> The majority rationalised the limitation by stating:

It is true that [ch III] is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap. III to any other source of power ... affirmative words ... may have also a negative force ...<sup>11</sup>

They continued:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our *Constitution* was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss. 1, 61 and 71.<sup>12</sup>

On appeal to the Privy Council,<sup>13</sup> the High Court majority's approach to ch III was affirmed. Viscount Simonds, in delivering the judgment for their Lordships, said that the crux of the case was 'whether and how far judicial and non-judicial power can be united in the same body', and indicated that 'there is nothing in Chap. III, to which alone recourse can be had, which justifies such a union'.<sup>14</sup> It is the second limb, rather than the first, which has proven to be the most troubling in practice.

6 (1956) 94 CLR 254.

7 See *A-G (Cth) v The Queen; Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

8 Dixon CJ, McTiernan, Fullager and Kitto JJ.

9 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 441 (Griffith CJ), 450 (Barton J), 465 (Isaacs and Rich JJ), 489 (Powers J) ('*Waterside Workers*').

10 *Boilermakers* (1956) 94 CLR 254, 289 (Dixon CJ, McTiernan, Fullager and Kitto JJ); *A-G (Cth) v The Queen; Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 540–1.

11 *Boilermakers* (1956) 94 CLR 254, 270.

12 *Ibid* 275.

13 *A-G (Cth) v The Queen; Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

14 *Ibid* 539 (Viscount Simonds delivered their Lordships' judgment).

### III BOILERMAKERS' AS HYDRA: THE PROBLEM

The polycephalous, and ever robust, Hydra of Greek mythology was a snake-like water beast. Its hardiness lay in its purported ability to grow two heads in place of any one severed.<sup>15</sup> The *Boilermakers'* doctrine, while only two-limbed, has proven similarly durable and, like the Hydra, has managed to adapt when challenged. While the doctrine's sturdiness could be perceived as a virtue, this article argues that the maintenance of the second limb of *Boilermakers'*, in the face of significant qualifications and exceptions, is a weakness justifying its defeat.

The first limb in *Boilermakers'*, that the exercise of judicial power was reserved for courts listed in s 71 of the *Constitution*, was established orthodoxy by the 1950s.<sup>16</sup> However, the case's second branch, that federal courts could not exercise non-judicial power unless ancillary or incidental, has long been seen as an overreach.<sup>17</sup> It severely complicates and obscures ch III unnecessarily. In *Joske*, Barwick CJ criticised the *Boilermakers'* addition as being 'unnecessary ... for the effective working of the *Australian Constitution* or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power'.<sup>18</sup> His Honour noted that it resulted in 'excessive subtlety and technicality ... without any compensating benefit'.<sup>19</sup>

The plurality in *Boilermakers'* went well beyond earlier statements of the Court in relation to the constraints of ch III.<sup>20</sup> As has frequently been noted, the text of

15 Susan Woodford, 'Displaying Myth: The Visual Arts' in Ken Dowden and Niall Livingstone (eds), *A Companion to Greek Mythology* (Wiley-Blackwell, 2011) 157, 158.

16 See, eg, George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 61.

17 See, eg, *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1973) 130 CLR 87, 90 (Barwick CJ), 102 (Mason J) ('*Joske*'); George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law — Essays in Honours of Professor Leslie Zines* (Federation Press, 1994) 185, 188; Winterton, *Parliament, the Executive and the Governor-General*, above n 16, 61–3; Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 (December) *Canberra Bulletin of Public Administration* 1, 6; Sir Anthony Mason, 'Judicial Review: Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 339; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 299; Fiona Wheeler, 'The *Boilermakers* Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 172; Justice Else-Mitchell quoted in Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 194–5; A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 75–6; James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 113.

18 (1973) 130 CLR 87, 90.

19 *Ibid.*

20 See *Waterside Workers'* (1918) 25 CLR 434, 441 (Griffith CJ), 450 (Barton J), 465 (Isaacs and Rich JJ), 489 (Powers J); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 116 (Evatt J); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1937) 59 CLR 556, 567 (Latham CJ), 590 (McTiernan J), 588 (Dixon and Evatt JJ) (where it was assumed that functions that were not inconsistent with judicial power might be exercisable).

ch III (and intentions of the Constitution's framers) did not require the grafting of the 2<sup>nd</sup> limb.<sup>21</sup> As the Commonwealth submitted in *Boilermakers*:

Section 71 does not suggest that the courts shall have only judicial powers, nor is there anything in s. 73 (iii.) which indicates that the framers of the *Constitution* had any hard and fast notions on divisions of power.<sup>22</sup>

Indeed, as de Smith has noted, the courts in the United Kingdom have not had their functions so narrowly confined but have still been able to maintain their status as independent institutions.<sup>23</sup>

The real concern is whether non-judicial powers, which are not suitably incidental or ancillary to the exercise of judicial power, should be excluded from federal judicial exercise when the incidental/ancillary exception only provides a very narrow release from the concentration upon judicial power.<sup>24</sup> As Joseph and Castan have argued:

There is no doubt that certain functions, such as the 'core' of legislative (for example, enacting statutes) or executive powers (for example, performing a ministerial role) cannot and should not be invested in a court. However, it may be questioned whether the judicial process is tainted by a court's involvement in the exercise of *any* non-judicial power ... as not all ... functions are 'political'.<sup>25</sup>

There was an obvious and much less extreme option available to the Court: to allow the exercise of non-judicial powers if they did not compromise or were not incompatible with the continued ability to exercise judicial power under ch III. This was the approach that Williams J adopted in his dissent in *Boilermakers*. His Honour was comfortable with non-judicial powers being exercised as long as they were not 'functions which courts are not capable of performing consistently with the judicial process' as 'nothing must be done which is likely to detract from their complete ability to perform their judicial functions'.<sup>26</sup> The preferability of an incompatibility doctrine is that it would protect the role of the judiciary while not foiling a 'federal court from exercising a function which might conveniently

21 J M Finnis, 'Separation of Powers in the *Australian Constitution*: Some Preliminary Considerations' (1967) 3 *Adelaide Law Review* 159; Winterton, *Parliament, the Executive and the Governor-General*, above n 16, 62; Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 207–9; Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96, 104; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 9, 36; Wheeler, 'The *Boilermakers Case*', above n 17, 167–8.

22 *Boilermakers* (1956) 94 CLR 254, 260. See also *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 271 (Higgins J); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 368 [60] (Kirby J) ('*Albarran*').

23 S A de Smith, 'Separation of Powers in Australia' (1957) 20 *Modern Law Review* 391, 393.

24 See, eg, *R v Joske; Ex parte Shop Distributive and Allied Employees Association* (1976) 135 CLR 194, 216 (Mason and Murphy JJ).

25 Sarah Joseph and Melissa Castan, *Federal Constitutional Law — A Contemporary View* (Lawbook, 3<sup>rd</sup> ed, 2010) 196 (emphasis in original).

26 *Boilermakers* (1956) 94 CLR 254, 314–15.

be undertaken by a court and [which] is not necessarily incompatible with the exercise of judicial power'.<sup>27</sup>

However, in spite of this chequered history, in *TCL Air Conditioner* French CJ and Gageler J confirmed that the second limb of *Boilermakers*' has been the High Court's approach since 1956.<sup>28</sup> So, why in light of such resounding criticism has the second limb not been detached from the Hydra of *Boilermakers*'? There are 3 notable reasons for its longevity.

First, the stringency and profound 'inconvenience'<sup>29</sup> of the non-judicial prohibition has been softened by a number of exceptions to the second limb — most notably, the 'chameleon powers' doctrine. This troubling exception<sup>30</sup> allows 'functions [to] take their character ... from the body on which they are conferred'<sup>31</sup> such that functions which might be assigned as legislative or executive in nature are suitable for judicial conferral because they are curially vested.<sup>32</sup> Kirby J commented on the potential for this exception, if 'uncontrolled', to 'subvert the constitutional separation of powers'.<sup>33</sup>

The *persona designata* exception has enhanced the rubberiness of *Boilermakers*'.<sup>34</sup> This exception permits non-judicial power to be exercised by ch III judges if the exercise occurs in a personal capacity and is not incompatible with the judge's judicial role and the exercise of the judicial power of the Commonwealth.<sup>35</sup> The problem with this doctrine is that it appears synthetic, at least when it is applied to functions taken on within their normal court setting.<sup>36</sup> As Mason and Deane JJ noted in *Hilton v Wells* in their dissenting judgment:

To the intelligent observer ... it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a

27 Mason, 'A New Perspective on Separation of Powers', above n 17, 6. See also Mason, 'Judicial Review: Constitutional and Other Perspectives', above n 17, 339; Winterton, *Parliament, the Executive and the Governor-General*, above n 16, 62; *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 260 [60] (Weinberg, Bennett and Edmonds JJ) ('*Hussain*').

28 (2013) 295 ALR 596, 605 [26].

29 *Hussain* (2008) 169 FCR 241, 278 [159] (Weinberg, Bennett and Edmonds JJ).

30 See P H Lane, 'The Decline of the *Boilermakers*' Separation of Powers Doctrine' (1981) 55 *Australian Law Journal* 6, 14; John de Meyrick, 'Whatever Happened to *Boilermakers*? Part I' (1995) 69 *Australian Law Journal* 106, 115–19; John de Meyrick, 'Whatever Happened to *Boilermakers*? Part II' (1995) 69 *Australian Law Journal* 189, 189, 193.

31 *Kable* (1996) 189 CLR 51, 106 (Gaudron J).

32 *R v Davison* (1954) 90 CLR 353, 369–70 (Dixon CJ and McTiernan J); *Thomas v Mowbray* (2007) 233 CLR 307, 326–7 [12] (Gleeson CJ).

33 *Albarran* (2007) 231 CLR 350, 371 [70]. See also *Thomas v Mowbray* (2007) 233 CLR 307, 413 [303], 425–8 [339]–[344] (Kirby J).

34 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) ('*Wilson*').

35 *Grollo v Palmer* (1995) 184 CLR 348, 362–5 (Brennan CJ, Deane, Dawson and Toohey JJ) ('*Grollo*'); *Wilson* (1996) 189 CLR 1, 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

36 See, eg, *Hussain* (2008) 169 FCR 241, 279 [160], [165] (Weinberg, Bennett and Edmonds JJ); Mason, 'A New Perspective on Separation of Powers', above n 17, 5.

private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.<sup>37</sup>

The difficulty is ensuring that these exceptions do not, at best, undermine, and at worst, eat up, the non-judicial *Boilermakers'* proscription.<sup>38</sup> As Campbell has persuasively argued:

It seems odd to relegate the idea of *Grollo* incompatibility, with its various advantages, to the position of having to cure the problems that may be caused by *persona designata*, when it could serve as an effective substitute for that clearly defective notion.<sup>39</sup>

The second reason for the doctrine's continuance is the amorphousness of the boundaries of 'judicial power'.<sup>40</sup> The High Court has shied away from clearly defining the scope of judicial power, and has instead relied upon a shopping list of indicative factors.<sup>41</sup> This formlessness has given the Court considerable flexibility in its application of *Boilermakers'*, as was evident in the majority's reluctance to class the control order functions conferred in *Thomas v Mowbray*<sup>42</sup> as non-judicial. As Wheeler has explained:

the first and second limbs of the separation of federal judicial power have never been rigidly applied by the High Court. Rather, their application has nearly always been fashioned, within certain limits, to changing circumstances, producing what Professor Geoffrey Sauer described as a 'commonsense adjustment of doctrine to practical need'.<sup>43</sup>

The third reason is that *Re Wakim*<sup>44</sup> meant that the music stopped for those revelling in the chance of a *Boilermakers'* turnaround. This decision saw a majority of the High Court invalidate cross-vesting legislation, which allowed state Parliaments to confer state jurisdiction on federal courts. Although also a

37 (1985) 157 CLR 57, 84.

38 Colin D Campbell, 'An Examination of the Doctrine of Persona Designata in Australian Law' (2000) 7 *Australian Journal of Administrative Law* 109, 120; Zines, *The High Court and the Constitution*, above n 17, 262; Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000), 469. See also Wheeler, 'The *Boilermakers* Case', above n 17, 172.

39 Campbell, above n 38, 120.

40 Fiona Wheeler, 'The Separation of Judicial Power and Progressive Interpretation' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent — Essays in Honour of George Winton* (Federation Press, 2009) 227–9; Wheeler, 'The *Boilermakers* Case', above n 17, 171; Suri Ratnapala, *Australian Constitutional Law — Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 124–5.

41 *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 66–7 (McHugh J) ('*Chu Kheng Lim*'); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 124–5 [78] (Kirby J).

42 (2007) 233 CLR 307.

43 Wheeler, 'The Separation of Judicial Power and Progressive Interpretation', above n 40, 229–30. See also Colin Howard, *Australian Federal Constitutional Law* (Law Book, 2nd ed, 1972) 154.

44 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

much criticised determination,<sup>45</sup> Wheeler has noted that overruling *Boilermakers*' has become much harder because of the degree to which *Re Wakim* reinforced, and was consistent with, 'the exhaustive nature of Chapter III of the *Constitution*' set down in *Boilermakers*'.<sup>46</sup>

Essentially, the second limb of *Boilermakers*', although problematic, has been consistently eluded through judicial contortions.<sup>47</sup> And, as Lynch contends in his *Thomas v Mowbray* critique, '[i]t is difficult to know what point of principle is served by further lip service to that doctrine'.<sup>48</sup> Why then is it particularly time to reconsider its continuance now? It is submitted that there are two prime reasons that it is timely to consider departing from the *Boilermakers*' non-judicial proscription.

First, *Boilermakers*' is unable to adequately supervise the separation of judicial powers, particularly in light of the changing societal expectations of the judiciary. The need for adaption is not new to the judicature.<sup>49</sup> However, there is increasing pressure on the courts to take on national security/terrorism focused functions,<sup>50</sup> assist with the challenges of organised crime,<sup>51</sup> accommodate non-adversarial tendencies,<sup>52</sup> and respond to the expectations of a human rights culture.<sup>53</sup> These changes present real difficulties for *Boilermakers*'. Not only does the second limb of *Boilermakers*' preclude the conferral of a wider range of functions on the judiciary, but it also assumes that the classification of the function conferred is an adequate protection of the curial role. For this reason, 'substance over form' glosses have been added to the federal ch III inquiry. In *Thomas v Mowbray*, this was evident in the plaintiff's two-stage submissions which, building on decisions like *Polyukhovich v Commonwealth*<sup>54</sup> and *Chu Kheng Lim*<sup>55</sup> argued that if the power to make a control order was judicial — and hence in compliance with

45 See, eg, Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 186.

46 Wheeler, 'The *Boilermakers* Case', above n 17, 173; see also Fiona Wheeler, 'The Rise and Rise of Judicial Power Under Chapter III of the *Constitution*: A Decade in Overview' (2000) 20 *Australian Bar Review* 282; Saunders, above n 21, 13.

47 See Andrew Lynch, 'Thomas v Mowbray — Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182, 1201.

48 Ibid 1201, 1210.

49 Ralph Cavanagh and Austin Sarat, 'Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence' (1980) 14 *Law & Society Review* 371, 411.

50 See *Thomas v Mowbray* (2007) 233 CLR 307.

51 See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*'); *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*'); *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*'); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 ('*Condon*').

52 See, eg, Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, 2009); Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Federation Press, 2014).

53 See, eg, Stellios, above n 17, 135; Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers*' and the Separation of Judicial Power in Australia' (2012) 31 *University of Queensland Law Journal* 265, 279; *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

54 (1991) 172 CLR 501 ('*Polyukhovich*').

55 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

*Boilermakers*’— it was ‘inconsistent with the essential character of a court or with the nature of judicial power’.<sup>56</sup> Further, the *Boilermakers*’ exceptions, which have been crafted by the Court, cast doubt on the ability of the test to adapt in a logical and constitutionally defensive way.

Second, the High Court’s development in the state court context of the post-*Kable* line of cases, discussed below, points to a real opportunity for a rationalisation in the approach to ch III. *TCL Air Conditioner* has highlighted that a potential streamlining of ch III is not purely quixotic.

#### IV *TCL AIR CONDITIONER* — A COOL CHANGE?

The *TCL Air Conditioner* decision<sup>57</sup> concerned the constitutionality of the Federal Court of Australia’s involvement in enforcement of awards made pursuant to the *International Arbitration Act 1974* (Cth) (*IAA*). The *IAA* was enacted to give effect to the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (*Model Law*), and Australia’s international obligations including under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.<sup>58</sup> The plaintiff, *TCL Air Conditioner* (Zhongshan) Co Ltd, submitted that following a commercial arbitration, the Federal Court’s jurisdiction, via s 16 of the *IAA*, to hear an application under art 35 of the *Model Law* was unconstitutional under ch III of the *Constitution*. Twin constitutional arguments were mounted by the plaintiff. First, that the making of an arbitral award by a non-ch III Court was an unconstitutional exercise of judicial power outside the bounds of *Boilermakers*’. Second, that it violated the institutional integrity of the Federal Court for it to enforce an arbitral award of an arbitral tribunal — even if tainted by error of law on its face.

The High Court, across two joint judgments, rejected the constitutional arguments of the plaintiffs, and confirmed that the jurisdictional and procedural arrangements brought about by the *IAA* did not contravene ch III. Firstly, because the arbitral tribunal, in resolving a dispute based on the ‘voluntary agreement of the parties’,<sup>59</sup> was not exercising judicial power. Secondly, the Federal Court’s enforcement of an arbitral award, even if tainted by error of law on its face, did not undercut the ‘institutional integrity’ of the Federal Court as the Court was not ‘endors[ing]’ the legal validity of the arbitral award.<sup>60</sup>

Addressing the first submission required a straightforward application of the first limb of *Boilermakers*’ as to whether a non-ch III Court was vested with

56 *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ). This form of ch III submission was not rejected by the Court: see also at 335 [30] (Gleeson CJ), 433 [362] (Kirby J).

57 (2013) 295 ALR 596.

58 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

59 *TCL Air Conditioner* (2013) 295 ALR 596, 606 [29] (French CJ and Gageler J); see also 622 [106] (Hayne, Crennan, Kiefel and Bell JJ).

60 *Ibid* 607 [34] (French CJ and Gageler J).

the judicial power of the Commonwealth. The Court concluded that the arbitral tribunal was not vested with federal judicial power.<sup>61</sup>

The second submission was more significant. The plaintiff was seeking to challenge the *IAA* as undermining the institutional integrity of the Federal Court because of the Court's inability to conduct a 'substantive review of an award for error of law when the Federal Court determines the enforceability of an award'.<sup>62</sup> This test, based on the undermining of, or incompatibility with, a court's 'institutional integrity', was crafted in the context of state courts, and is not language usually applied to a ch III Court at the federal level. The plaintiff asserted that:

Just as purporting to remove the Supreme Court's supervisory jurisdiction over inferior courts was held to undermine a defining characteristic of that court in *Kirk* ... so does the removal of the court's super-intending function in the case of arbitral awards ... in so doing they have undermined the courts' independence, their ability to determine what the law is, and, ultimately, their institutional integrity.<sup>63</sup>

The genesis of the 'institutional integrity' phraseology lies in the decision of *Kable*.<sup>64</sup> *Kable* was a derailing decision of the High Court which, by a 4:2 majority, found that the contemplation in ss 71 and 77(iii) of the *Constitution* that state courts ('court[s] of a State') could be vested with federal judicial power meant that state Parliaments could not confer functions on state courts which would affect the public's confidence in such courts as repositories of federal judicial power. As McHugh J explained:

although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the *Constitution* may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the *Constitution's* plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.<sup>65</sup>

In later cases,<sup>66</sup> the criterion of public confidence in the courts was abandoned in favour of asking whether a function was incompatible with the institutional integrity of a 'court of a State'.<sup>67</sup> For example, in *Fardon*, Gleeson CJ stated:

61 *Ibid* 606–7 [31] (French CJ and Gageler J), 622–3 [106]–[110] (Hayne, Crennan, Kiefel and Bell JJ).

62 *Ibid* 621 [101] (Hayne, Crennan, Kiefel and Bell JJ).

63 *TCL Air Conditioner (Zhongshan) Co Ltd, 'Plaintiff's Submissions', Submission in TCL Air Conditioner*, No S178 of 2012, 5 October 2012, [77], [81] (citations omitted).

64 *Kable* (1996) 189 CLR 51.

65 *Ibid* 118.

66 See, eg, *Baker v The Queen* (2004) 223 CLR 513, 542 [79] (Kirby J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ) ('*Fardon*'), 617–18 [102] (Gummow J), 629–31 [144] (Kirby J); *Totani* (2010) 242 CLR 1, 49–50 [73] (French CJ).

67 *Constitution* s 77(iii).

The decision in *Kable* established the principle that, since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.<sup>68</sup>

‘Institutional integrity’ has not been comprehensively defined. Instead, the Court has indicated that it is made up of features that contribute to the essential characteristics of a state court. For instance, in *Forge v Australian Securities and Investments Commission*, Gummow, Hayne and Crennan JJ explained that while ‘[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court’.<sup>69</sup>

the relevant principle is one which hinges upon maintenance of the defining characteristics of a ‘court’, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. 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.<sup>70</sup>

Further, in *Totani*, French CJ explained:

The question indicated by the use of the term ‘integrity’ is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court.<sup>71</sup>

The attempted application of the ‘institutional integrity’ expression to the Federal Court is a noteworthy step, particularly when the *Kable* and *Boilermakers’* tests have typically been kept as two separate ch III streams. In *TCL Air Conditioner*, French CJ and Gageler J appeared untroubled by the use of ‘institutional integrity’ phraseology in what has hitherto been *Boilermakers’* territory. French CJ and Gageler J concluded:

The inability of the Federal Court, as a competent court under Arts 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award does not signify the Federal

68 *Fardon* (2004) 223 CLR 575, 591 [15].

69 (2006) 228 CLR 45, 76 [64] (*Forge*). See also *Condon* (2013) 295 ALR 638, 660 [68] (French CJ).

70 *Forge* (2006) 228 CLR 45, 76 [63].

71 *Totani* (2010) 242 CLR 1, 48 [70].

Court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award.<sup>72</sup>

The joint judgment of Hayne, Crennan, Kiefel and Bell JJ in *TCL Air Conditioner* were more circumspect. In referring to the plaintiff's 'invo[ca]tion of] the constitutional principle enunciated in *Kable*',<sup>73</sup> their Honours stated:

*If it is right to apply directly to a court created by the federal parliament the doctrines enunciated in Kable with respect to state courts, there is no distortion of the institutional integrity of the Federal Court.*<sup>74</sup>

In distinguishing the statutes impugned in *Kable* and *Totani*,<sup>75</sup> their Honours concluded that the Federal Court's jurisdiction under the *IAA* was akin to enforcing a foreign court's judgment and that

the absence of a specific power to review an award for error of law does not distort judicial independence when a court determines the enforceability of an award. Nor can the presence of such jurisdiction be said to be a defining characteristic of a court. It is also plain that the absence of a supervisory jurisdiction to correct errors of law by arbitrators raises no separation of powers issue. The doctrine of the separation of powers is directed to ensuring an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power.<sup>76</sup>

They did however conclude that the functions conferred on the Federal Court were 'not repugnant to or incompatible with the institutional integrity of that court'.<sup>77</sup>

On one view, the attempt in *TCL Air Conditioner* to apply to federal courts the test of repugnancy to or incompatibility with the institutional integrity of a court does not represent a drastic constitutional shift. In accepting that the Federal Court was exercising federal judicial power, there was no suggestion that non-judicial powers were being unconstitutionally blended with the Federal Court's judicial functions. The submission that the functions exercised by the Federal Court were 'incompatible with the institutional integrity of that court'<sup>78</sup> could be paralleled with the approach long taken up from *Chu Kheng Lim*, that judicial power cannot be exercised in a manner 'inconsistent with the essential character a court or with the nature of judicial power'.<sup>79</sup> This interpretation of the plaintiff's submissions could be supported by the statement by French CJ and Gageler J

72 (2013) 295 ALR 596, 607 [34].

73 Ibid 620 [100] (Hayne, Crennan, Kiefel and Bell JJ).

74 Ibid 621 [102] (emphasis added). But see *Wainohu* (2011) 243 CLR 181, 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).

75 *TCL Air Conditioner* (2013) 295 ALR 596, 621–2 [105] (Hayne, Crennan, Kiefel and Bell JJ).

76 Ibid 621 [104].

77 Ibid 623 [111] (Hayne, Crennan, Kiefel and Bell JJ).

78 Ibid.

79 *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (citations omitted). See also their reflection in the plaintiff's submissions in *Thomas v Mowbray* (2007) 233 CLR 307, the framing of which was not rejected by the Court: 335 [30] (Gleeson CJ), 355 [111] (Gummow and Crennan JJ), 433 [362] (Kirby J).

that a ‘dimension’ of judicial power is the need for ‘the function always to be compatible with the essential character of a court as an institution’.<sup>80</sup> Further, while the plaintiff’s written submissions made close links with the state ch III cases of *Forge*,<sup>81</sup> *K-Generation Pty Ltd v Liquor Licensing Court*,<sup>82</sup> *Totani*,<sup>83</sup> and *International Finance Trust Co Ltd v New South Wales Crime Commission*,<sup>84</sup> they also referred to federal court cases like *Polyukhovich*<sup>85</sup> and *Thomas v Mowbray*<sup>86</sup> which included submissions as to the manner of exercise of federal judicial power.<sup>87</sup>

It is, however, submitted, that the hesitancy of Hayne, Crennan, Kiefel and Bell JJ to embrace the incompatibility with the ‘institutional integrity/essential character of a court’ phraseology suggests that the submission could have further significance. This is further underscored by the High Court’s decision in *Magaming*.<sup>88</sup>

In *Magaming*, the appellant challenged the constitutionality of the Commonwealth’s prosecutorial choice in relation to charging a suspected people smuggler with one of two ‘overlapping’ offences, one simple and one aggravated, under the *Migration Act 1958* (Cth) in the District Court of New South Wales, where only the aggravated offence carried a mandatory imprisonment term. The constitutional grounds on which the challenge was based, although in the state court context, were that the offences were ‘incompatible with the separation of judicial and prosecutorial functions’, ‘incompatible with the institutional integrity of the courts’ or enabled the imposition of ‘arbitrary and non-judicial’ sentences.<sup>89</sup> While the constitutional arguments were not accepted by a majority of the Court, the judgments did not dismiss, in this context, testing the validity of Commonwealth legislation through a test based on ‘incompati[bility] with institutional integrity’.<sup>90</sup>

In light of these considerations and the arguments in *TCL Air Conditioner*, the most obvious avenue for constitutional reform is for a *Kable*-style inquiry to be grafted onto *Boilermakers*. This is considered at heading V below. Alternatively, the article raises the question of whether broader reform, involving a ‘collapsed’ ch III approach, could be conceptualised. There is no suggestion that the state

80 *TCL Air Conditioner* (2013) 295 ALR 596, 605–6 [27]. Note also the reference in Bret Walker SC’s submissions (during argument) that ‘a court must be doing something which involves a judicial exercise of judicial power’: Transcript of Proceedings, *TCL Air Conditioner* [2012] HCATrans 277 (6 November 2012) 306.

81 (2006) 228 CLR 45.

82 (2009) 237 CLR 501 (*K-Generation*).

83 (2010) 242 CLR 1.

84 (2009) 240 CLR 319 (*International Finance Trust*).

85 (1991) 172 CLR 501.

86 (2007) 233 CLR 307.

87 *TCL Air Conditioner* (Zhongshan) Co Ltd, ‘Plaintiff’s Submissions’, Submission in *TCL Air Conditioner*, No S178 of 2012, 5 October 2012, [64]–[68].

88 (2013) 302 ALR 461.

89 *Ibid* 464 [11].

90 *Ibid* 470 [41]. See also *Kable* (1996) 189 CLR 51, 116 (McHugh J); *DPP (Cth) v Kamal* (2011) 248 FLR 64, 69 [9] (Martin CJ) (*Kamal*).

court approach can be wholly transferred to the federal court context or applied in the identical way.<sup>91</sup> However, there is the potential to explore a more unified ch III jurisprudence, which might have a number of benefits. This more radical approach is considered at heading VI below.

## V THE GRAFTING APPROACH — *KABLE-ISING BOILERMAKERS*'?

Could the *Boilermakers*' approach be married with a substantive inquiry into whether the function, even if judicial in nature, is appropriate for federal exercise and not 'incompatible with the institutional integrity' of a federal court? This would formalise the 'substance over form' approach of *Polyukhovich*<sup>92</sup> and *Chu Kheng Lim*<sup>93</sup> referred to above, which focuses on whether judicial power is being exercised in a manner 'inconsistent with the essential character of a court or with the nature of judicial power'.<sup>94</sup> More recent cases like *Thomas v Mowbray*<sup>95</sup> or *Kamal*<sup>96</sup> demonstrate the workability of such an approach.

The effect of this additional *Kable* step would not be radical. It would retain the stringency of *Boilermakers*', but overlay it with a focus on ensuring whether the integrity of a federal court was being compromised by the function conferred upon the judiciary. The second limb of *Boilermakers*' would remain, but it would be supplemented with a constitutional-style safety switch, which is necessary in light of the failings of the *Boilermakers*' test.

Bateman has made the case for something akin to this.<sup>97</sup> He has contended that a federal constitutional principle of due process, currently resting on uncertain foundations, could be grounded in a criterion based on the institutional integrity of a ch III Court.<sup>98</sup> Based on the reasoning in cases like *Forge*,<sup>99</sup> he looks to the 'institutional character' principle as acting as a litmus test for whether changes

91 See, eg, *Fardon* (2004) 223 CLR 575, 598 [36] (McHugh J); *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*'); *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450, 466 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Condon* (2013) 295 ALR 638, 673–4 [125]–[126] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* [2014] HCA 30 (14 August 2014) [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

92 (1991) 172 CLR 501.

93 (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

94 *Ibid* 27 (Brennan, Deane and Dawson JJ). See also Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

95 (2007) 233 CLR 307.

96 (2011) 248 FLR 64.

97 Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31 *Sydney Law Review* 411.

98 See also Anna Dziedzic, '*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges' (2007) 35 *Federal Law Review* 129, 141.

99 (2006) 228 CLR 45.

to court processes alter the institutional characteristic of a federal court.<sup>100</sup> As a separate test to *Boilermakers*, Bateman seeks to constrain the application of the institutional character approach within a ‘principled ... “functional analysis”’<sup>101</sup> based on the function the courts serve and the ‘characteristics of the institution ... essential to the performance of that function’.<sup>102</sup>

There is much merit in the approach Bateman proposes and the ‘open-textured reasoning’<sup>103</sup> it countenances. However, the shortcoming of this avenue is less its methodology than the fact that it falls short of the wholesale reform that is arguably needed in the ch III context. It would mean that *Boilermakers*’ would remain in place. This would mean that the judicial contortions, uncertainty and inconsistent rigidity of the federal *Boilermakers*’ principle would continue, principally in its continued exclusion of the federal exercise of non-incident, non-judicial power. In essence, ‘*Kable*-ising’ *Boilermakers*’ would miss an opportunity to re-think and even streamline the current ch III interpretive approaches.

## VI CREATING A NEW HYDRA? — INCOMPATIBILITY AS A CONSOLIDATING APPROACH

What if a consolidated ch III approach emerged, applicable across the Australian court hierarchy, and combining elements of *Kable* and *Boilermakers*’? As radical as it sounds, it would not require a complete *volte-face* by the High Court. Rather, by merging the concept of a ‘court’ (whether a ‘court of a State’ or a federal ‘court’) with an incompatibility inquiry of the sort envisioned in *TCL Air Conditioner* or seen in *Magaming*, it would build on much of the heavy constitutional lifting already undertaken by the High Court. What could emerge from this integrated approach is a test, not simply based on the state emphasis on institutional integrity, or the federal focus on judicial and non-judicial power, but centred instead on the incompatibility of functions conferred on or removed from a ‘court’, contextualised in terms of the court’s position in the court hierarchy. This is particularly important when, as discussed further below, it is clear that the constitutional position of federal courts cannot be necessarily equated with state courts.

What would this new Hydra look like? It could take any number of forms, and would inevitably be the subject of judicial development and adjustment. It is submitted, however, that such a streamlined and structured approach has the potential to address some of the difficulties of a more general incompatibility test.<sup>104</sup>

100 Bateman above n 97, 439–41.

101 Bateman above n 97, 439.

102 Ibid.

103 Ibid 442.

104 Stelliou, above n 17, 135.

Constitutional incompatibility was long advocated as a preferable alternative by Sir Anthony Mason. Soon after his retirement as Chief Justice of the High Court, he proposed a test which asked

whether a function given to a judge or court is incompatible with the judge's judicial functions, the proper discharge of the court's responsibilities, the independence of the judiciary or the maintenance of public confidence in the administration of justice.<sup>105</sup>

Mason favoured incompatibility over the stringency of the second limb of *Boilermakers*' as it hindered the 'exercis[e] [of] a function which might conveniently be undertaken by a court and is not necessarily incompatible with the exercise of judicial power'.<sup>106</sup> The implications of an incompatibility approach are significant. This is primarily because incompatibility shifts away from the focus in *Boilermakers*' on whether a function is judicial or not. It would permit federal judges to exercise non-judicial functions — in violation of the second limb of *Boilermakers*' — provided that the court is not compromised in its ability to exercise the judicial power of the Commonwealth as contemplated by s 71 of the *Constitution*. While this would represent a momentous paradigm shift, it is far from a novel approach, as it has long been employed in the *persona designata* context to allow federal judges to exercise otherwise prohibited non-judicial powers, as well as in the post-*Kable* line of decisions.<sup>107</sup>

In the *persona designata* setting, the non-judicial responsibilities, following *Grollo*<sup>108</sup> and *Wilson*,<sup>109</sup> must not be 'incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.<sup>110</sup> The function undertaken must not also be too close to the executive or legislative arms, and is examined for whether it is to be exercised independently or directed by political considerations.<sup>111</sup>

The *persona designata* incompatibility condition, as formulated in *Grollo* and *Wilson*, has often been seen as influencing the development of the principle in *Kable*.<sup>112</sup> In its refined form, the *Kable* doctrine focuses on the institutional integrity of 'court of a State', the essential characteristics which comprise such a 'court' and the functions which are incompatible with that court's continued ability to be vested with federal judicial power. As French CJ explained in *Momcilovic*:

105 Mason, 'A New Perspective on Separation of Powers', above n 17, 6.

106 Ibid. See also Mason, 'Judicial Review: Constitutional and Other Perspectives', above n 17, 339.

107 Stellios, above n 17, 130.

108 (1995) 184 CLR 348.

109 (1996) 189 CLR 1.

110 *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ).

111 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

112 *Fardon* (2004) 223 CLR 575, 618 [103] (Gummow J). See also Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183.

Legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. In particular, a State legislature cannot enact a law conferring upon a State court or a judge of a State court a non-judicial function which is substantially incompatible with the judicial functions of that court.<sup>113</sup>

Incompatibility, as a broader approach, would, however, constitute a significant constitutional change. In being applied as a consolidated ch III approach, applicable to state and federal courts alike, the risk is that not only would a general incompatibility test require the High Court to overrule *Boilermakers'*, but that it would be too vague and formless a test.<sup>114</sup> In other words, it would replace the stringency of *Boilermakers'* with constitutional equivocality, and would therefore endanger the protective role of ch III of the *Constitution*. Further, there is a need to adequately distinguish between the constitutional expectations of federal as opposed to state courts when ch III principles do not apply across the court hierarchy.<sup>115</sup> State Parliaments, in vesting powers in state courts, are not constrained by *Boilermakers'* and the separation of powers, and are hence capable of vesting some powers of a non-judicial nature.<sup>116</sup> While a general notion that the Commonwealth must 'take a State court as it finds it' is qualified by the *Kable* line of cases,<sup>117</sup> there is a degree to which state Parliaments can determine the organisation of their courts, to a greater degree than is the case with their federal counterparts.<sup>118</sup> Without accommodating these concerns, the benefits of a simplification of the ch III jurisprudence might be rather pyrrhic.

Instead of a generalised incompatibility test, the alternative is the instatement of a beefier and more structured ch III incompatibility test.<sup>119</sup> Stellios has contended that a test departing from the second *Boilermakers'* limb and based on incompatibility and institutional integrity could operate, provided it ensured that judicial independence and impartiality were not compromised, and that political functions were not judicially assigned. Stellios argues that this would allow an abandonment of the *persona designata* or chameleon principles,<sup>120</sup> and that

[t]here would continue to be a gap between the *Kable* standards (independence and impartiality) and the revised federal separation of

113 (2011) 245 CLR 1, 66–7 [93].

114 *A-G (Cth) v The Queen; Ex Parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 542; Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 163. See also Martin H Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46 *Mercer Law Review* 697, 712.

115 See, eg, *Constitution* s 72.

116 See, eg, *Kable* (1996) 189 CLR 51, 118 (McHugh J); *Condon* (2013) 295 ALR 638, 673–4 [125]–[126] (Hayne, Crennan, Kiefel and Bell JJ).

117 See, eg, *Totani* (2010) 242 CLR 1, 46 [68] (French CJ), quoting *Kable* (1996) 189 CLR 51, 102; *Kable* (1996) 189 CLR 51, 110 (McHugh J).

118 *Forge* (2006) 228 CLR 45, 75 [61] (Gummow, Hayne and Crennan JJ).

119 Stellios, above n 17, 135. For alternative two-limbed formulations see also Appleby, above n 53, 280–6; Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash University Law Review* 66, 95–7.

120 Stellios, above n 17, 136.

judicial power principles (independence and impartiality, plus the rule against political functions), in recognition that there is no separation of powers at the State level. But, the underlying similarities of the respective sets of principles would be conceptually aligned.<sup>121</sup>

One possible formulation of this more structured ch III test is a ‘contextual incompatibility’ test.<sup>122</sup> This would build on the history of incompatibility, but, like the multifaceted test of Sir Anthony Mason,<sup>123</sup> would tighten the inquiry by a structured series of questions based around the constitutional role of the courts and the assignment of governmental functions. It establishes an integrated test applicable across state and federal spheres to a wide range of functions. It can invalidate a function not because on the surface it is non-judicial, non-incident or simply innovative, but because it threatens the constitutional role contemplated for the courts — namely a court’s continued ability to exercise Commonwealth judicial power or fulfil its ch III role with independence and integrity.

It is submitted that a broad ch III contextual incompatibility test could be constructed, a ch III test that could potentially apply to functions legislatively conferred on state or federal courts, while also applying to functions vested outside of the courts, such as within the executive arm.<sup>124</sup> Executive conferral of functions is, for instance, likely to be particularly problematic in the criminal context where decisions about guilt and punishment are typically the exclusive province of the courts.<sup>125</sup> Such a test could also potentially invalidate the conferral of a decision-making power which is protected from judicial review.<sup>126</sup> One model for this broader contextual incompatibility approach could be as follows:

- 1) *What is the role and nature of the body or individual which is to exercise the function conferred by the Act, including a consideration of its powers, historical functions and constitutional position?*
- 2) *Is this a function reserved for a particular governmental branch, or is it closely connected or aligned with a particular governmental branch?*

121 Ibid. See also Stephen McLeish, ‘The Nationalisation of the State Court System’ (2013) 24 *Public Law Review* 252, 265.

122 This test has developed in the more narrow context of less-adversarial mechanisms: see Murray, above n 52.

123 See Mason, ‘A New Perspective on Separation of Powers’, above n 17, 6.

124 See, eg, *Magaming* (2013) 302 ALR 461, 469 [40] (although in this case French CJ, Hayne, Crennan, Kiefel and Bell JJ dismissed the appellant’s argument that the discretion vested in the prosecutor to select the appropriate people smuggling offence was unconstitutional: at 470 [41]).

125 See, eg, *Totani* (2010) 242 CLR 1, 50–1 [76] (French CJ), 67 [147] (Gummow J); *Magaming* (2013) 302 ALR 461, 473–4 [61]–[62], 479–80 [82] (Gageler J, although in dissent); *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, 207 [138] (Gageler J, dissenting). See also Leslie Zines, ‘Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*’ (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010) (with commentary by Dr Kristen Walker); George Williams and Andrew Lynch, ‘The High Court on Constitutional Law: The 2010 Term’ (Paper presented at the Gilbert + Tobin 2011 Constitutional Law Conference and Dinner, Sydney, 18 February 2011) 12–13.

126 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (‘*Plaintiff S157/2002*’); *Kirk* (2010) 239 CLR 531.

- 3) *What other functions have been conferred alongside this function and what is the context of its conferral?*
- 4) *In light of 1)-3), would this function, its removal, or its manner of exercise, be incompatible with:*
  - a) *ch III;*
  - b) *the exercise of Commonwealth judicial power; or*
  - c) *the essential constitutional character of a court (including its independence, impartiality and the ability to duly administer justice)?*

This tailored incompatibility approach contextualises the inquiry by focusing on the powers, historical role and constitutional position of the body receiving the function. For courts, this means that a function can be assessed in terms of its ramifications for that particular court within the integrated court structure.<sup>127</sup> This is important because the constitutional outcome may vary depending on the court concerned.<sup>128</sup>

It assesses the nature of the function and whether there is a branch with which it is closely aligned.<sup>129</sup> Further, it ensures that any function is not assessed separately,<sup>130</sup> but rather as part of wider holistic assessment.<sup>131</sup> The test's final step is a ch III amalgam, and positions the inquiry within the context of the answers to the first three questions. It does this by channelling the incompatibility test within the post-*Kable* focus upon 'courts' and their essential or defining characteristics (preferring this language to the shorthand 'institutional integrity' phrase which tends to obfuscate rather than aid the analysis).<sup>132</sup> Similarly to the due process approach of Bateman,<sup>133</sup> it presents a methodology which incorporates Deane and Toohey JJ's focus in *Leeth v The Commonwealth* on courts 'exhibit[ing] the essential attributes of a court and observ[ing], in the exercise of that judicial power, the essential requirements of the curial process'.<sup>134</sup> This represents a radical simplification of the current *Boilermakers'* inquiry, and would therefore integrate overlays such as whether there is a usurpation of the judicial function<sup>135</sup> or interference with the judicial process.<sup>136</sup> Ultimately, the approach zones in on

127 See, eg, *Hogan v Hinch* (2011) 243 CLR 506, 541 [45] (French CJ) ('*Hogan*').

128 Zines, *The High Court and the Constitution*, above n 17, 296.

129 Note the influence of the US approach in *Mistretta v United States* 488 US 361, 385–6 (1989).

130 For the dangers this can present see Martin H Redish, 'Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*' (1989) 39 *DePaul Law Review* 299, 303; Walker, above n 114, 163.

131 *International Finance Trust* (2009) 240 CLR 319, 355 [57] (French CJ).

132 See, eg, *Wainohu* (2011) 243 CLR 181, 192 [7], 208–9 [44] (French CJ and Kiefel J).

133 Bateman above n 97.

134 (1992) 174 CLR 455, 487 (Deane and Toohey JJ) ('*Leeth*'). See also *Polyukhovich* (1991) 172 CLR 501, 607 (Deane J).

135 *Polyukhovich* (1991) 172 CLR 501.

136 *Nicholas v The Queen* (1998) 193 CLR 173 ('*Nicholas*').

the text of ch III and provides, in a similar way to *Grollo*<sup>137</sup> and *Wilson*,<sup>138</sup> a system for analysing the constitutionality of a legislatively conferred function.

Certainly, a federal law would still need to be within a head of Commonwealth legislative power, but the contextual incompatibility test would become a means of assessing that no ch III limits were unwittingly being violated. Unlike the *Boilermakers*' second limb, a function could be judicial or non-judicial under this new approach but would be monitored to determine whether it is incompatible, in form or substance, with the ch III role that the *Constitution* has conferred upon Australian courts, including the investiture of judicial power under s 71.

For state laws, the test would also be a new development and would provide greater clarity in how ch III applies to 'court[s] of a State'. While not affected by the *Boilermakers*' difficulties that are the focus of this article, the variations in, and vagaries of, the post-*Kable* approach are well documented.<sup>139</sup> A contextual incompatibility approach would filter the incompatibility inquiry through a consideration of the textual and structural requirements of ch III, elements which both assist in explaining decisions like *Kirk* (where both s 73(ii) of the *Constitution* and the integrated court structure played a role).<sup>140</sup> Ultimately, it would provide a transparent methodology by which to examine the constitutionality of functions conferred by state Parliaments.

## A Contextual Incompatibility: Nuts and Bolts

The various steps of the proposed contextual incompatibility approach are explained below.

### 1 What is the role and nature of the body or individual which is to exercise the function, conferred by the Act including a consideration of its powers, historical functions and constitutional position?

The first aspect contextualises the inquiry by focusing on the jurisdictional, historical and constitutional position of the body exercising the function pursuant to the Act, state or federal. 'Body', while typically comprising a court, is a broad term wide enough to include an individual, a department or another entity. For example, if conferred on a court, a function can be assessed in terms

137 (1995) 184 CLR 348.

138 (1996) 189 CLR 1.

139 For such criticisms see, eg, Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts following *Kable v DPP (NSW)* and Why it Matters' (2009) 32 *University of New South Wales Law Journal* 75, 104; Ayowande A McCunn, 'The Search for a Single Standard for the *Kable* Principle' (2012) 19 *Australian Journal of Administrative Law* 93, 93; Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 28.

140 *Kirk* (2010) 239 CLR 531, 579 [93]; Zines, 'Recent Developments in Chapter III' above n 125, 10–11; Williams and Lynch, above n 125, 8.

of its ramifications for the court's role in the integrated court structure.<sup>141</sup> This is important because while there are considerable overlaps, the constitutional analysis and ultimate outcome may vary depending on whether the focus is on a state or federal court (eg due to s 72 of the *Constitution*) or even a superior court within that state or federal hierarchy.<sup>142</sup> For example, the High Court's findings in relation to the unique constitutional position of state Supreme Courts in *Kirk*<sup>143</sup> give weight to this. In *Kirk*, albeit through some controversial reasoning,<sup>144</sup> the High Court found that s 73 of the *Constitution* guaranteed state Supreme Court's historical supervisory jurisdiction over jurisdictional errors.<sup>145</sup> Similarly, in *Condon*,<sup>146</sup> French CJ and Gageler J were influenced in their decision by their identification of the inherent jurisdiction of the Supreme Court of Queensland.<sup>147</sup> The High Court might also require particular consideration because of its 'special position and function'<sup>148</sup> by virtue of the terms of ch III (including s 75(v) of the *Constitution*),<sup>149</sup> while the strict appointment, tenure and remuneration requirements are imposed on all federal tier judges by s 72 of the *Constitution*.

## **2 Is this a function reserved for a particular governmental branch, or is it closely connected or aligned with a particular governmental branch?**

The second aspect builds on Australian<sup>150</sup> and United States jurisprudence.<sup>151</sup> In the judicial context, it allows for a warning light if a function seems executive or legislative in nature,<sup>152</sup> or if it is closely connected or aligned with the executive or legislative branches.<sup>153</sup> This means that if a function conferred on a court is clearly so foreign to the judicial role, and so political in nature that it would only be appropriate for it to be exercised by the legislative or executive arms, it will be

141 See, eg, *Hogan* (2011) 243 CLR 506, 541 [45] (French CJ).

142 Zines, *The High Court and the Constitution*, above n 17, 296–7. See, eg, *Condon* (2013) 295 ALR 638, 673–4 [125]–[126] (Hayne, Crennan, Kiefel and Bell JJ). For a discussion of the degree of convergence see: McLeish, above n 121.

143 *Kirk* (2010) 239 CLR 531.

144 Chris Finn, 'Constitutionalism Supervisory Review at State Level: The End of *Hickman*?' (2010) 21 *Public Law Review* 92, 99; Nick Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 876–7; Leslie Zines, 'Recent Developments in Chapter III, above n 125, 9–10; Williams and Lynch, above n 125, 8.

145 *Kirk* (2010) 239 CLR 531, 580–1 [98]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

146 *Condon* (2013) 295 ALR 638.

147 *Ibid* 652 [44] (French CJ), 694 [212] (Gageler J).

148 See, eg, *Gould v Brown* (1998) 193 CLR 346, 383–4 [23]–[24] (Brennan CJ and Toohey J), citing Windeyer J in *Spratt v Hermes* (1965) 114 CLR 226, 277.

149 *Plaintiff S157/2002* (2003) 211 CLR 476, 511–2 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

150 *Boilermakers'* (1956) 94 CLR 254, 340–1 (Taylor J).

151 *Morrison v Olson* 487 US 654, 680–1 (1988); *Mistretta v United States* 488 US 361, 385–6 (1989).

152 For example the task of ratifying a treaty, or removing a judge for misbehaviour or incapacity. But compare a task such as the issue by a court of court rules which, while legislative in nature, is not exclusively so.

153 See, eg, *International Finance Trust* (2009) 240 CLR 319; *Totani* (2010) 242 CLR 1.

struck down by the contextual incompatibility inquiry. Isaacs J made a similar point in *Federal Commissioner of Taxation v Munro*:

I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances.<sup>154</sup>

The separation of powers doctrine in existence at the federal level makes this criterion of greater relevance to federally conferred functions.<sup>155</sup> For example, Stellios explains that the ‘ministerial adviser’ functions assigned to Justice Mathews, and challenged in *Wilson*,<sup>156</sup> were constitutionally questionable because as well as compromising the judge’s independence and the proscription against giving advisory opinions, it was really a political role.<sup>157</sup>

While state Parliaments are not as hamstrung by separation of powers considerations, this factor might still have relevance. For state courts, it brings the focus to how independently a function is being exercised by a member of the judiciary and could, for example, strike down the hypothetical function identified by McHugh J in *Kable*, of granting to the Supreme Court of a state the power to decide a state’s child welfare budget.<sup>158</sup>

More broadly, this second factor might allow a consideration of a member of the executive branch receiving a particular function, and facilitate an assessment of to what extent this conferral would violate the constitutional role contemplated for the courts within that jurisdiction. Indeed, this might invalidate an attempt to silo in the Attorney-General an unreviewable power to unilaterally determine an individual’s guilt and associated jail term because it would be incompatible with the constitutionally contemplated role of the courts.<sup>159</sup> Or, as was seen in *Magaming*, it can facilitate an assessment of whether a function is something typically associated with the role of a Prosecutor, and the nature of ‘prosecutorial choice’.<sup>160</sup>

It might be that a function cannot be clearly assigned under this step. Not all functions can necessarily be linked with a particular governmental branch. Such a conclusion will itself be useful for the purposes of the contextual incompatibility assessment, as it facilitates a hybrid formalist/functionalist assessment depending on the nature of the particular function. The assessment has formalist<sup>161</sup> attributes in highlighting that there might be some boundaries around what functions

154 (1926) 38 CLR 153, 178.

155 See discussion of this in the context of the federation in: *Forge* (2006) 228 CLR 45, 73 [56] (Gummow, Hayne and Crennan JJ).

156 (1996) 189 CLR 1.

157 Stellios, above n 17, 133.

158 (1996) 189 CLR 51, 117.

159 See sources cited in above n 125.

160 *Magaming* (2013) 302 ALR 461, 469 [39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

161 Peter Gerangelos, ‘Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate’ (2005) 8 *Constitutional Law & Policy Review* 1, 2; Redish, ‘Separation of Powers, Judicial Authority, and the Scope of Article III’, above n 130, 304–5.

federal courts can undertake.<sup>162</sup> However, it is functionalist<sup>163</sup> in not assuming that a judge exercising a non-judicial function is automatically to be prevented from doing so. Rather, the function can be uniquely assessed in the context of the particular court affected, as well as the manner in which it is to be carried out.

### **3 What other functions have been conferred alongside this function and what is the context of its conferral?**

The third aspect ensures that a function is not assessed separately,<sup>164</sup> but as part of a wider holistic and legislative assessment. As French CJ explained in *International Finance Trust*, ‘[a]n accumulation of ... intrusions, each “minor” in practical terms, could amount over time to death of the judicial function by a thousand cuts’.<sup>165</sup> The wider context is also important. For instance, in considering the constitutionality of the acting judicial appointments which were challenged in *Forge*,<sup>166</sup> Gummow, Hayne and Crennan JJ looked at not only who had been appointed to the bench in an acting capacity but ‘for how long, to do what, and ... why’ such an appointment was justified.<sup>167</sup> Similarly in *Magaming*, the joint judgment focused on the fact that prosecutorial choice as to the charge to be laid was quite separate from the decision about punishment, which was reserved for curial exercise.<sup>168</sup>

### **4 In light of 1–3, would this function (or its removal), or its manner of exercise, be incompatible with:**

**(a) ch III;**

**(b) the exercise of Commonwealth judicial power; or**

**(c) the essential constitutional character of a court (including independence, impartiality and the ability to duly administer justice)?**

The fourth aspect allows for the ultimate assessment of whether a function (or even its removal<sup>169</sup> or the manner of its exercise), is incompatible with ch III. This analysis, unlike a more general incompatibility test, is framed within the context set by the first three steps, but is also measured against the ch III role, the exercise of Commonwealth judicial power (whether by state or federal courts)

162 See Gerangelos, above n 161, 11–12; Mason, ‘A New Perspective on Separation of Powers’, above n 17, 6.

163 Suzanne Prieur Clair, ‘Separation of Powers: A New Look at the Functionalist Approach’ (1989) 40 *Case Western Reserve Law Review* 331, 333.

164 For the dangers this can present see Redish, ‘Separation of Powers, Judicial Authority, and the Scope of Article III’, above n 130, 303; Walker, above n 114, 163.

165 *International Finance Trust* (2009) 240 CLR 319, 355 [57].

166 *Forge* (2006) 228 CLR 45.

167 *Ibid* 88 [101]. See also 149–50 [277] (Heydon J).

168 *Magaming* (2013) 302 ALR 461, 467 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

169 See, eg, *Kirk* (2010) 239 CLR 531; *Wainohu* (2011) 243 CLR 181.

and the essential constitutional character of a court (including the non-exhaustive attributes of independence, impartiality and the ability to duly administer justice). It can be applied to post-*Kable* style state cases in terms of such courts' ongoing ability to be vested with Commonwealth judicial powers. For federal courts, it moves beyond the stringency of *Boilermakers'* in a similar way to that achieved by the *persona designata* exception. It also means that overlays, such as constitutional guarantees of due process,<sup>170</sup> could be fed into this final step's focus on the 'manner of exercise' of a function.

The three elements of step four which are used as the constitutional barometer — 'ch III', 'the exercise of Commonwealth judicial power' or 'the essential constitutional character of a court' — are intentionally not defined. As explained below, this is essential to the workability of the test. What these facets do is put the spotlight on the ongoing constitutional role of the courts and the question of whether the particular function has the potential to compromise that through its conferral, removal or its manner of exercise. Crucially, these facets act as filters for the analysis while not ordaining a particular constitutional conclusion. The test therefore harnesses the benefits of an incompatibility test while transparently guiding its application.

Under the proposed methodology, independence, impartiality and the ability to duly administer justice present a starting point to what being a 'court' entails.<sup>171</sup> The test does not seek to comprehensively define judicial independence, impartiality or the due administration of justice,<sup>172</sup> but recognises that these aspects are crucial to the architecture of Australian courts, as recognised by the *Constitution* and the High Court's interpretation of its dictates. The unique characteristics of a particular court can also be fed into the inquiry from step one of the test. In *Totani*, French CJ referred to the 'defining characteristics' of state courts as including the 'non-exhaustive'<sup>173</sup> elements of 'independence, impartiality, fairness and adherence to the open-court principle'.<sup>174</sup> Elements such as these are incorporated into part 4(c) of the test, and could be compromised by a variety of legislation including those imposing variations in terms of appointment,

170 See, eg, *Leeth* (1992) 174 CLR 455. The work of Wheeler and Lacey is particularly noteworthy here: Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia', above n 94; Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', above n 94; Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57.

171 See, eg, *Totani* (2010) 242 CLR 1, 20 [1] (French CJ); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81] (Gaudron J), 373 [116] (Kirby J); *Fardon* (2004) 223 CLR 575, 600–1 [41]–[42] (McHugh J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152–3 [3] (Gleeson CJ), 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*'); *Gypsy Jokers* (2008) 234 CLR 532, 552–3 [10] (Gummow, Hayne, Heydon and Kiefel JJ); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 637–8 [92] (Kirby J); *Condon* (2013) 295 ALR 638, 476–7 [67]–[68] (French CJ), 497 [177] (Gageler J); *TCL Air Conditioner* (2013) 295 ALR 596, 605–6 [27] (French CJ and Gageler J). See also Wheeler, 'The Doctrine of Separation of Powers', above n 94, 252–3.

172 *Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 140 [228] (Kenny J).

173 Citing *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ).

174 *Totani* (2010) 242 CLR 1, 43 [62]. See also *Forge* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ).

remuneration and tenure,<sup>175</sup> qualifications on open justice,<sup>176</sup> legislative/executive interference,<sup>177</sup> or shortfalls in procedural fairness.<sup>178</sup> Importantly, the structured nature of the test would make a court's determination more open to later scrutiny and/or critique.

There are at least three prime reasons for recommending contextual incompatibility. First, it would bring about a purposive shift in the approach to ch III of the *Constitution*. This would mean that the focus would move to why the federal separation of powers is important, and why the constitutional expectation of a 'court of a State' imposes limitations on legislatively assigned functions. Stellios has contended that the difficulty is that the precise justification for the interpretation of ch III and the principle of separation of powers as a whole is not entirely clear.<sup>179</sup> He has stated:

While the identification of multiple rationales has, arguably, hampered the development of separation of powers principles, what is important for present purposes is that, under each rationale, judicial independence and impartiality operates as the core functional attributes that are needed by the courts. Whether the courts are seen as protecting the federal compact, protecting liberty or operating as a check on the other arms of government, the judiciary is required to be independent and impartial ...<sup>180</sup>

The contextual incompatibility test would be grounded in the *Constitution's* reference to 'courts' while seeking to contain this through the elements of independence, impartiality and the due administration of justice, and what these filters might mean for courts either at the state or federal level.

Second, it would allow a departure from the impracticability and constitutional excesses of the second limb of *Boilermakers'*, a limb which tends to curb legislative innovation without assessing whether such conferrals align with the *Constitution's* requirements.

Third, it would bring about a simplification in approach. Rather than having to apply a test with the potentially numerous exceptions and qualifications that *Boilermakers'* has wrought, it provides a clear analysis which could bring greater certainty to the ch III quagmire. It would streamline into one test the concerns relating to any due process guarantees, the continued ability to act as a repository for federal judicial power and the implications for what it means to be a 'court'. It would also be broad enough to apply to functions conferred outside of the judiciary. Even for state-based determinations, the contextual incompatibility approach has the benefit of structuring the analysis into a clear

175 *Forge* (2006) 228 CLR 45, 79–80 [74] (Gummow, Hayne and Crennan JJ).

176 *K-Generation* (2009) 237 CLR 501, 520–1 [49] (French CJ); *Russell v Russell* (1976) 134 CLR 495, 505 (Barwick CJ), 520 (Gibbs J), 532 (Stephens J); *Hogan* (2011) 243 CLR 506.

177 *Nicholas* (1998) 193 CLR 173; *International Finance Trust* (2009) 240 CLR 319, 355 [56] (French CJ).

178 *International Finance Trust* (2009) 240 CLR 319, 354–5 [54]–[55] (French CJ), 366–7 [97] (Gummow and Bell JJ); *Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

179 Stellios, above n 17, 120.

180 *Ibid.*

methodology which has the potential to bring about greater clarity, transparency and consistency in post-*Kable* decision-making. The test is, however, facilitative, rather than conclusory. Further, it is constructed on the assumption that, like the functions themselves, it might be subject to modification or adjustment.

## **B Contextual Incompatibility — Applying it at the Coalface?**

How would this broader contextual incompatibility approach work in practice? While not all the four steps would be as relevant to every case, the test would examine the function conferred in a transparent (and hence more consistent and easily scrutinised) and structured way to determine whether it violated ch III of the *Constitution*. It would also provide greater guidance to courts, legislators and administrators as to the constitutional requirements and what factors should be taken into account in conferring functions which could impact on the operation of ch III of the *Constitution*.

Consider, for example, how it might apply to the facts of *Momcilovic*.<sup>181</sup> This case concerned, amongst other things, the constitutionality of the Victorian Supreme Court being authorised to make a declaration of inconsistent interpretation (ie a determination that ‘a statutory provision cannot be interpreted consistently with a human right’) pursuant to s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Contextual incompatibility would, as a first step, assess the nature of the Victorian Supreme Court, including its powers, history and position as a superior state court. Second, it would consider the function of making a declaration of inconsistent interpretation — is this a function that is legislative or executive in nature, in light of the fact that it is not a function that would be seen as typically judicial? The third step would facilitate an assessment of the Victorian Charter, the nature of the powers it confers and the other functions exercised by the Supreme Court. Finally, the incompatibility assessment at the fourth stage would look at whether the declaration, and the way in which it is to be exercised, are incompatible with the Victorian Supreme Court’s role within ch III of the *Constitution*, its continued ability to exercise Commonwealth judicial power or its essential character as a court. This assessment would be made against the backdrop of the first three steps. For example, this might include the identification of the fact that as a non-judicial power it could not be the subject of an appeal within s 73 of the *Constitution*,<sup>182</sup> but also that it is not squarely aligned with an executive or legislative function. The fourth step could also take into account the fact that any declaration is made independently of the other governmental arms, and is made by judges acting impartially and in open court with adversarial style procedures. The post-*Kable* assessment is ultimately guided by the four steps, and would allow the unique attributes of the Victorian Supreme Court to be expressly considered, as well as the broader context in which the Victorian Charter operates.

181 (2011) 245 CLR 1.

182 See *Ibid* 31–2 [6], 70 [101] (French CJ).

The contextual incompatibility approach would also significantly alter the approach applied to a function conferred on the federal judiciary. It ensures (in step four of the inquiry) that the s 71 requirement that the judicial power of the Commonwealth be vested in courts (as set down in the first limb of *Boilermakers'*) is retained. However, it would not preclude all non-judicial functions.

Take, for instance, how it might have applied to the case of *Wilson*.<sup>183</sup> This case concerned the nomination of a Federal Court judge to prepare a report for the Minister as to whether to make a declaration in relation to 'a significant Aboriginal area' under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

The first contextual incompatibility step would examine the individual role of the federal court judge who was to receive the non-judicial reporting function. This would allow an assessment of the federal court judicial role and the functions typically undertaken by such a judge, consistently with a s 72 appointment. The second step would look at the substance, and not just the form, of the reporting function conferred. The test, in departing from the rigidity of the second *Boilermakers'* limb, would not automatically exclude the function on the basis of it being non-judicial, but would instead consider its alignment with the executive or legislative branches. The reporting role, in recommending an outcome to the Minister, could suggest a close alignment with the executive function of making a declaration (of a political nature) under the Act. The analysis could also clarify whether the judge is required to act independently of the Minister and is to use the traditional skills of a judge to compile the necessary evidence and facts so that the most informed decision can be made. The third step ensures that the function is examined within the context of the legislative scheme. Does the Act contemplate the judge reviewing the Minister's decision or the facts upon which it was based? Is there an inquiry to be conducted by the judge in an open court? Is the judge able to be recused from a later case coming before the Federal Court on the subject? Does the context of the conferral change the appearance of the reporting role? How extensive is the role to be undertaken? What other functions are assigned to the judge?

Steps one, two and three then facilitate the incompatibility assessment in step four. Can the reporting function ultimately be exercised alongside the judge's ch III role, the ongoing exercise of judicial power and compatibly with the essential constitutional character of a court? Are the reporting obligations conferred on Justice Mathews incompatible with the independence and impartiality expected of a federal court judge? To what extent does the manner of exercise of the function impact upon the curial role? If the function is perceived as independently informing the executive it is less likely to be seen as incompatible than if the assessment, like the majority decision in *Wilson*, is that the judge is acting as a political adviser. The contextual incompatibility methodology can be seen to provide a clear, and broadly applicable, structure, while ensuring that the

183 (1996) 189 CLR 1.

incompatibility assessment is not made with a frozen conception of the judicial role.

### **C Traps for the Contextual Incompatibility Model?**

The obvious criticism of contextual incompatibility is that it does not sufficiently curb the subjectivity or open nature of incompatibility as a constitutional tool. Even more specifically, does it merely open a constitutional can of worms as to what is a ‘court’, what are essential curial characteristics and what ch III requires? Three points can be made in response to this.

First, the quest for definitional certainty misses the point. There cannot be bright lines around what a ‘court’ is,<sup>184</sup> or what amounts to a court’s essential characteristics. It is submitted that this flexibility is constitutionally essential in order for the contextual incompatibility model to have utility. It is clear that the role of the courts has changed and is changing.<sup>185</sup> This does not mean, however, that terms such as ‘court’ or ‘essential characteristics’ are entirely unbridled. As French CJ clarified in *Condon*:

The defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms. They are used to describe limits, deriving from Ch III of the *Constitution*, upon the functions which legislatures may confer upon state courts and the commands to which they may subject them. Those limits are rooted in the text and structure of the *Constitution* informed by the common law, which carries with it historically developed concepts of courts and the judicial function. Historically evolved as they are and requiring application in the real world, the defining characteristics of courts are not and cannot be absolutes.<sup>186</sup>

The test facilitates an open discussion of these ‘roots’ within the broader constitutional, legislative and historical context.

Contextual incompatibility, particularly at the fourth step, brings the focus to the text of the *Constitution*. It ties the test to the requirements of ch III, particularly to ss 71 and 77. Certainly, Chief Justice Spigelman has argued that while there is an ‘aura of orthodoxy’ in the tethering of the constitutional reasoning to the text of ch III, this

aura dissipates when the court undertakes the unavoidably creative task of instilling substantive content to the constitutional dimension

184 Chief Justice Robert French, ‘Essential and Defining Characteristics of Courts in an Age of Institutional Change’ (Paper presented at Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf>>.

185 See, eg, Bateman above n 97, 439.

186 (2013) 295 ALR 638, 660 [68].

of a constitutional expression by identifying its ‘essential’ features or characteristics.<sup>187</sup>

Lim has argued convincingly that while the ‘attribution’ of what amounts to a ‘court’ must align with the constitutional text, the text does not, as Chief Justice Spigelman notes, provide definitive answers as to its content.<sup>188</sup> However, the key is that the text provides the framework and, as Lim contends, the ultimate constitutional outcome is the subject of an ‘evaluative process’ and not the ‘highly general language’ of these essential features or ‘characteristic[s]’.<sup>189</sup>

Second, the strength of incompatibility as a tool is that it provides flexibility. If the methodology were to dictate the constitutional outcome in a particular circumstance, it would be unlikely to take into account the attributes of the particular body, the legislative framework in which it is operating or the inherent dynamism of institutions and the functions they exercise. In this context, Lim aptly cites Gummow J’s comment in *Fardon* that ‘incompatibility’ cannot be marked out ‘in terms which necessarily dictate future outcomes’.<sup>190</sup>

The third point builds on the first and second. This is that the ambulatory nature of the contextual incompatibility test is restrained by the structured nature of the test and the three filters in steps 4(a), (b) and (c).<sup>191</sup> This provides a more solid foundation for the ch III constitutional methodology, and tightens what might otherwise be an undisciplined inquiry. Incompatibility is therefore not assessed fluidly but in the context of the powers, historical function and constitutional position of a particular body, the other functions the body exercises and the nature and alignment of the function itself. It also ensures that a function is not looked at in isolation or assessed in too restrictive a way. Indeed, while some equivocality is beneficial to the exercise, contextual incompatibility tempers it by the adoption of a clear and rationale-driven approach built around the exigencies of ch III. This means that the determination is framed around a constitutionally purposive structure which is transparent and hence, susceptible to later scrutiny and critique at each stage of the analysis.

## D A Future for Contextual Incompatibility?

Admittedly, the challenges for contextual incompatibility are many. Not only would it require a departure from the established decisions of *Boilermakers’* and *Re Wakim*, it would also unite (although with varying application) the constitutional methodology applied to state and federal courts — approaches which have always been bifurcated. However, it is submitted that pitching a

187 Chief Justice JJ Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77, 80. See also Brendan Lim, ‘Attributes and Attribution of State Courts — Federalism and the *Kable* Principle’ (2012) 40 *Federal Law Review* 31, 46.

188 Spigelman, above n 187, 80; Lim, above n 187, 39–40.

189 Lim, above n 187, 49, quoting *K-Generation* (2009) 237 CLR 501, 530 [90] (French CJ).

190 Lim, above n 187, 50, quoting *Fardon* (2004) 223 CLR 575, 618 [104].

191 See, eg, Stelios, above n 17, 130 discussing the merits of incompatibility as an approach when ‘driven by independence and impartiality’.

contextual incompatibility approach is not simply a constitutional reverie. Even besides cases like *TCL Air Conditioner*, there are three reasons for optimism.

First, there is an increasing trend in the High Court's decisions to focus on what it means to be a 'court'. While this is most stark in the state court context, there are signs that this curial focus might operate more broadly.<sup>192</sup> In the state court context in *Kirk*, drawing on *Forge*,<sup>193</sup> the High Court majority explained the 'requirement'

to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.<sup>194</sup>

This curial focus is something long-predicted by commentators.<sup>195</sup> This attempts to 'anchor' the constitutional reasoning more to the text of ch III,<sup>196</sup> but also presents an opportunity for a more streamlined ch III approach focusing on what a 'federal court' or 'court of a State' may require in a constitutional sense.

Second, there is a marked interest, expressly or impliedly, in constitutional analyses derived from the integrated structure of the Australian Judicature. This was central to *Kable*,<sup>197</sup> and is evident in cases that have followed it, like *Wainohu*.<sup>198</sup> It also contributes to a heightened understanding of the end result in *Kirk*, by explaining the Court's conclusions about the supervisory jurisdiction of Supreme Courts in terms of the integrated appellate structure set down by the *Constitution*.<sup>199</sup> To some extent the approaches of some members of the High Court in *Lane v Morrison*<sup>200</sup> and *Momcilovic*<sup>201</sup> evidence a similar trend. Contextual incompatibility has the benefit of not only placing the constitutional inquiry within the context of a particular body, but also in light of its broader historical and constitutional role. Even more generally, the methodology in collapsing the test allows state and federal courts to be considered in terms of what ch III requires of them, while allowing for different constitutional answers

192 See, eg, *TCL Air Conditioner* (2013) 295 ALR 596, 607 [34] (French CJ and Gageler J).

193 (2006) 228 CLR 45.

194 *Kirk* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Forge* (2006) 228 CLR 45, 76 [63].

195 George Winterton, 'Justice Kirby's Coda in *Durham*' (2002) 13 *Public Law Review* 165, 168; Daniel Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182, 186 quoting Dawson J in *Kable* (1996) 189 CLR 51, 83.

196 Spigelman, above n 187, 80; Meagher, above n 195, 186; Dziedzic, above n 98, 141.

197 (1996) 189 CLR 51, 112–14 (McHugh J).

198 (2011) 243 CLR 181, 208–9 [44] (French CJ and Kiefel J). See also McLeish, above n 121.

199 (2010) 239 CLR 531, 580–1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Here the High Court found that s 73 of the *Constitution* guaranteed state Supreme Court's historical supervisory jurisdiction over jurisdictional error: see Zines, 'Recent Developments in Chapter III', above n 125, 10–11; Williams and Lynch, above n 125, 8.

200 (2009) 239 CLR 230, 244 [35] (French CJ and Gummow J). See also *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 173 [90] (Kirby J).

201 (2011) 245 CLR 1, 70 [101] (French CJ), 81–2 [138] (Gummow J).

depending on the particular court and its position within the integrated court structure.

Third, in light of the carve-outs and exceptions brought about by the second limb of *Boilermakers'* — including *persona designata* and the chameleon powers doctrine — it is not so drastic a step to accept that non-judicial functions can be exercised by the federal judicial arm. Further, the twin headed Hydra of *Boilermakers'* has been shown to be inadequate, such that further heads have been grafted on — focusing on whether a function is compatible with the essential character of a court or the nature of judicial power. Contextual incompatibility would simplify this beast by providing a structured inquiry by which to assess the constitutional substance and the form of a function, responsibility or role conferred on a particular body, including a court.

## VII CONCLUSION

In *TCL Air Conditioner*, the High Court was faced with submissions applying the post-*Kable* phraseology of incompatibility and institutional integrity to the typical *Boilermakers'* federal court setting. If the state court approaches were to encroach onto *Boilermakers'* territory, this could occur in slight or monumental ways. The less dramatic avenue could see questions of incompatibility with federal institutional integrity grafted onto the standard two-step *Boilermakers'* test. Alternatively, a more sweeping incompatibility approach could consolidate the state and federal constitutional approaches, push past the limitations of the second *Boilermakers'* limb, and apply diverse constitutional standards across state and federal tiers. The challenge of this more radical contextual incompatibility approach is overturning established orthodoxy and ensuring that the test remains flexible and dynamic without becoming too amorphous.

Contextual incompatibility shows that constitutional consolidation could be feasible. It sets up a structured and transparent test by which to assess the constitutionality, in form and substance, of a function being conferred. It has the benefit on focusing on the role of the particular body destined to receive the function, (including the ch III role of a court), while ensuring that each element of the test can be transparently applied and, if necessary, later scrutinised.

For Hercules, overcoming the Hydra of Lerna was his second labour.<sup>202</sup> Certainly, the second limb of the Hydra of *Boilermakers'* is likely to present no less of a task. However, it is submitted that the progressive undermining of *Boilermakers'*, the heightened interest in the integrated court hierarchy and what it means to be a 'court' and the benefits that this consolidating reform would bring to the interpretation of ch III, make it well worth the endeavour. Recent decisions of the High Court, including *TCL Air Conditioner*, while a long way from this end result, allow a constitutional brainstorming as to what a loosening of the ch III approach might begin to look like.

202 Woodford, above n 15, 158.