

Institutional Costs of Judicial Independence

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I Introduction

For 100 years,¹ the High Court of Australia has been employing Chapter III of the Australian Constitution to protect the independence of the federal judiciary and the exercise of federal judicial power from the political branches of government. For almost 20 years,² the Court has been drawing those implications further, extending the protections of Chapter III to the courts of the Australian States.

Chapter III protections are institutional – they protect the structure and organisation of the courts and their judges, and the exercise and processes of judicial power. These protections are often perceived as important safeguards within the Australian Constitution, acting to protect fundamental due process rights in the absence of a comprehensive scheme of constitutional rights protections.³ But they have not been without criticism. Scholars have criticised the High Court for ‘lack of methodological rigour’ in the way the implied limits have been drawn;⁴ and for the difficulties and inconsistencies in the application of ‘messy’ doctrine.⁵

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1 *New South Wales v Commonwealth* (1915) 20 CLR 54.

2 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*).

3 See discussion of their potential to achieve this in Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248; George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185; Fiona Wheeler, ‘The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview’ (2001) 20 *Australian Bar Review* 283.

4 See, eg, Jeffrey Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (2014) 40 *Monash University Law Review* 75; George Winterton, ‘Justice Kirby’s Coda in *Durham*’ (2002) 13 *Public Law Review* 165, 168; Elizabeth Handsley, ‘Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power’ (1998) 20 *Sydney Law Review* 183.

5 Cheryl Saunders, ‘Organised Crime Control and the Promise of Procedural Fairness: *Condon v Pompano Pty Ltd*, *Opinions on High* (22 July 2013), <<https://blogs.unimelb.edu.au/opinionson-high/2013/07/22/saunders-pompano/>>; Gabrielle Appleby and John Williams, ‘A New Coat of Paint: Law and Order and the Refurbishment of *Kable*’ (2012) 40 *Federal Law Review* 1.

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