

# THE HIGH COURT AND KABLE: A STUDY IN FEDERALISM AND RIGHTS PROTECTION

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*This article explores the impact of the High Court's uncertain formulation and application of the Kable doctrine on Australia's federal system and the democratic protection of rights. It will argue that the definitional difficulties inherent in the doctrine have had a deleterious effect on the federation, undermining federal diversity. Further, while the Kable doctrine has achieved important, incidental, rights protection benefits in the curial context, in political discourse it has been used as a substitute for deeper public conversations about the role of the state in community protection, criminal punishment and acceptable incursions into human liberties. This 'buck-passing' is dangerous in systems that rely substantially on legislative protection of rights and lack express and enforceable judicial rights protections. Implied structural principles such as the Kable doctrine have an inherently limited capacity to operate as a rights protective mechanism.*

## I INTRODUCTION

The High Court of Australia's ch III jurisprudence protects minimum characteristics of judicial institutional integrity across the federation: in Commonwealth, state and territory courts. The jurisprudence, particularly as it relates to state courts, remains unsettled. Alternating periods of expansion and dormancy have defined its judicial application. From 2009, the High Court started to apply the *Kable*<sup>1</sup> doctrine with renewed vigour after a period of retraction.<sup>2</sup> This vigour is now fading.<sup>3</sup> The states have responded to the doctrine's expansion and would appear to have groped their way back within its limits. This article explores the potential impact of these trends in the High Court's *Kable* jurisprudence

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1 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

2 See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 ('*International Finance Trust*'); *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*'); *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*'). See also the application of the *Kable* doctrine in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ('*Kirk*'); *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'). See also *New South Wales v Kable* (2013) 87 ALJR 737.

3 See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 ('*Pompano*'); *A-G (NT) v Emmerson* (2014) 88 ALJR 522; *Kuczborski v Queensland* (2014) 89 ALJR 59.

on the operation of Australia's federal system and the democratic protection of individual rights.<sup>4</sup>

In Australia, law and order initiatives have remained, by and large, within the legislative autonomy of the states.<sup>5</sup> This, according to federal theory, ought to allow for local diversity to flourish. It ought to facilitate sub-national governments' experimentation with institutional design to accommodate evolving community conceptions of justice; for example, through the employment of therapeutical and restorative justice in the criminal and family law spheres, and expectations of government in the face of threats to community safety, for example against terrorism, organised crime and sexual predators.<sup>6</sup> The first Part of this article maps the states' law and order responses to organised crime, analysing how this case study might reflect federalism theory.

Next, I consider how constitutional limits derived from state courts' position within the federal judicial structure in ch III provide a theoretical limit to diversity and local responsiveness in the name of maintaining minimum standards of judicial impartiality, independence and, in a word, integrity.

However, I will argue that, rather than an inherent conceptual incompatibility between the *Kable* principle and federalism, it is the definitional difficulties in the High Court's approach to the scope and content of the *Kable* principle that have contributed to a harmonisation effect that unnecessarily undermines federal diversity.<sup>7</sup> The inexactness of the constitutional requirements has encouraged state governments to replicate known-to-be-valid constitutional provisions, at the price of developing new, locally tailored, regimes.

I will also argue that, rather than a wholly positive outcome in a jurisdiction that lacks a bill of rights instrument, this effect can undermine important democratic safeguards for the protection of human rights.<sup>8</sup> In many instances there is evidence that the constitutionality of measures under the *Kable* principle is presented by governments in place of deeper conversations about the role of the state in community protection and acceptable incursions into individual liberties. The uncertainty of *Kable* has thus created a danger of 'buck-

4 I must thank those who piqued my interest in considering the impact of the *Kable* doctrine through a federalist lens, my colleagues, James Stellios and John Williams, as well as Brendan Lim for his excellent piece: Brendan Lim, 'Attributes and Attribution of State Courts — Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31. More recently, see Brendan Lim, 'Laboratory Federalism and the *Kable* Principle' (2014) 42 *Federal Law Review* 519; Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38 *Melbourne University Law Review* 709.

5 This also applies to the territories. Although the territories exist in a different constitutional position in the federation, they are subject to the *Kable* principle.

6 See also Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Federation Press, 2014) 10, 17.

7 See also discussion of centralisation caused by the High Court's Chapter III jurisprudence in Stephen McLeish, 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252; James Stellios, 'The Centralisation of Judicial Power within the Australian Federal System' (2014) 42 *Federal Law Review* 357.

8 This article does not consider the direct impact of the *Kable* principle on the implementation of human rights protections by the states, demonstrated, for example, in *Momcilovic* (2011) 245 CLR 1.

passing' by parliamentarians to the courts, who are inadequately equipped to protect human rights.

## II LAW AND ORDER IN THE STATES

In Australia, the government's fundamental 'duty of protecting ... every member of ... society from the injustice or oppression of every other member of it'<sup>9</sup> falls, by and large, within the constitutional authority of the states. Commonwealth movement into previously state spheres — including the regulation and provision of health care, education and even local government — was buoyed for almost a century<sup>10</sup> by the High Court's expansive reading of Commonwealth legislative power,<sup>11</sup> and its disinclination to attach limits to the federal spending power.<sup>12</sup> Thus, the states have been forced to make political hay in those areas that the Court and the Commonwealth has left to them. Law and order is an attractive area for the states to do this. Politically, it is relatively easy for governments to convince their constituents of the importance of law and order policies.<sup>13</sup> Law and order policies are also relatively cost neutral or low cost, at least compared, for example, to grand promises to build infrastructure or improve health care delivery.

States' law and order policies provide an informative study of federalism in Australia. This paper will focus on state responses to organised crime in the course of the last five years. Relative state autonomy over organised crime has been maintained in this period, even in the face of federal takeover attempts.<sup>14</sup> The case study has been chosen both because it is an area in which there has been a large amount of law reform in the time period, but also because much of that law

9 Adam Smith, *An Inquiry into the Nature and the Causes of the Wealth of Nations* (W Strahan and T Cadell, 1776) vol 3, 41.

10 A trend that started with *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 29 CLR 406.

11 This trend hit somewhat of a high water mark in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'), although note some indication that this approach is changing in the remarkably constrained approach of Hayne and Kiefel JJ in *Williams v Commonwealth* (2012) 248 CLR 156 ('*School Chaplains' Case*'), in their construction of the 'benefits to students' power in *Constitution* s 51(xxiiiA): at 277–80 [273]–[285] (Hayne J), 366–8 [570]–[574] (Kiefel J). Cf at 321–3 [408]–[441] (Heydon J).

12 See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338 ('*AAP Case*'). Contrast the Court's more recent approach: see the majority positions in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *School Chaplains' Case* (2012) 248 CLR 156.

13 See, eg, an explanation of how this is achieved through fearmongering techniques by Former United States National Security Adviser, Zbigniew Brzezinski, 'Terrorized by "War on Terror"' *Washington Post* (online), 25 March 2007 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html>>.

14 See, eg, Emily Moulton, 'WA Breaks Ranks in Julia Gillard-Led Federal Bokie War', *PerthNow* (online), 13 April 2013 <<http://www.perthnow.com.au/news/western-australia/wa-breaks-ranks-on-julia-gillard-led-federal-bokie-war/story-fnhocxo3-1226619920634>>; 'States May Resist PM's Anti-Gang Law Deal', *The Australian* (online), 6 March 2013 <<http://www.theaustralian.com.au/national-affairs/states-may-resist-pms-anti-gang-law-deal/story-fn59niix-1226591528715?nk=eb886dc61fcff0e6a422039a7902d761>>; Greg Smith and Michael Gallacher, 'NSW Presses for National Action on Organised Crime' (Joint Media Release, 12 April 2012) <<http://www.emergency.nsw.gov.au/news.php/660.html>>.

reform has involved the state judiciary and therefore raises questions about the application of the *Kable* doctrine and its impact on federalism.

### **A State Law and Order Regimes and Federalism**

State responsibility for law and order policies allows for customisation and tailoring of policies to the needs of particular states and in accordance with the expectations of the community within those states. Local communities have a louder ‘voice’<sup>15</sup> when speaking to their state governments than if responsibility lay with the central government. In theory, individuals are able to ‘exit’<sup>16</sup> those states in favour of others where policies are implemented that fail to reflect their views, or, in their opinion, inappropriately derogate from their rights. State governments are more responsible to, and therefore must be more responsive to the concerns and wishes of, a greater number of their citizens.<sup>17</sup> Diversity across a federation arises from differing regional expectations as to the government’s responsibility to provide a safe environment and its relationship to the government’s obligations to protect the rights of individuals. In these areas, there are many contested political questions that reflect different attitudes to the values of security, privacy and liberty. Diversity of responses across the states gives rise to the possibility of innovation and competition.<sup>18</sup>

In the law and order sphere, George Williams has argued that anti-organised crime measures, such as control orders, should be left as a matter for individual states. This allows for targeting and tailoring ‘to the individual circumstances of the state’. He argues that ‘[m]aking the laws at the lower level of the Federation ensures that their harm is minimised and that they are limited only to the justified need’.<sup>19</sup>

State reforms targeting organised crime, and specifically bikie-related violence, are wide-ranging and diverse.<sup>20</sup> Their adoption and design reflect the level of threat posed in particular states and community expectations within that state. Reforms have included increased police powers to bring down fortifications

15 Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

16 *Ibid.*

17 David L Shapiro, *Federalism: A Dialogue* (Northwestern University Press, 1995) 91–2.

18 See also Anne Twomey and Glenn Withers, ‘Federalist Paper I: Australia’s Federal Future’ (Report, Council for the Australian Federation, April 2007) 4.

19 Evidence to Joint Committee on the Australian Crime Commission, Parliament of Australia, Sydney, 29 September 2008, 2 (Professor George Williams).

20 For a more complete overview up to 2010, see Lorana Bartels, ‘The Status of Laws on Outlaw Motorcycle Gangs in Australia: Second Edition’ (Research in Practice Report No 2, Australian Institute of Criminology, 2010).

around bikie clubhouses,<sup>21</sup> increased police investigative powers,<sup>22</sup> increased powers to freeze and confiscate unexplained wealth and proceeds of crime,<sup>23</sup> new powers to obtain control orders against members of declared organisations,<sup>24</sup> new offences for being a member of, recruiting members or associating with members of a criminal organisation,<sup>25</sup> the re-enactment of historical consorting laws,<sup>26</sup> tightened regulation of firearms<sup>27</sup> and industries such as liquor, gambling and security,<sup>28</sup> and tattoo parlours,<sup>29</sup> and restricting the display of bikie-colours and insignia.<sup>30</sup> Alongside many of these reforms has been the introduction of ‘criminal intelligence’ provisions in legislation that allow the police to gain executive and court orders based on information not provided to the respondent.<sup>31</sup>

Some of these reforms have been adopted across a number of state and territory jurisdictions and there is thus a level of similarity and uniformity. However, even within this uniformity, jurisdictions have tailored the measures to meet local

21 See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 16A; *Serious Crime Control Act 2009* (NT) pt 6; *Criminal Organisation Act 2009* (Qld) pt 5; *Summary Offences Act 1953* (SA) pt 16; *Police Offences Act 1935* (Tas) pt 2 div 3; *Fortification Removal Act 2013* (Vic); *Corruption and Crime Commission Act 2003* (WA) pt 4 div 6.

22 For example, legislation that has allowed ‘controlled operations’, that is, undercover operations where assumed identities are adopted: see *Crimes (Controlled Operations) Act 2008* (ACT); *Law Enforcement (Controlled Operations) Act 1997* (NSW); *Police Powers and Responsibilities Act 2000* (Qld) ch 11; *Police Powers (Controlled Operations) Act 2006* (Tas); *Crimes (Controlled Operations) Act 2004* (Vic); *Corruption and Crime Commission Act 2003* (WA) pt 4 div 5; *Criminal Investigation (Covert Powers) Act 2012* (WA).

23 See *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act 2002* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA). Tasmania has the *Crime (Confiscation of Profits) Act 1993* (Tas), but this only applies to property after a person has been convicted or has absconded.

24 See *Crimes (Criminal Organisations Control) Act 2012* (NSW); *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld); *Serious and Organised Crime (Control) Act 2008* (SA); *Criminal Organisations Control Act 2012* (Vic); *Criminal Organisations Control Act 2012* (WA). The Australian Capital Territory and Tasmania are the only two jurisdictions without legislation of this nature.

25 See, eg, *Crimes (Sentencing) Act 2005* (ACT); *Crimes Legislation Amendment (Gangs) Act 2006* (NSW); *Criminal Organisations Legislation Amendment Act 2009* (NSW); *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT); *Criminal Organisation Act 2009* (Qld) s 100; *Serious and Organised Crime (Control) Act 2008* (SA) s 35; *Criminal Organisations Control Act 2012* (WA) s 106.

26 *Crimes Act 1900* (NSW) s 93X; *Summary Offences Act 1979* (NT) s 55A; *Summary Offences Act 1953* (SA) s 13; *Summary Offences Act 1966* (Vic) s 49F. See also Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37 *Melbourne University Law Review* 103.

27 See, eg, amendments to the *Firearms Act 1977* (SA) by the *Firearms (Firearms Prohibition Orders) Amendment Act 2008* (SA).

28 See, eg, amendments to the *Gaming Machines Act 1992* (SA); *Liquor Licensing Act 1997* (SA); *Security and Investigation Agents Act 1995* (SA) by the *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005* (SA).

29 See, eg, *Tattoo Parlours Act 2012* (NSW).

30 See, eg, the effect of wearing insignia in *Criminal Law Consolidation Act 1935* (SA) ss 5AA, 83E; *Serious and Organised Crime (Control) Act 2008* (SA) s 39Z and the possibility of a prohibition on wearing insignia in *Criminal Organisations Control Act 2012* (Vic) ss 45, 47.

31 This type of provision was unsuccessfully challenged in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (‘Gypsy Jokers’); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (‘K-Generation’). This type of provision now occurs in many of the anti-organised crime statutes.

needs and expectations. Some jurisdictions have prided themselves on having the ‘toughest laws’ in the country on organised crime.<sup>32</sup> Some jurisdictions have introduced ‘safeguards’ into the schemes to balance the goals of community safety with the protection of individual liberties.<sup>33</sup> Some have migrated the reforms into other fields.<sup>34</sup> Others have refrained entirely from implementing some of the more extreme measures.<sup>35</sup>

The gradual spread of preventive regimes across the Commonwealth and the states could be seen to be illustrative of one of Brandeis J’s ‘happy incidents of the federal system’, that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’.<sup>36</sup>

However, closer inspection of their adoption reveals problems with labelling these reforms a successful incident of laboratory federalism. Indeed, the reality of organised crime responses in the Australian states demonstrates the complexities of federation in practice, and its ability to produce positive as well as deleterious effects.

Many of these reforms were not introduced after novel ideas had been ‘tested’ in one jurisdiction, in the sense of tested in their practical operation. This leads to a conclusion that adoption of measures across the different states is politically motivated, often occurring even before the initial measures have commenced operation.<sup>37</sup> Jim McGinty, Attorney-General at the time when the first Western

32 See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 2001, 5038 (Dr Geoff Gallop, Premier). See also Tony Barrass, ‘Toughest New Laws for Bikies’, *The Australian* (Sydney), 18 June 2009, 6. In 2013, the Newman LNP Government introduced measures that it claimed were the toughest in the country: see ABC Radio National, ‘Bikies Heading to WA to Escape Tough New QLD Laws’, *The World Today*, 30 October 2013 (Caitlyn Gribbin) <<http://www.abc.net.au/worldtoday/content/2013/s3880028.htm>>.

33 For example, in Queensland and Victoria, the control order legislation adopted a system of special counsel to test material relied upon under the criminal intelligence regimes: see *Criminal Organisations Control Act 2009* (Qld) s 86; *Criminal Organisations Control Act 2012* (Vic) ss 71, 79. While not alleviating all of the unfairness the criminal intelligence provisions create, they alleviate some of it.

34 See, eg, the use of ‘criminal intelligence’ provisions in *Child Sex Offenders Registration (Miscellaneous Amendment Act 2013)* (SA).

35 The Bracks Labor Government in Victoria, for example, resisted the introduction of control order legislation, instead opting for a suite of legislation that strengthened police investigatory powers: see, eg, Rob Hulls, ‘Victoria’s Tough Laws Best for Dealing with Bokie Gangs’ (Media Release, 15 April 2009). Tasmanian Premier Lara Giddings has indicated that there is not the same problem with organised crime in Tasmania so as to warrant the introduction of control order legislation, but the State is working together with the other states to ensure it does not become a haven for bokie violence: see Lara Giddings, ‘Government Moves on Organised Crime’ (Media Release, 16 April 2009). More recently, there have been indications that Tasmania will act and was only waiting to see the outcome of constitutional challenges to other states’ laws: see Calla Wahlquist, ‘State Keeping Watch on New Anti-Bokie Laws’, *The Examiner* (Launceston), 16 November 2012, 2. The Australian Capital Territory Attorney-General, Simon Corbell, has said that the Australian Capital Territory government would not accept the ‘extreme approach’ taken in the other states: see, eg, David Stockman, ‘Police Union Urges Tougher Bokie Laws’, *The Canberra Times* (Canberra), 1 July 2009, 2. See also Bartels, above n 20; Stephenson, above n 4, 739–44.

36 *New State Ice Co v Liebmann*, 285 US 262, 311 (1932).

37 See also analysis of the spread of anti-terror and anti-organised crime laws in Rebecca Ananian-Welsh and George Williams ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38 *Melbourne University Law Review* 362, 397–400.

Australian anti-organised crime legislation was introduced in 2003, later said: ‘toughening the law is fine at a political, rhetorical level ... [but] [o]ur experience in Western Australia has shown that ... [the laws] haven’t been used and therefore have not been effective’.<sup>38</sup>

The federal anti-terror control orders were largely modelled on those in the United Kingdom.<sup>39</sup> The measures were passed through the Commonwealth Parliament with little debate about how successfully they had been employed in the United Kingdom or whether they would work to combat the terrorist threat posed to Australia and its community. Rather, they were used as part of an urgent political reaction to the London bombings.<sup>40</sup> When the United Kingdom modified its response,<sup>41</sup> and subsequently repealed its control order legislation on the basis it was no longer required, Australia did not follow suit.<sup>42</sup>

The adoption of control orders by the states as a tool against organised crime was done after the High Court had confirmed their constitutionality at the federal level in *Thomas v Mowbray*.<sup>43</sup> The judgment in *Thomas* was handed down on 2 August 2007 and South Australia introduced its control order legislation to Parliament on 21 November 2007. At that time, the only person who had been the subject of a control order under the federal legislation was Jack Thomas. The interim control order that he had challenged was lifted on 23 August 2007 and replaced with a signed undertaking by Mr Thomas that included similar conditions to those contained in the control order.<sup>44</sup> At the time South Australia introduced its system of control orders it was certainly not based on keen observation of successful experimentation with the system by the Commonwealth.

The next state to act was New South Wales. It introduced its control order regime after a violent bikie-related incident on 22 March 2009 at Sydney Airport, in which a brawl between members of the Commanchero motorcycle club and the Hells Angels motorcycle club resulted in the death of an associate of the Hells Angels. The New South Wales Police Minister explained that the genesis for the law’s system of declarations was the South Australian model, albeit with some changes.<sup>45</sup> In early 2009, the South Australian legislation had never been successfully applied. The first time that it was applied it was challenged, and at

38 Michael Edwards, ‘Hit Bikies’ Hip Pockets in Gang Crackdown: McGinty’, *ABC News* (online), 1 April 2009 <<http://www.abc.net.au/news/2009-04-01/hit-bikies-hip-pockets-in-gang-crackdown-mcginty/1637242>>.

39 Clive Walker, ‘The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!’ (2013) 37 *Melbourne University Law Review* 143, 143.

40 See, eg, Andrew Lynch, ‘Legislating with Urgency — The Enactment of the *Anti-Terrorism Act [No 1] 2005*’ (2006) 30 *Melbourne University Law Review* 747.

41 For example, with the introduction of special advocates after the European Court of Human Rights decision in *Chahal v United Kingdom* [1996] V Eur Court HR 1831.

42 Walker, ‘The Reshaping of Control Orders’, above n 39.

43 (2007) 233 CLR 307 (*Thomas*). Constitutionality as one of the driving reasons as to why particular regimes are adopted across the states is returned to below.

44 Julia Medew, ‘Federal Court Lifts “Terror” Restrictions on Jack Thomas’, *The Age* (Melbourne), 24 August 2007, 5.

45 New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009, 14340–1 (Tony Kelly, Minister for Police).

the time that New South Wales introduced its legislation — less than two weeks after the brawl on 2 April 2009 — the constitutionality of the South Australian legislation was still under consideration by the Full Court of the Supreme Court of South Australia.<sup>46</sup> South Australian magistrates had refused to consider any control order applications until they received the Supreme Court's ruling.<sup>47</sup> By 2009, the Commonwealth legislation had been applied on only one further occasion — against David Hicks for a 12 month period from December 2007, after his release from serving time in Adelaide's Yatala prison for convictions before a United States Military Commission. During the confirmation hearing of the interim control order, upon an application that the reporting requirements be reduced from three times a week, the Australian Federal Police conceded that they had the 'means available to know whether the Respondent is present within the specified premises and also that during any day the Applicant has the ability to ascertain the whereabouts of the Respondent at some point', making the stricter reporting requirements unnecessary.<sup>48</sup> Again, it would be difficult for New South Wales to argue that, in response to an increased threat of organised crime in the State, it was adopting proven successful experiments from other jurisdictions. Rather, it could be surmised that it was adopting measures and rhetoric for political ends.

The law and order arena provides an example of the complexity of federal theory in practice. It illustrates experimentation with innovative and novel measures and the tailoring of measures to local needs and community expectations. However, it also illustrates that local needs and community expectations may be but one reason why states adopt new policies. Successful political rhetoric is also ripe for adoption from state to state within the federation. This observed tendency in the law and order sphere is returned to when we consider the impact of the High Court's complex *Kable* jurisprudence, as it manifests as a tendency for state governments to adopt 'easy', known-to-be *Kable*-proof regimes in favour of tailoring those regimes to local circumstances and expectations.

### III DIVERSITY IN AN INTEGRATED COURT SYSTEM: AN OXYMORON?

While the limitation first enunciated in *Kable* can be criticised as in search of secure constitutional foundations, each of the judgments in the majority (Gaudron, McHugh, Gummow and Toohey JJ) emphasised the importance of the integrated court system created by ch III.<sup>49</sup> State courts became part of a larger whole. Gummow J also found that by referring to the 'Supreme Court' in ch III

46 *Totani v South Australia* (2009) 105 SASR 244.

47 See, eg, Sean Fewster, 'Magistrate Blocks Bikie Control Order' *The Advertiser* (online), 10 June 2009 <<http://www.adelaidenow.com.au/news/magistrate-blocks-bikie-control-order/story-e6freo8c-1225731124724>>.

48 *Jabbour v Hicks* [2008] FMCA 178 (19 February 2008) [47].

49 *Kable* (1996) 189 CLR 51, 96 (Toohey J), 102–3 (Gaudron J), 114–16 (McHugh J), 127–8 (Gummow J).



of the *Constitution*, the framers created a ‘constitutional expression’.<sup>50</sup> States must maintain a system of courts that meets the constitutional requirements of their constitutional expression in order to maintain the proper operation of the integrated court system created by ch III.<sup>51</sup>

The very idea of an integrated court system — the unification of parts to make a whole — tends towards harmonisation. It is theoretically difficult to reconcile the idea of diversity and experimentation in state judicial systems with the concept of an integrated court system and maintaining the institutional integrity of courts across Australia by reference to a set of minimum or essential characteristics. Nonetheless, the High Court has repeatedly, even during times of expansion of the *Kable* doctrine, confirmed that there remains space for sub-national diversity. It would appear, in theory, that this is correct. However, the High Court’s reluctant approach to the enunciation of the *Kable* doctrine with any clarity has greatly undermined this space.

As a threshold point, it is necessary to question whether federalist concerns around the *Kable* principle are fundamentally complaints about the harmonisation that is inherent in the idea of minimum guarantees of rights and liberties. The *Kable* principle protects institutions and their integrity and is not a direct form of rights protection. When federal experimentation yields because of the minimum protections that must be afforded individual rights within a community (such as the right to a fair trial), this is generally greeted not as a tragedy of federalism, but as a triumph of universal human rights protection. However, I would suggest that there are two conceptual difficulties for the continuation of a vibrant federal system that are associated with the *Kable* principle that are not posed by measures designed to protect human rights. First is its formulation. Respecting the rights of individuals who might come into contact with the judicial institution sets down no institutional minimums, dictates no institutional design. Rather, any institutional arrangements and processes must not affect the protected individual sphere. Second is the sophistication of human rights jurisprudence in comparison to the *Kable* jurisprudence, at least in so far as the former includes a well-established proportionality test. This usually provides for a level of deference (at least with respect to most rights) to the democratic legislatures to pursue, in a reasonably proportionate way, legitimate government objectives, even where there are some incursions on individual rights. This jurisprudence therefore accommodates the democratic mandate of the legislatures and therefore their superior understanding of local community values and expectations. With the exception of some exploratory statements in the more recent cases,<sup>52</sup> the proportionality concept

50 Ibid 141 (Gummow J).

51 See the adoption of this aspect of the *Kable* principle as the guiding rule in, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [27]–[30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (*‘Bradley’*); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) (*‘Forge’*).

52 *Pompano* (2013) 295 ALR 638, 641 [5], 660 [68] (French CJ). See also: at 682 [157] (Hayne Crennan, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181, 229 [107] (Gummow, Hayne, Crennan and Bell JJ) citing *Bradley* (2004) 218 CLR 146, 158 [14] (Gleeson CJ). See also 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.

has been missing from the High Court's application of the *Kable* principle. The following discussion demonstrates that while the court has emphasised that the *Kable* principle ought not to apply to the detriment of state autonomy, it has not established a consistent jurisprudence to weigh these competing values.

### A *Integration and Diversity in Theory*

An integrated court system, achieved through the 'autochthonous expedient'<sup>53</sup> captured in ss 71 and 77(iii), and the general appellate jurisdiction of the High Court in s 73, was a departure from the *Constitution's* otherwise almost wholesale adoption of ch III of the *United States Constitution*.<sup>54</sup> That meant that the repercussions of its adoption on the state courts were unknown. There was some indication that the framers expected the states to retain control over their judiciaries despite these changes. Andrew Inglis Clark, for example, explained:

What we want is a separate federal judiciary, *allowing the state judiciaries to remain under their own governments*. If you have your various governments moving in their respective orbits, *each must be complete, each must have its independence*. You must have an independent legislature, an independent executive, and an independent judiciary, *and you can have only a mutilated government if you deprive it of any one of these branches*.<sup>55</sup>

There has been little academic commentary on the extent to which the *Kable* doctrine can stifle diversity in the states.<sup>56</sup> Rather, commentary has been focussed on other areas, including the basis and uncertain content of the principle, or its ability to provide a minimum level of protection for individual liberty and procedural safeguards in the judicial process through the protection of judicial independence and impartiality. Its impact on the operation of the federal system has, however, not gone unnoticed, particularly in the immediate aftermath of *Kable*. Relying on the warnings of Robert Orr, a senior legal practitioner in the Attorney-General's Department, Enid Campbell explained:

While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform.<sup>57</sup>

53 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers*').

54 See a good analysis of this history in *Totani* (2010) 242 CLR 1, 37–9 [48]–[51] (French CJ).

55 *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, 253 (Andrew Inglis Clark) (emphasis added).

56 Although this is changing. See, eg, the contributions of Lim, 'Attributes and Attribution of State Courts', above n 4; Lim, 'Laboratory Federalism and the *Kable* Principle', above n 4; Stephenson, above n 4.

57 Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 421, citing Robert Orr, '*Kable v DPP*: Taking Judicial Protection Too Far?' (1996) 11 *ALJL Forum* 11, 15–17.

For over a decade, these warnings might have been thought to overstate the threat. Harmonisation is not the inevitable consequence of an integrated court system. As Brendan Lim has observed, this will depend upon whether, in its application of the *Kable* doctrine, the High Court emphasises the attribution of courts as *state* courts or the attributes of state courts as state *courts*.<sup>58</sup> The High Court has consistently argued that the two concepts — diversity and institutional integrity — are, in fact, compatible.

In the years after the *Kable* decision, the High Court's jurisprudence supported this assertion. For instance, in considering the constitutionality of the remuneration arrangements of the Chief Magistrate in the Northern Territory, which would *not* have met the requirements for a federal judicial officer in s 72 of the *Constitution*, Gleeson CJ explained that differences in structural arrangement for courts did not breach the *Kable* principle:

*The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.*<sup>59</sup>

At least with respect to the structural guarantees of independence, the High Court emphasised that there was still significant room for diversity and experimentation.<sup>60</sup> During this period, it appeared that there was even a large amount of latitude for states to vest courts with non-judicial functions. McHugh J explained in *Fardon* that '[t]he content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State,' and that, for example, 'nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts'.<sup>61</sup>

The High Court's approach to applying the *Kable* principle was certainly consistent with this position until the decision in *International Finance Trust* in 2009.<sup>62</sup> Since the principle's reinvigoration in this case, the High Court has happily expanded our understanding of what the essential or defining characteristics of courts might be, noting that an exhaustive definition is impossible.<sup>63</sup> Independence and impartiality is the standard formulation that was prominent in the immediate post-*Kable* period,<sup>64</sup> but more recently procedural fairness,<sup>65</sup> adherence to the

58 Lim, 'Attributes and Attribution of State Courts', above n 4; Lim, 'Laboratory Federalism and the *Kable* Principle', above n 4.

59 *Bradley* (2004) 218 CLR 146, 152 [3] (emphasis added).

60 See also comments in *Forge* (2006) 228 CLR 45, 65–6 [36]–[37] (Gleeson CJ).

61 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 600 [40] ('*Fardon*'). See also: at 600–1 [41]; *K-Generation* (2009) 237 CLR 501, 529–30 [88] (French CJ).

62 See discussion in Appleby and Williams, above n 52, 8–11.

63 *Bradley* (2004) 218 CLR 146, 163 [30]. See also the statement in *Forge* (2006) 228 CLR 45, that there is no 'single all-embracing statement of the defining characteristics of a court': at 76 [64] (Gummow, Hayne and Crennan JJ). See also *Fardon* (2004) 223 CLR 575, 618–19 [105] (Gummow J); *Pompano* (2013) 295 ALR 638, 673 [124] (Hayne, Crennan, Kiefel and Bell JJ); *Totani* (2010) 242 CLR 1, 47–8 [69] (French CJ).

64 *Bradley* (2004) 218 CLR 146, 163 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), quoting *Ebner v Official Trustee* (2000) 205 CLR 337, 373 [116] (Kirby J).

65 *International Finance Trust* (2009) 240 CLR 319; *Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

open court principle,<sup>66</sup> the giving of reasons,<sup>67</sup> and a minimum supervisory jurisdiction to correct jurisdictional error have been added.<sup>68</sup> Even accepting that essential or defining characteristics are generally malleable, the more that emerge, the less scope for state diversity.

Further, the High Court has approached the determination of what measures may intrude on the institutional integrity of courts by reference to historical powers.<sup>69</sup> This was perhaps most dramatically demonstrated by the High Court's decision in *Kirk*, where the court determined that the supervisory jurisdiction of state Supreme Courts was an essential characteristic of those courts by reference to a case decided in 1874.<sup>70</sup> While this has on occasion been used to justify the conferral of powers not strictly judicial on the courts, other times it has been used to strike down novel schemes.<sup>71</sup> In this way, the doctrine is an inherently conservative and unifying force.<sup>72</sup>

In articulating the content of these essential or defining characteristics in the post-2009 period, another identifiable trend is the High Court's use of federal separation of powers jurisprudence, producing greater harmony as the previously distinct doctrines converge. For example, in *Kirk* the High Court implied a limitation on the use of privative clauses at the state level that largely mimics the express limit in s 75(v) of the *Constitution* that applies at the federal level.<sup>73</sup> In *Wainohu*, the High Court relied heavily on federal *persona designata* cases in creating and applying similar limits to state judges.<sup>74</sup>

This trend is also notable in that line of cases considering the minimum requirements of judicial process. In *Thomas*, the High Court explained that the ch III requirement that federal jurisdiction is exercised in accordance with 'the methods and standards which have characterised judicial activities in the past'

66 *Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

67 *Wainohu* (2011) 243 CLR 181.

68 *Kirk* (2010) 239 CLR 531.

69 See, eg, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* ('*Hindmarsh Island Bridge Case*') (1996) 189 CLR 1, 25–6 (Gaudron J). Her Honour says that there may be functions that may give rise to 'the appearance that there is an unacceptable relationship between the judiciary and the other branches of government' but because of their historical pedigree do not risk public confidence. 'However', she continues, 'history cannot justify the conferral of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally': at 25–6. See also *Totani* (2010) 242 CLR 1, 42 [60] (French CJ), 63 [134] (Gummow J); *Wainohu* (2011) 243 CLR 181, 212–13 [52] (French CJ and Kiefel J); *Pompano* (2013) 295 ALR 638, 674 [126] (Hayne, Crennan, Kiefel and Bell JJ), although cf at 677 [138].

70 *Kirk* (2010) 239 CLR 531, 580 [97], quoting *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442.

71 See, eg, the comparison between the control order regime in *Totani* and historical consorting legislation: *Totani* (2010) 242 CLR 1, 30–1 [33] (French CJ).

72 See similar predictions in Orr, above n 57, 16.

73 See also Lim, 'Attributes and Attribution of State Courts', above n 4, 64; McLeish, above n 7, 253–4.

74 *Wainohu* (2011) 243 CLR 181, especially at 225–6 [94], 229 [106] (Gummow, Hayne, Crennan and Bell JJ), 206 [39] (French CJ and Kiefel J). Contrast the approach of Heydon J. See also Lim, 'Attributes and Attribution of State Courts', above n 4, 64–5; McLeish, above n 7, 257–9.

applies to any ‘court exercising federal jurisdiction’.<sup>75</sup> In *International Finance Trust*, French CJ relied heavily on federal judicial process cases.<sup>76</sup> French CJ acknowledged that these cases were concerned with courts exercising federal jurisdiction, but quoted with approval McHugh J’s statement in *Kable* that ‘in some situations the effect of Ch III of the *Constitution* may lead to the same results as if the State had an enforceable doctrine of separation of powers’.<sup>77</sup> In *Pompano*, the High Court relied heavily on *Thomas* to reject arguments that the Supreme Court of Queensland’s involvement in making a declaration against organisations on the basis of the unacceptable risk posed by the group to the safety, welfare or order of the community was unconstitutional.<sup>78</sup> In many of these cases, the use of federal cases as a guide can be explained on the basis of the *Bachrach* principle,<sup>79</sup> that is, if the legislation does not breach the federal separation of powers doctrine, it does not breach the *Kable* doctrine. However, as Stephen McLeish has observed, this

is an example of the beginning of a conceptual convergence, whereby two different but parallel principles ... inform each other’s application and thereby, potentially at least, start to resemble each other.<sup>80</sup>

Even after the High Court’s newfound vigour in applying the *Kable* principle to strike down state legislation and its harmonisation with some aspects of the federal limitations, in theory the states retained their autonomy and ability to diversify and innovate. In *Totani*, French CJ noted the ‘undoubted power of State Parliaments to determine the constitution and organisation of State courts’, explaining that this does not

75 *Thomas* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ), quoted in *International Finance Trust* (2009) 240 CLR 319, 353 [52] (French CJ) in relation to state courts; *Totani* (2010) 242 CLR 1, 157 [427] (Crennan and Bell JJ).

76 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Nicholas v The Queen* (1998) 193 CLR 173; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; *Thomas* (2007) 233 CLR 307, cited in *International Finance Trust* (2009) 240 CLR 319, 352–3 [50]–[52].

77 *International Finance Trust* (2009) 240 CLR 319, 354 [53], quoting *Kable* (1996) 189 CLR 51, 118 (McHugh J). Contrast with *International Finance Trust* (2009) 240 CLR 319, 364 [89] (Gummow and Bell JJ), citing *Thomas* (2007) 233 CLR 307. See also *Totani* (2010) 242 CLR 1, 62–5 [131]–[138], 65 [140] (Gummow J), 159 [434] (Crennan and Bell JJ).

78 The contested legislation was *Criminal Organisation Act 2009* (Qld) s 10(1). See *Pompano* (2013) 295 ALR 638, 646 [24] (French CJ) with whom Gageler J agreed: at 686 [175]. See also: at 678–9 [143] (Hayne, Crennan, Kiefel and Bell JJ). A further example of this phenomenon is the reasoning employed by Hayne J in *Totani*, where he considered the peculiar nature of punishment of criminal guilt as an exclusive incident of judicial power in determining whether the *Serious and Organised Crime (Control) Act 2008* (SA) breached the *Kable* doctrine, despite the *Kable* doctrine not turning on whether judicial power is being exercised.

79 *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561–2 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

80 McLeish, above n 7, 255–6. While it is beyond the scope of this paper, it will be interesting to see whether this is part of a trend in which the courts no longer consider the application of the *Boilermakers*’ principle as against the *Kable* principle in the federal/state contexts respectively, but rather use a single test of whether a federal or state court continues to meet the constitutional requirements of a federal or state court respectively; see, eg, *Pompano* (2013) 295 ALR 638, 686 [177] (Gageler J); *TCL Air Conditioner (ZhongShan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 553 [27] (French CJ and Gageler J).

detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.<sup>81</sup>

In *Pompano*, Hayne, Crennan, Kiefel and Bell JJ made similar statements to those of the United States Supreme Court in *Mistretta*,<sup>82</sup> noting the novelty of the criminal intelligence scheme created by the Queensland *Criminal Organisation Act 2009* (Qld), and that ‘it is no doubt possible to say of them that they depart from hitherto established judicial processes’. Importantly, however, they went on:

The fact that the procedures prescribed by the Act are novel presents the question. Novelty does not, without more, supply the answer to that question. More detailed analysis is necessary.<sup>83</sup>

## **B Kable and Integration Today: Stifling Diversity in Practice**

While the *Kable* principle has the capacity to allow for state diversity in theory, diversity in practice has been greatly reduced as an *indirect* result of the High Court’s approach to the *Kable* principle. In this Part, I explore the extent to which, as a result of the uncertainty of the *Kable* principle, state governments and legislatures are likely to exercise prudence in involving courts in innovative schemes.<sup>84</sup> The effect of the High Court’s uncertain jurisprudence has been noted by others. Sarah Murray, in her exploration of constitutional impediments on less-adversarial judicial structures and techniques, argues that constitutional requirements ought to be clear and not overly restrictive so as to unnecessarily impede institutional change.<sup>85</sup> Justice John Basten, speaking extra-curially, has observed in relation to the decisions in *Kable* and *Kirk*, that ‘[t]he indeterminacy of the governing concepts has left a wide scope for challenges’, and the resulting uncertainty is ‘contrary to an underlying principle of the law’ and ‘increases unproductive social cost’.<sup>86</sup>

The Court’s approach to the *Kable* principle has operated to promote state adoption of constitutionally safe, known-to-be valid law and order measures to the detriment of experimentation and diversification. This has emerged to the detriment of democratic engagement and participation in a conversation about the sufficiency and appropriateness of community protection measures, which is explored in the final Part of this article.

81 *Totani* (2010) 242 CLR 1, 45 [66]. See also: at 44 [64], 46 [67]–[68]; *Wainohu* (2011) 243 CLR 181, 212–13 [52] (French CJ and Kiefel J); *Pompano* (2013) 295 ALR 638, 661 [72] (French CJ).

82 *Mistretta v United States*, 488 US 361 (1989). The Supreme Court indicated that: ‘Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation’: at 385.

83 *Pompano* (2013) 295 ALR 638, 677 [138].

84 See Anne Twomey, ‘The Limitation of State Legislative Power’ (2001) 4 *Constitutional Law and Policy Review* 13, 19.

85 Murray, above n 6, 2.

86 John Basten, ‘Constitutional Law in the Federal and State Courts in 2014: The Judiciary and the Legislature’ (Paper delivered at the Gilbert + Tobin Centre of Public Law, Constitutional Law Conference, 13 February 2014) 8.

During the immediate post-*Kable* era, the *Kable* doctrine was applied by the High Court in a way that operated as a cue to the states that, despite initial concerns the *Kable* doctrine would stifle diversity, the states ought to be confident in continuing to use state courts in innovative crime prevention regimes.<sup>87</sup> The trends in the High Court's jurisprudence commencing with *International Finance Trust* in 2009, however, must have left the states reeling and uncertain about the limits of their own powers. In *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment*,<sup>88</sup> Heydon J asked:

Has the basis of the decision changed over time? Does ... [*Kable*] lack a ratio decidendi? Are the *Kable* statements, being 'insusceptible of further definition in terms which necessarily dictate future outcomes', inconsistent with the rule of law because they are so uncertain that they make prediction impossible and give too much space within which the whims of the individual judge can take effect without constraint? 'As law becomes more abstract and more generously endowed with doctrinal axioms and categories, the doctrines themselves seem to become emptied of real significance; they become compatible with more or less any conclusion in concrete cases'.<sup>89</sup>

Cheryl Saunders has described the recent jurisprudence on *Kable* as 'messy', 'in which different judges relied on different features of the challenged legislation to draw what sometimes appeared to be fine lines between what was acceptable and what was not'.<sup>90</sup> In the circumstances, it is of more than passing curiosity that states continue to use their courts in these regimes at all.<sup>91</sup> As was pointed out in *Fardon*, the states are free to take these powers away from the courts and give them to non-judicial bodies, such as a panel of psychiatrists.<sup>92</sup> It would appear that the desire to cloak their policies in the legitimacy of the courts has been the stronger allure for governments for many years.<sup>93</sup> However, this restraint should not be taken for granted. More recently states have started to turn away from the courts and towards non-judicial bodies, including the Governor or parole board,<sup>94</sup> to take on these roles.

87 See analysis of this period in Appleby and Williams, above n 52, 8–11.

88 (2012) 250 CLR 343.

89 Ibid 369–70 [62] (citations omitted), quoting *Fardon* (2004) 223 CLR 575, 618 [104]; A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 202.

90 Cheryl Saunders, 'Organised Crime Control and the Promise of Procedural Fairness: *Condon v Pompano Pty Ltd*' on *Opinions On High* (22 July 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/2013/07/22/saunders-pompano/>>.

91 *Totani* (2010) 242 CLR 1, 96–7 [247] (Heydon J).

92 *Fardon* (2004) 223 CLR 575, 591 [18] (Gleeson CJ), 600 [40], 602 [44] (McHugh J). Although note more recent comments of Gummow J in *Totani* (2010) 242 CLR 1, 67 [147], throwing some doubt onto this.

93 *Mistretta v United States* 488 US 361, 407 (1989).

94 See *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld), which was struck down by the Court of Appeal on *Kable* grounds because the Governor's power to order the continuing detention of a serious sexual offender interfered with the Court's decision to refuse this order: *A-G (Qld) v Lawrence* (2013) 306 ALR 281. See also *Corrections Amendment (Parole) Act 2014* (Vic).

It could be asked whether the *Kable* principle is any more uncertain than other constitutional doctrines. A level of ambiguity and uncertainty is necessary, and indeed often beneficial, in constitutional tests, where standards are often perceived as preferable to rules. However, the uncertain dimensions of the High Court's positions in recent *Kable* cases are many and demonstrate uncertainty in the basis, formulation and content of the doctrine. The division among the High Court in *Momcilovic*,<sup>95</sup> on almost every aspect of the constitutional arguments as to the validity of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'),<sup>96</sup> is perhaps the best illustration of divisions within the High Court as to the principle's modern application.<sup>97</sup> Further, the principle, to date, has been formulated in absolute terms, with no leeway given to the governments through a form of proportionality test (such as, for example, we see in relation to the implied freedom of political communication).<sup>98</sup>

Other cases also illustrate the uncertainties and evolution with respect to the principle's formulation, content and application. In *Kirk*, despite previous indications to the contrary,<sup>99</sup> the High Court found that one of the defining characteristics of a Supreme Court was its supervisory jurisdiction to review the decisions of inferior courts and tribunals for jurisdictional error.<sup>100</sup> In *Wainohu*, despite some statements to the effect that the *Kable* doctrine applied to courts and not judges,<sup>101</sup> the High Court held that state appointment of judges *personae designatae* would attract similar limitations to those that apply to judges of federal courts.<sup>102</sup> The High Court then found that the absence of a legislative requirement for state judges to give reasons would breach this limitation,<sup>103</sup> even though a similar absence in an earlier federal decision did not.<sup>104</sup>

In *International Finance Trust*, a majority of four judges took an approach to the interpretation of the impugned provision that is hard to reconcile with the High Court's previous approach to interpretation so as to avoid unconstitutionality

95 (2011) 245 CLR 1.

96 Section 36 empowers the Supreme Court of Victoria to issue a 'declaration of inconsistent interpretation' in circumstances where the Court believed that there was no way to interpret the legislation in a way that was consistent with the human rights in the *Charter* and with the purpose of the legislation.

97 French CJ, Bell, Crennan and Kiefel JJ held s 36 to be constitutionally valid; Gummow, Hayne and Heydon JJ held s 36 to be invalid.

98 I am indebted to James Stellios for this point.

99 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 633–4 (Gaudron and Gummow JJ).

100 *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See further Nicholas Gouliadatis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 876; Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of *Hickman*?' (2010) 21 *Public Law Review* 92, 100.

101 *Kable* (1996) 189 CLR 51, 103–4 (Gaudron J). Cf at 117–18 (McHugh J).

102 *Wainohu* (2011) 243 CLR 181, 210–11 [47]–[48] (French CJ and Kiefel J), 228–9 [104]–[105] (Gummow, Hayne, Crennan and Bell JJ).

103 *Ibid* 219–20 [68]–[69] (French CJ and Kiefel J), 228 [104], 229–30 [109] (Gummow, Hayne, Crennan and Bell JJ).

104 *Grollo v Palmer* (1995) 184 CLR 348.



in *Gypsy Jokers* and *K-Generation* — an approach to which three judges in *International Finance Trust* continued to adhere.<sup>105</sup>

*Pompano* aggravated the uncertainty and caused resultant difficulties for the states in a number of ways, not least the statement in the joint judgment that

the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration.<sup>106</sup>

The quote serves as a warning against taking general statements about the scope of the *Kable* principle out of the factual context in which they were made. Such an approach makes it difficult for states to move away from the exact factual circumstances previously considered by the High Court when drafting law and order schemes. This provides little guidance to the states. It is indicative of a judicial move away from the crafting of implied limitations in the form of tests for future use,<sup>107</sup> in favour of deciding narrowly the questions posed by the factual circumstances. Sir Anthony Mason once explained that the role of a *constitutional court* is to expound the former. He explained that judges should aim to provide reasons that

deal fairly and impartially with the competing considerations, *resting wherever possible on a principle of appropriate generality*, even though the full reach of the principle must be left for later examination.<sup>108</sup>

In *Totani*, the High Court was confronted by legislation that relied on a number of known-to-be-valid provisions — including those that allowed for the use of criminal intelligence<sup>109</sup> and the issuing of control orders by ch III courts.<sup>110</sup> Nonetheless, the High Court held to be invalid the provision that required the South Australian Magistrates Court to make a control order against a person where the Court is satisfied that the person is a member of a declared organisation.<sup>111</sup> The majority of the High Court held the legislation invalid on the basis that the limited role given to the Magistrates Court in the scheme, in contrast to that of the Attorney-General, demonstrated that it was, in fact, rendered an instrument of the Executive.<sup>112</sup> The outcome in *Totani* stands in contrast to the High Court's

105 See also Lim, 'Attributes and Attribution of State Courts', above n 4, 55–7.

106 *Pompano* (2013) 295 ALR 638, 677 [137] (citations omitted). See similar commentary in Saunders, above n 90.

107 As was seen, for example, during the Mason and Brennan eras of the High Court.

108 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' in Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) 110, 141 (emphasis added).

109 *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.

110 *Thomas* (2007) 233 CLR 307.

111 *Serious and Organised Crime (Control) Act 2008* (SA) s 14(1), later amended by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.

112 *Totani* (2010) 242 CLR 1, 21 [4], 52–3 [82]–[83] (French CJ), 66 [142], 67 [149] (Gummow J), 160 [436] (Crennan and Bell JJ), 172 [479] (Kiefel J). Cf the reasoning employed by Hayne J, which focussed more on whether the power conferred on the Court was properly classified as judicial power.

decision in *Baker v The Queen*.<sup>113</sup> In that case, Gleeson CJ rejected the argument that the Court was being used to mask a ‘legislative decree’.<sup>114</sup> He asked whether discretion given to the court is ‘devoid of content, so that it is impossible for any case to satisfy [its exercise]’.<sup>115</sup>

Together, these uncertainties and divergent precedents create an almost unmanageable position for the state executive or legislature in determining the constitutional scope of their own power when considering new and innovative curial measures. As Murray explains: ‘The State constitutional criteria do not provide sufficient clarity or transparency for accurate constitutional assessment to be made in the face of curial reform’.<sup>116</sup>

### **C Consequences of Uncertainty on Federalism and Rights Protection**

In *Totani*, French CJ explained the indefinable nature of the principle and any resulting uncertainty in a positive light:

For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.<sup>117</sup>

It is certainly the case that the current articulation of the *Kable* principle and its application by the High Court (as well as by intermediate courts) makes it difficult for government legal advisers to provide constitutional advice on law and order schemes involving the courts.<sup>118</sup> This may mean that states, as French CJ indicates, should, approach the use of state judiciaries cautiously. Should this be greeted enthusiastically, particularly so in a system that has no constitutional protection for individual rights? Heydon J has noted that ‘[l]awyers commonly think that the *Kable* doctrine has had a beneficial effect on some legislation’.<sup>119</sup>

Two questions must be asked about this state of constitutional affairs. First, if we accept, as we must, that the *Constitution* gives prominence to representative and responsible government as the key protector of human rights,<sup>120</sup> is it appropriate that the High Court should be using the *Kable* principle to warn governments and

113 (2004) 223 CLR 513.

114 Ibid 522–3 [11], 525 [19] (Gleeson CJ).

115 Ibid 524 [16]. See also at 525 [18]–[19].

116 Murray, above n 6, 199. See also at 2, 202.

117 *Totani* (2010) 242 CLR 1, 47–8 [69].

118 Orr, above n 57, 16.

119 *Totani* (2010) 242 CLR 1, 95 [245].

120 See, eg, Justice P A Keane, ‘In Celebration of the *Constitution*’ (Speech delivered at the National Archives Commission, Banco Court, Supreme Court of Queensland, Brisbane, 12 June 2008) 2–4.

parliaments away from the limits of their constitutional powers? Helen Irving has argued (in the context of whether the High Court should provide advisory opinions) that ‘engender[ing] timidity in governments’ is not a preferable state of constitutional affairs.<sup>121</sup> She argues:

Progressive legislation in Australia has often proceeded by constitutional ‘adventures’ undertaken by governments who are prepared to test the established constitutional limits and to make new constitutional arguments in support of their legislative programs. Persuasive new arguments, made in concrete cases concerning new legislative initiatives, advance the law. ... Those ... who promote the view that the *Constitution* should adapt to current needs and values, should particularly value the opportunity to advance fresh perspectives in constitutional interpretation.<sup>122</sup>

There are questions about whether this justification should apply with equal force to legislation involving state judiciaries as opposed to other areas, for example, the legislative exploration of the boundaries of the division of legislative power. Certainly, in the law and order sphere, some experimentation risks undermining fundamental constitutional principles, including the independence of the judiciary, curbing arbitrary power, the rule of law and the protection of individual liberty. However, that is not to say that all innovative legislative arrangements involving the courts must be viewed as *necessarily* undermining these principles. In recent times, Australia has seen important innovations in the restorative justice arena, including the introduction of ‘problem-solving courts’, such as mental health courts, drug courts and Indigenous sentencing courts. There has also been significant experimentation and diversity in the design of state tribunals.<sup>123</sup> It is important that in exercising ‘prudence’ the states are not discouraged from advancing novel schemes.<sup>124</sup>

French CJ’s call for the exercise of ‘prudence’ appears to be an elaborate game of bluffing. However, it is a game of bluffing with potentially dangerous consequences. For decades, despite the emergence of the *Kable* doctrine, the states continued in their attempts to include the courts in their new law and order schemes.<sup>125</sup> This was despite the constitutional possibility that they could simply

121 Helen Irving, ‘Advisory Opinions, the Rule of Law, and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 105, 132.

122 *Ibid.* See also the discussion of parliament’s role in constitutional interpretation, and what factors should guide its action where constitutional power is uncertain, in Gabrielle Appleby and Adam Webster, ‘Parliament’s Role in Constitutional Interpretation’ (2013) 37 *Melbourne University Law Review* 255.

123 See further Gabrielle Appleby and Anna Olijnyk, ‘The Impact of Uncertain Constitutional Norms on Government Policy: Tribunal Design after *Kirk*’ (2015) *Public Law Review* (forthcoming).

124 See also Murray, above n 6, 2.

125 Most recently, South Australia announced its intention to establish a control order regime for child sex offenders: Nigel Hunt, ‘Attorney-General John Rau Unveils Measures to Put Worst Pedophiles under Lifelong Control Orders’ *The Advertiser* (online), 30 August 2013 <<http://www.adelaidenow.com.au/news/attorneygeneral-john-rau-unveils-measures-to-put-worst-pedophiles-under-lifelong-control-orders/story-fni6uok5-1226707179650>>.

remove these schemes from the courts altogether,<sup>126</sup> the resultant reduction in judicial scrutiny being to the detriment of individual liberties.<sup>127</sup> This danger is not new. It was mooted when the *Kable* principle was first enunciated. However, the High Court's more stringent approach to the *Kable* principle since 2009 once again raised the possibility of the states moving in this direction. In 2013 and 2014, the states started to make this change.

In 2013, in a high profile law and order crackdown, the Newman LNP government introduced a suite of new laws targeting organised crime as well as serious sex offenders. The *Criminal Law Amendment (Public Interest Declaration) Amendment Act 2013* (Qld) vested power in the Governor in Council, on the advice of the Attorney-General, to make a public interest declaration against an individual (ordering their continued detention) who has previously been the subject of an order by a court under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).<sup>128</sup> The Queensland Court of Appeal struck down the legislation on the basis of its interference with the exercise of the Court's power;<sup>129</sup> the Attorney-General did not appeal to the High Court.

In 2014, the Victorian Parliament passed the *Corrections Amendment (Parole) Act 2014* (Vic). This Act inserted s 74AA into the *Corrections Act 1986* (Vic). This provision was stated to apply to 'the prisoner Julian Knight' only. Mr Knight had been convicted of seven counts of murder and sentenced to life imprisonment. He became eligible for parole on 8 May 2014.<sup>130</sup> Section 74AA provides that the Parole Board may only make an order for parole if satisfied that the prisoner is 'in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person' and 'has demonstrated that he does not pose a risk to the community'. The legislation mirrors, in many important respects, the legislation that was struck down in *Kable*, with a notable departure — vesting the power of continued detention in the Parole Board and not the courts.<sup>131</sup>

Second, the High Court has been able to protect important judicial process guarantees and secure resultant benefits for individual liberty under the *Kable* principle. The uncertainty and judicial bluffing around the principle may have assisted in this regard. However, it has begun to become apparent that in this uncertain environment, the states may become so fixated on securing compliance with the *Kable* principle that this will substitute discussion about the

126 Although note recently the comments of Gummow J in *Totani* (2010) 242 CLR 1, 66–7 [146]–[147], that this may be unavailable, at least in relation to the power to detain individuals after the determination of criminal guilt.

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

128 The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was the legislation that was upheld in *Fardon* (2004) 223 CLR 575.

129 *A-G (Qld) v Lawrence* (2013) 306 ALR 281.

130 Jeremy Gans, 'News: One-Person Parole Law Enacted in Victoria' on *Opinions on High* (27 March 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/03/27/news-one-person-parole-law-enacted-in-victoria/>>.

131 This was based largely on legislation upheld by the High Court in *Crump v New South Wales* (2012) 247 CLR 1.

appropriateness of the particular law and order scheme. That is to say, states may stop engaging in a dialogue about community protection (or criminal enforcement and appropriate punishment) and the costs that can be borne in its name (in terms of incursions into individual liberties). Instead, when a definite ruling is given on the constitutionality of a law and order scheme under the *Kable* principle, the states may hold this out as sufficient to achieve the necessary balancing between community protection and individual liberties. As Rebecca Ananian-Welsh and George Williams have argued, the High Court's control order cases have 'ultimately played a role in facilitating the migration and normalisation of once-extreme measures'.<sup>132</sup> Scott Stephenson has also observed that High Court decisions have often resulted in narrowing the scope of debate, that when the High Court validates a model it elevates it, providing it with a stamp of legitimacy, despite that model not necessarily being 'an exemplar of good judicial process'.<sup>133</sup> This is dangerous in the Australian context where legislatures retain the primary role in protecting rights through their representative nature and deliberative processes.<sup>134</sup>

There is already evidence that states are waiting for the High Court's imprimatur for constitutionally contentious schemes before adopting these in their own jurisdictions. After *Totani*, South Australia waited for the decision in *Wainohu* before amending its control order legislation to reflect that decision. When Western Australian Attorney-General Christian Porter introduced that state's control order legislation, he said:

Western Australia has the advantage of the High Court decisions [*Totani* and *Wainohu*] providing us here in Western Australia with guidance about the most constitutionally valid approach.<sup>135</sup>

This has implications for the operation of the federal system. When state legislatures adopt laws simply because they have been given the High Court's stamp of constitutional approval, they may stop responding to the voices of their citizens in developing these measures and engaging in deliberative debate over the most appropriate response to the perceived level of threat in their jurisdictions. Experimentation and innovation within the federation becomes less about the adoption of effective and appropriate measures and more about the adoption of constitutionally valid measures. The High Court, by declaring legislation constitutionally valid, performs a public legitimising process.<sup>136</sup> The potential for federalism to flourish in the law and order arena is being undermined not by the constitutional principle itself, but by the judicial uncertainty around it, along with

132 Ananian-Welsh and Williams, above n 37, 406.

133 Stephenson, above n 4, 746.

134 This is true even in Victoria and the Australian Capital Territory, where statutory bills of rights exist: *Charter; Human Rights Act 2004* (ACT). These statutory instruments retain primary responsibility for rights protection with the legislature, albeit they also provide an important role for the judiciary, and establish mechanisms to enhance the deliberative process within the legislature.

135 Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 2011, 9678 (Christian Porter).

136 Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1<sup>st</sup> ed, 1988) 28.

the parliaments' unwillingness (and perhaps inability) to engage with the limits, complexity and nuances of this jurisprudence.

State and territory governments have often used compliance with the *Kable* principle as a substitute for debate about whether law and order measures are appropriate to combat the particular threat with as little incursion into individual liberties as necessary. But passing muster under the *Kable* principle is not the same as satisfying Australia's international obligations to protect and uphold universal human rights. McHugh J in *Fardon* explained:

State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise, or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.<sup>137</sup>

And, as Bret Walker SC explained in his review of the federal counter-terrorism legislation:

The constitutional validity of the [control order] legislation has been upheld. This does not foreclose the possibility of an adverse opinion on the part of the [Independent National Security Legislation Monitor] concerning any of the effectiveness, appropriateness (including compliance with international obligations) and necessity of the [counter-terrorism laws] in this regard.<sup>138</sup>

Even if one accepts that there have been benefits achieved through the High Court's use of the *Kable* principle,<sup>139</sup> and that the High Court has used it against legislation that can only be described as possessing draconian features, the substitution of the *Kable* principle for a bill of rights should be viewed with a level of concern.<sup>140</sup>

These concerns can be illustrated by two examples. In *Pompano*, the High Court considered the Queensland control order scheme and, specifically, the part of the scheme by which information was declared to be criminal intelligence. While the respondent was excluded from the hearing on this matter (and parts of the substantive hearings at which criminal intelligence was used), a Public Interest Monitor (PIM) was permitted to be present and to make submissions. The PIM's functions are described as follows:

<sup>137</sup> *Fardon* (2004) 223 CLR 575, 601 [41].

<sup>138</sup> Bret Walker, 'Declassified Annual Report' (Independent National Security Legislation Monitor, 20 December 2012) 35.

<sup>139</sup> See also Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 29–30.

<sup>140</sup> See also Ananian-Welsh and Williams, above n 37, 406. Cf Mirko Bagaric, 'The Revived *Kable* Doctrine as a Constitutional Protector of Rights?' (2011) 35 *Criminal Law Journal* 197, 200–1. See also Stephenson's analysis: Stephenson, above n 4, 749–50.

- (a) to monitor each application to the court for a criminal organisation order or the variation or revocation of a criminal organisation order; and
- (b) to monitor each criminal intelligence application; and
- (c) to test, and make submissions to the court about, the appropriateness and validity of the monitored application.<sup>141</sup>

French CJ was the only judge who treated the existence of the PIM as relevant to the constitutionality of the legislation, that is, as one of a number of factors that led to that outcome.<sup>142</sup> The joint judgment of Hayne, Crennan, Kiefel and Bell JJ made no mention of the PIM in the course of their reasoning. Gageler J considered, but rejected, the argument that the PIM could add to the fairness of the scheme:

The COPIM does not act as an advocate for a respondent to a substantive application. The COPIM is not required to act in the interests of a respondent. The presence of the COPIM doubtless adds to the integrity of the process. But it cannot cure a want of procedural fairness.<sup>143</sup>

In the wake of *Pompano*, both New South Wales and South Australia passed new amendments to their control order regimes.<sup>144</sup> These amendments transferred the power to make declarations from individual judges to courts, mirroring the Queensland scheme upheld in *Pompano*. New South Wales introduced a Criminal Intelligence Monitor,<sup>145</sup> akin to the PIM. The importance of the High Court's brief comments on the relevance of this feature to the constitutionality of the scheme was expressed by the Attorney-General in his second reading speech:

While the High Court's decision on the Queensland legislation did not focus on the existence of the Criminal Organisations Public Interest Monitor, as the position is known under the Queensland Act, the monitor's role was described as one aspect which tended to support the validity of the Act. Consequently the bill proposes to adopt this mechanism in New South Wales.<sup>146</sup>

In New South Wales the introduction of a PIM was not advocated because it was seen as appropriate to remedy unfairness in the established criminal intelligence scheme, but rather because it may be relevant to support the constitutionality of the scheme.

In contrast, South Australia did not introduce a system akin to that of the PIM. South Australia has demonstrated little inclination to go any further than has been constitutionally mandated by the High Court. The protections of the High Court

141 *Criminal Organisation Act 2009* (Qld) s 86.

142 *Pompano* (2013) 295 ALR 638, 658 [65].

143 *Ibid* 693 [208].

144 *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW); *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA).

145 *Crimes (Criminal Organisations Control) Act 2012* (NSW) pt 3B div 2.

146 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 2013, 19116 (Greg Smith).

in applying the *Kable* doctrine were perceived as wholly adequate. In the second reading speech to the amendment Bill, the Attorney-General explained that the amendments were made only to respond to direct constitutional questions:

the constitutionally safe course is to replace ‘eligible judges’ with the Supreme Court and to make consequential amendments to the Act. The Northern Territory did so in 2011 (*Serious Crime Control Amendment Act 2011*). After *Pompano* was decided, New South Wales amended a Bill already in Parliament to do so (*Crimes (Criminal Organisations Control) Amendment Bill 2013*). Victoria legislated using the Supreme Court in the *Criminal Organisations Control Act 2012*. The trend is clear. South Australia must now stand with the others, and with that legislative model that has been definitively ruled to be valid.<sup>147</sup>

The second example concerns the decision of the South Australian government, during its post-*Totani* overhaul of its legislation, to confer the power to make declarations against organisations on individual judges *personae designatae* rather than on the Supreme Court. Following *Totani* and *Wainohu*, South Australia released a draft Bill proposing that the Supreme Court make these declarations.<sup>148</sup> After the release of the initial exposure draft the Bill was amended so that this power was given to Supreme Court judges *persona designata*. The change followed the receipt of a letter by the South Australian Attorney-General, John Rau, from the Western Australian Attorney-General, Christian Porter, to the following effect:

In WA we have maintained the use of the ‘eligible judge’ ... In so doing we noted that the High Court, in its *Wainohu* decision, said nothing adverse in respect of the powers to make a declaration being vested in a single designated authority. Our advice is that having the declaration made in the Supreme Court opens the declaration process to appeal compared to what we are proposing which are simple avenues for the respondent to seek variation to, or revocation of, the declaration.<sup>149</sup>

This candid advice between state Attorneys-General reveals again the focus on whether provisions will pass *constitutional* muster, rather than on engaging in a conversation about the circumstances in which individual rights and liberties ought to be sacrificed for the sake of community protection. The South Australian Parliament would eventually transfer this power back to the Supreme Court after *Pompano* to secure its constitutionality.<sup>150</sup>

Of course, this phenomenon is not the direct fault of the High Court. However, while the High Court’s role in the constitutional framework may be theoretically separated from the political spheres of government, the manner by which it carries

147 South Australia, *Parliamentary Debates*, House of Assembly, 4 July 2013, 6421 (John Rau).

148 See Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2011 (SA) (draft for consultation) <<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2011-serious-and-organised-crime-amendment-bill.pdf>>.

149 Letter from Christian Porter to John Rau, 3 October 2011 (citations omitted).

150 *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA) s 9.



out its function undoubtedly has a very important political effect. There is a failure of democratic engagement and participation in the policy and law-making process. This *may* be occurring as a consequence of the High Court's approach to the *Kable* principle. Of course, it is speculative to posit that, if politicians were not able to use the *Kable* principle as a smokescreen for a discussion about a bill of rights, that discussion would otherwise occur. However, it may be that there would be greater political pressure to address rights directly if lip service could not be paid to constitutionality and compliance with *Kable*.

#### IV CONCLUSION

The minimum guarantees for the institutional integrity of state courts and through that, the protection of individual rights, achieved by the *Kable* principle are generally perceived positively. Without detracting from some of the positive effects of the principle, I have asked in this paper what might be the costs associated with it. In an area in which federal experimentation and diversity remain possible, stultification has nonetheless occurred for a number of reasons. One is that adoption of regimes is often motivated by political objectives, to the detriment of federal diversity and experimentation. Of course, this is not the result of the *Kable* principle. But the *Kable* principle's current conception, as a set of minimum characteristics that must be shared across all Australian jurisdictions, is inherently harmonising. When the uncertain nature of these characteristics is added to the mix, states begin to legislate in constitutionally prudent ways, adopting known-to-be valid provisions rather than exploring the breadth of their constitutional powers.

This development, despite its federal costs, has potentially important human rights benefits. However, there is evidence that democratic protection of human rights may have been impoverished because of the *Kable* principle. The *Kable* principle has created an environment in which constitutional validity can be substituted by the states for a full conversation with the electorate about the desirability of incursions into civil liberties in the name of community protection.

I have argued that these issues do not arise to the same extent in systems with constitutional protection of human rights. At least in those systems, if the politicians pass the buck to the courts, the deeper analysis is not avoided. Courts are equipped with a more complete set of tools to determine whether individual rights are appropriately protected. If our system is supposed to provide protection of individual rights through representative and responsible government, politicians need to engage in a dialogue about this. Passing the buck to the courts is insufficient. Equipped only with implications from ch III, the courts do not have the tools to look at these schemes through the prism of human rights. They have been relying on uncertainty together with bluff and bluster, an unsustainable tactic that is potentially damaging in the long-term.