Federalism and the *Constitution* – An Update

The Hon Robert French AC[1]

Former Chief Justice of the High Court of Australia

INTRODUCTION

This paper concerns federalism in general, our federation in particular, and how our Federal Constitution affects Commonwealth law-making and executive powers, and the rule of law.

FEDERALISM IN GENERAL

Federalism denotes a class of systems of government in which power is distributed between one national government and several sub-national governments, each responsible for a part of the national territory. The distribution of powers between the centre and the regions is effected by a constitution which cannot be amended unilaterally by the central government or by the regions acting separately or together. That distribution of powers is generally interpreted and policed by a judicial authority.[2] Judicial authority is therefore an important feature of federation. A.V. Dicey wrote: 'Federalism ... means legalism — the predominance of the judiciary in the constitution — the prevalence of a spirit of legality among the people'.[3] Dicey described the courts in a federation like the United States as 'the pivot on which the constitutional arrangements of the country turn'.[4] The bench, he said, 'can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the

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[2] Geoffrey Sawer, *Modern Federalism*. Carlton: Pitman, 2nd edition, 1976, p. 1.

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*. London: Macmillan, 10th edition, 1959, p. 175.

[4] Dicey, *Study of the Law of the Constitution*, p. 175.

guardian but also at a given moment the master of the constitution'.[5] Hence the importance of judicial decisions in shaping our federation. Ultimately of course, it is the people who are the masters of the Australian *Constitution* through their power to amend it pursuant to s 128.

Another important factor in the shaping of our federation has nothing to do with the judiciary. That is cooperative federalism. That describes an attribute of a federation in which the component governments routinely engage in cooperative action with a view to achieving common objectives. In Australia that cooperation can be legislative, administrative, judicial or a mixture of all or some of them. It can be vertical, between Commonwealth and State and Territory governments, or horizontal involving the State and Territory governments only. It may use joint decision-making regimes or a single decision-maker acting under a consultative regime. There are many examples of cooperative federalism at work in Australia and its development is a very important part, if not the most important part, of the evolution of our federation today. The courts, for all their significance, are ad hoc decision-makers. Their decisions depend upon the cases that come before them.

THE LAW-MAKING POWERS OF THE COMMONWEALTH PARLIAMENT

Australia's Federal Constitution confers legislative power on the Commonwealth Parliament with respect to enumerated topics set out in s 51. Although, for the most part, those powers are concurrent with the legislative powers of State Parliaments, they are, by operation of s 109, paramount. A State law inconsistent with a Commonwealth law is invalid to the extent of the inconsistency.

By reason of s 109, the broad judicial interpretation of Commonwealth legislative powers, the Commonwealth's financial strength as primary revenue raiser deriving from its taxation power and the power to make conditional grants to the States under s 96 on any topic, the Commonwealth is the dominant party in the Federation.

Further, some of the powers conferred upon the Commonwealth Parliament under the *Constitution* have been interpreted as ambulatory and enable it effectively to legislate with respect to subjects outside the enumerated list. Leading examples are the

[5] Dicey, *Study of the Law of the Constitution*, p. 175.

taxation power,[6] the external affairs power[7] and the corporations power.[8] Nevertheless, Australia is not a unitary State. Commonwealth powers do not cover all the matters which might be the subject of legislation. Moreover there are limits imposed on the legislative power of the Commonwealth and the States by express guarantees and prohibitions and judicially developed doctrines. Those doctrines include the proposition that the Commonwealth cannot make a law which will destroy or weaken the functioning of the States or their capacity to govern. That important qualification was developed in a number of cases dating back to 1947.[9]

A central element of the *Constitution* was the creation of an economic union in which the States and their people were accorded formal equality. Accordingly, by operation of s 92, trade, commerce and intercourse among the States are 'absolutely free'. The Commonwealth Parliament has exclusive power with respect to customs, excise, and bounties.[10] It was to impose uniform duties of customs within two years after its establishment.[11] It can make laws with respect to taxation under s 51(ii) but not so as to discriminate between States or parts of States.[12] Section 99 provides that the Parliament could not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another. A resident in any State

6 *Constitution* s 51(ii); *South Australia v Commonwealth* (1942) 65 CLR 373 (*First Uniform Tax Case*); *Victoria v Commonwealth* (1957) 99 CLR 575 (*Second Uniform Tax Case*); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Ray Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97.

7 *Constitution* s 51(xxix); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act C*ase).

8 *Constitution* s 51(xx); *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*).

9 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

10 *Constitution* s 90.

11 *Constitution* s 88.

12 As to the application of which see *R v Barger* (1908) 6 CLR 41, 78, 107; *Elliott v Commonwealth* (1936) 54 CLR 657, 668 and 683; *Conroy v Carter* (1968) 118 CLR 90; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

cannot be subject, in any other State, to any disability or discrimination which would not be equally applicable to him or her if resident in such other State.[13]

COOPERATIVE FEDERALISM

Despite the dominance of the Commonwealth, cooperative federalism in Australia is alive and well. It involves voluntary arrangements between the States and the Commonwealth in the service of national objectives which neither, acting separately, could achieve. This is manifested by the existence of a significant number of cooperative regulatory schemes involving mirror legislation or the enactment of a Commonwealth law outside its constitutional competency on the basis of a referral of power by the States. Such referrals are possible under s 51(xxxvii) of the *Constitution*. By way of example, the *Corporations Act 2001* (Cth) is made by the Commonwealth in the exercise of a referred power. For although the Commonwealth has power to make laws with respect to foreign corporations and trading and financial corporations formed within Australia, that power was held by the High Court not to extend to the formation of corporations.[14] It now has that power pursuant to a referral from the States.

The *Constitution* does not mandate cooperative federalism, but it certainly allows for it. Cooperative federalism tends to be driven by factors including, but not limited to, national objectives of economic efficiency and regulatory and legislative harmonisation calculated to enhance Australia's ability to compete in global markets.[15]

FEDERAL CONSTRAINTS ON COMMONWEALTH LEGISLATIVE POWER

It has long been the case that the Parliament of the Commonwealth can make laws affecting the States and their agencies. However, there is an implied limit that the Commonwealth cannot make laws which destroy or significantly burden or weaken the capacity of the States to carry out their proper legislative, executive and judicial

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13 *Constitution* s 117. See *Street v Queensland Bar Association* (1989) 168 CLR 461.

14 *New South Wales v Commonwealth* (1990) 169 CLR 482.

15 Robert French, 'Co-operative Federalism', in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution*. Oxford: Oxford University Press, 2018, pp. 807–29.

functions. The *Constitution* assumes the continuing existence of the States, their co-existence as independent entities within the Commonwealth and the functions of their governments.

On that basis the High Court in 2003 held that a law of the Commonwealth which imposed a special tax on the statutory pension entitlement of a State judge, which was supposed to be equated to the general superannuation surcharge, was invalid.[16] The tax law was not one of application to taxpayers generally. The judge would have been liable to pay a surcharge calculated in part on 'the amount that constituted the actuarial value of the benefit that accrued to him or her, … for each financial year'. The position of State judges was thus differentiated from that of other high income earners. Chief Justice Gleeson put it this way:

> That differential treatment is constitutionally impermissible, not because of any financial burden it imposes upon the States, but because of its interference with arrangements made by States for the remuneration of their judges.[17]

More likely to attract the sympathy of parliamentarians was the subsequent case of *Clarke v Federal Commissioner of Taxation*[18] in 2009 which concerned the validity of a similar law imposing a special surcharge on the statutory superannuation entitlement of retired Members of the South Australian State Parliament. In holding the law to be invalid, the Court said that the legislation involved a significant curtailment or interference with the exercise of State constitutional power. It impaired the capacity of the State to fix the amount and terms of the remuneration of its parliamentarians. That is a critical aspect of the State's capacity to conduct a parliamentary form of government and to attract competent persons to serve as legislators.

The High Court has also, in recent times, been concerned with the limits on Commonwealth power imposed by anti-discrimination provisions of the *Constitution*. Particular provisions in relation to tax and laws relating to trade, commerce or review are set out in s 51(ii) and s 99 of the *Constitution*. Section 51(ii) prohibits discrimination between States and parts of States in relation to taxation laws and s 99 provides that:

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16 *Austin v Commonwealth* (2003) 215 CLR 185.

17 *Austin v Commonwealth* (2003) 219 [28].

18 (2009) 240 CLR 272.

'The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof'. As was said in *Capital Duplicators Pty Ltd v Australian Capital Territory*[19] these provisions, taken with other parts of the *Constitution*, created a Commonwealth economic union not an association with States each with its own separate economy.

In *Fortescue Metals Group Ltd v Commonwealth*,[20] decided in 2013, Fortescue challenged the validity of the Commonwealth Minerals Resource Rent Tax legislation on the basis that it applied differentially between States dependent upon the local State royalty regimes. The challenge was rejected by the High Court. In a joint judgment Hayne, Crennan, Kiefel, Bell and Keane JJ, said that a Commonwealth law does not discriminate between States merely because it has a different practical operation in different States arising from the fact that those States may have created different circumstances in which the Commonwealth law will apply by enacting different State legislation. The *Minerals Resource Rent Tax Act 2012* (Cth) did not provide for any difference in MRRT liability according to where a mine operated. To the extent that the amount payable varied from State to State because different rates of royalty were charged, those variations were due to different conditions that exist in the different States and, in particular, the legislative regimes provided by the States.

The decision did not undercut in any sense the constitutional concept of a Commonwealth economic union rather than an association of States as separate economic entities.

In 2012 there was an attempt to invoke s 92 against a New South Wales State law which imposed particular fees in relation to out-of-State betting services. In *Betfair Pty Ltd v Racing New South Wales*,[21] s 33 of the *Racing Administration Act 1998* (NSW) prohibited an operator from using New South Wales racing field information unless it had an approval under that Act and complied with its conditions. The section empowered the relevant racing control body, in that case Racing New South Wales, to grant approval to a person to use New South Wales racing field information subject to the condition that the person pay a fee. A betting exchange operator, incorporated in Australia with its head office in Victoria, provided wagering services to customers

[19] (1993) 178 CLR 561.

[20] (2013) 250 CLR 548.

[21] (2012) 249 CLR 217.

throughout Australia by the operation from Tasmania of a call centre. It contended that the fee conditions infringed s 92 of the *Constitution* because a greater percentage of the revenue drawn from its wagering operations was taken up by the fees than was taken from bookmakers and the totalisator based in New South Wales which had higher profit margins. The Court held in *Betfair* that the fee condition did not infringe s 92. It was for the betting exchange operator to point to a relevant differential treatment likely to discriminate in a protectionist sense between interstate and intrastate wagering transactions which used New South Wales race field information. The interstate operator had not demonstrated that the likely practical effect of the fee condition would be a loss of, or impediment to, increasing market share or profit. The purpose of s 92 as an anti-protectionist measure supportive of an economic union was reinforced.

The shape of federation is affected not just by the scope of Commonwealth legislative power in its impact on the States but also by cooperative action between the States, Territories and the Commonwealth and laws made to give effect to such cooperation. There are, however, limits on the scope of such cooperative action if it engages a constitutional prohibition. In *ICM Agriculture v Commonwealth,*[22] the Court upheld the validity of New South Wales water legislation which provided for the conversion of existing bore licences into new aquifer access licences. The conversion provision was made to implement a funding agreement between the State and the Commonwealth. The funding arrangements between the Commonwealth and the State relied upon s 96 of the *Constitution* which provides for conditional grants to be made to the States. The Commonwealth was to contribute to the cost of a project proposed by New South Wales on condition that the State would convert all water licences to achieve a 50 percent reduction in entitlements by 1 July 2016. This arrangement was located within the general scope of an intergovernmental agreement known as 'The National Water Initiative' involving the Commonwealth, New South Wales, Victoria, Queensland, South Australia, the ACT and the Northern Territory.

The challenge to the conversion legislation, which did not succeed, was based on the proposition that the conversion of the licences in fulfilment of the condition imposed by the Commonwealth amounted to an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.

[22] (2009) 240 CLR 140.

The Court ruled that the conversion was not an acquisition of property. Ground water was a natural resource. Importantly, however, four of the Justices, French CJ, Gummow, Heydon and Crennan JJ were of the view that the conditional grants power under s 96 of the *Constitution* does not authorise the Commonwealth to give financial assistance to States on terms and conditions requiring the States to acquire property other than on just terms.

THE EXECUTIVE SPENDING POWER OF THE COMMONWEALTH — THE *PAPE CASE*

The executive spending power of the Commonwealth, which is relevant to the balance of power between the Commonwealth and the States, has been explored in three cases beginning with *Pape v Federal Commissioner of Taxation*.[23] The cases have implications for federalism in terms particularly of the Commonwealth's power to expend directly into areas of State interests without the support of a s 96 conditional grant or under a valid Commonwealth law.

Pape concerned the validity of the *Tax Bonus for Working Australians Act 2009* (Cth). The Act provided for payments to be made to a large number of Australian resident taxpayers. Its purpose was to create a 'fiscal stimulus', to support economic activity as a means of mitigating the effects of the Global Financial Crisis. Mr Pape, a law lecturer at the University of New England, contended that the payment and the legislation authorising it were beyond the executive and legislative powers of the Commonwealth. A majority of the High Court held that the determination by the Executive, supported by agreed facts in the case, that there was a need for a fiscal stimulus, enlivened executive spending power and, with it, the power to enact the *Tax Bonus Act*. The *Tax Bonus Act* was incidental to the exercise of the executive power and therefore authorised by s 51(xxxix) of the *Constitution*. An important holding by all members of the Court was that satisfaction of the constitutional requirement for a parliamentary appropriation under ss 81 and 83, was not a source of substantive executive spending power. That had to be found elsewhere in the *Constitution* or in statutes made under it. Appropriation was a necessary, but not a sufficient condition of the power to expend public money.

[23] (2009) 238 CLR 1.

In their joint judgment in *Pape*, Gummow, Crennan and Bell JJ posed the question about the respective spheres of the exercise of executive power by Commonwealth and State governments. They said that s 61 confers on the Executive Government power to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[24] They described the Executive Government of the Commonwealth as the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale of the Global Financial Crisis. It was said to have its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution*. Its form in Australia today is a power to act on behalf of the federal polity.[25] It was unnecessary to attempt an exhaustive description of the content of the power provided by s 61. That set the scene for the *School Chaplaincy Cases* in *Williams (No 1)*[26] and *(No 2)*.[27]

THE EXECUTIVE SPENDING POWER – THE *SCHOOL CHAPLAINCY CASES*

In *Williams (No 1)* the plaintiff, whose children were enrolled at a Queensland State Primary School, challenged the validity of an agreement made by the Commonwealth Government with the Scripture Union Queensland for the provision of funding under the National School Chaplaincy Program. Under the agreement the Scripture Union was to provide chaplaincy services and to ensure that they were delivered in accordance with the National School Chaplaincy Program Guidelines. The Commonwealth was obliged to provide the funding for those services, subject to the availability of sufficient funds and compliance by Scripture Union with the terms on which the funding was provided. That was direct money by the Executive and not a s 96 grant. There was no statutory authority for the expenditure. The Court held that the agreement and payments were beyond the executive power of the Commonwealth.

[24] (2009) 87–8 [228].

[25] (2009) 89 [233].

[26] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

[27] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

The Commonwealth argued that the Executive had a capacity similar to that of other legal persons which meant that its power to spend was affectively unlimited. In the alternative it argued that Commonwealth executive power mapped the contours of its legislative powers. The capacities argument was rejected by six members of the Court. Gummow and Bell JJ quoted from the 1954 judgment of the High Court in *Australian Woollen Mills Pty Ltd v Commonwealth* the observation that 'the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved'.[28] Their Honours also observed that the Commonwealth's submission on this point appeared to proceed from an assumption that the Executive branch had a legal personality distinct from the Legislative branch with a result that it was endowed with the capacities of an individual. The legal personality, as they said, is that of the Commonwealth of Australia, which is the body politic established under the *Commonwealth of Australia Constitution Act 1900* and identified in covering cl 6 of the *Constitution*.

Importantly, four of the Justices in *Williams (No 1)* rejected the argument that the executive power follows the contours of Commonwealth legislative power. In my view, expressed in my judgment, there were consequences for the Federation flowing from attributing to the Commonwealth such a wide executive power to expend moneys on any subject of Commonwealth legislative competency subject only to the requirement of a parliamentary appropriation.[29] Gummow and Bell JJ, in common with Crennan J, were concerned about the bypassing of the grants power in s 96 and the importance of the principle of responsible government in relation to the requirement of statutory authority for executive spending.[30]

The Commonwealth Parliament subsequently enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), an omnibus bill, purporting to provide broad legislative authority for the Executive to enter into contracts and to spend money on programs specified in regulations. The Chaplaincy Program was purportedly supported by this legislation. The program was challenged successfully in *Williams (No 2).*

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[28] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 236 [151] citing *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461.

[29] (2012) 248 CLR 156, 192–3 [37].

[30] (2012) 234 [143].

In *Williams (No 2)* the Court was invited to reopen *Williams (No 1)* but declined to do so. It held that the omnibus legislation, in its application to the National Schools Chaplaincy Program, was not supported by any constitutional head of legislative power. The making of payments for the purposes of the program was not within the executive power of the Commonwealth. Six Justices sat on the case. The Justices rejected an argument that *Williams (No 1)* should be reopened because it did not give a single and comprehensive answer to when and why Commonwealth spending needs statutory authorisation.

There are, no doubt, from an academic perspective, many unanswered questions about the scope of Commonwealth executive power in Australia and perhaps also the scope of the executive power of the States. Some of them may give rise to anxiety about future directions. The judiciary is unlikely to provide a comprehensive answer in any one case. The development of principle will proceed case-by-case. It may be that there will not be many more challenges to the expenditure of public moneys. In that connection, it may be noted that the Court recently dismissed challenges to the expenditure of Commonwealth moneys to fund a postal survey of electors on the question whether the definition of 'marriage' in the *Marriage Act 2004* (Cth) should be amended to extend to marriages between couples of the same gender.[31]

THE *COMMONWEALTH CONSTITUTION* AND STATE JUDICIAL POWER

The doctrine of separation of powers does not have a general application to State courts. There have been a number of unsuccessful challenges to State laws on the basis that they offended against that doctrine. Professor Carney[32] observed that they have failed for two principal reasons:

- The inability to derive any intent from the relevant State Constitutions to vest the judicial power of the State exclusively in its courts; and

[31] Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance [2017] HCATrans 176.

[32] Gerard Carney, *The Constitutional Systems of the Australian States and Territories*. Cambridge: Cambridge University Press, 2006, pp. 344-5; *Clyne v East* (1967) 68 SR(NSW) 385; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *Building Construction Employees and Builder's Labourers Federation of New South Wales v Minister for Industrial Relations* (NSW) (1986) 7 NSWLR 372; *Collingwood v Victoria (No 2)* [1994] 1 VR 652.

- The lack of entrenchment of those provisions which concern the judicial branch.

In *Kable v Director of Public Prosecutions (NSW)*,[33] a majority of the High Court held that the New South Wales Constitution does not embody a doctrine of the separation of judicial power from the legislative and executive powers.[34] As a general proposition, reiterated by four Justices of the High Court in a judgment delivered in December 2012,[35] the doctrine of separation of powers as developed and applied in the *Boilermakers' Case* in respect of the Commonwealth Court of Conciliation and Arbitration does not apply to the States.[36]

Nevertheless, the *Kable* doctrine and a number of cases which followed it over the years have developed principles which, taken together, have a number of features of a separation of powers doctrine for State courts which limit the law-making power of State parliaments. A full discussion of those decisions would require a separate paper. However, they have given rise to the following principles:

- State legislatures cannot abolish State Supreme Courts[37] nor impose upon them functions incompatible with their essential characteristics as courts nor subject them in their judicial decision making to direction by the executive.[38]
- A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the courts institutional integrity.[39]

[33] (1996) 189 CLR 51.

[34] (1996) 65 (Brennan CJ), 79 (Dawson J), 92–94 (Toohey J), 103–104 (Gaudron J), 109–110 (McHugh J).

[35] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343.

[36] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 368, [57] citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Hayne, Crennan, Kiefel and Bell JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 78–80 (Dawson J), 92-94 (Toohey J), 109, 118 (McHugh J); *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531, 573 [69].

[37] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J), *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543–44 [151]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[38] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

[39] *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92–93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

- A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[40]
- State legislatures cannot immunise statutory decision makers from judicial review by the Supreme Court of the State for jurisdictional error.[41]
- State judges acting persona designata cannot validly be given functions incompatible with the role of their courts as repositories of federal jurisdiction.

There are some elements of those propositions which produce outcomes similar to those flowing from the doctrine of separation of powers at Commonwealth level. However, putting to one side the inability of State legislatures to abolish Supreme Courts or to deprive them of their traditional supervisory jurisdiction, a key concept underpinning the stated limits is that of institutional integrity. That concept has been developed in terms of essential or defining characteristics which mark courts apart from other decision-making bodies.

The implications drawn by the High Court from Ch III of the *Constitution* and reflected in *Kable* and other cases has the effect of shoring up the rule of law at Commonwealth, State and Territory levels. There is no exercise of official power at Commonwealth or State levels that is beyond the scope of judicial review for jurisdictional error. All of that underpins the judicial system of Australia as not merely a system of State and Federal courts, but a national integrated judicial system with a number of components.

CONCLUSION

The story of federalism under the *Constitution* is sometimes depicted, in a rather simplistic way, as the story of the rise of Commonwealth power relative to that of the States. That is an important historical reality. But the full story is a good deal more complex. It is also a story about the limits of Commonwealth law-making and executive power derived from the federal nature of the *Constitution*. It is a story about cooperative federalism. It is also a story about the recognition of the rule of law as an

[40] *Wainohu v New South Wales* (2011) 243 CLR 81, 210 [47] (French CJ and Kiefel J).

[41] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

essential aspect of our federal and state judiciaries reflecting their collective character as a national integrated system of courts.

The story is a rich one and there is much more of it to be told.