Constitutional Limits on Extra-Judicial Activity by State Judges: Wainohu and Conundrums of Incompatibility

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Abstract

The Kable principle is transforming Australian constitutional law. This article examines one aspect of this transformation: the emerging separation of powers limitations on extra-judicial activity by state judges. Wainohu v New South Wales, decided by the High Court of Australia in 2011, established that ch III of the Australian Constitution constrains the legislative and executive functions that a state judge can validly undertake, in addition to their ordinary judicial role, even when those functions are conferred on the judge in their personal capacity. This article discusses the impact of this decision on the ability of state judges to undertake three kinds of extra-judicial service — as members of non-judicial tribunals, as Royal Commissioners, and as executive officials. In doing so, consideration is given to the relationship between Wainohu and the principles, also derived from ch III, that limit engagement in extra-judicial work by federal judges. It is claimed that Wainohu is a legitimate extension of the Kable principle that highlights the profound shift that has occurred in recent decades in the constitutional status of Australian courts and judges. Accepting this is so, an argument is advanced in favour of a conceptually unified approach to the crucial test of incompatibility with federal judicial power that is a common feature of state and federal doctrine in this area.

I Introduction

The Kable principle is transforming Australian constitutional law. Only two decades ago, it was widely accepted that state parliaments had largely unconfined authority over state courts. On this view, a state could validly legislate to direct the consequences of proceedings in its courts,¹ and even, at least in theory, to abolish its Supreme Court.² Today, as a result of the 1996 High Court decision in Kable v Director of Public Prosecutions (NSW) (‘Kable’),³ ch III of the Australian

¹ Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372.
² Ibid 401 (Kirby P) commenting on the position of the Supreme Court of New South Wales.
Constitution entrenches the Supreme Courts as parts of an integrated national system of courts for the exercise of federal judicial power. Chapter III now also requires state courts to retain certain basic institutional features — most importantly, their independence and impartiality — thereby affording such courts a guaranteed level of protection against incursions by the other branches of government. In short, by virtue of *Kable*, ‘a form of the separation of powers’ has been developed for the states.

While the *Kable* principle has several strands, the object of this article is to examine one of the newest: the emerging separation of powers limitations on extra-judicial activity by state judges. *Wainohu v New South Wales* (*Wainohu*), decided by the High Court in 2011, establishes that ch III of the *Australian Constitution* constrains the legislative and executive functions that a state judge can validly undertake, in addition to their ordinary judicial role, even when those functions are conferred on the judge in their personal capacity. The impact of this finding on extra-judicial activities historically performed by state judges — such as service as Royal Commissioners — is discussed. In doing so, consideration is given to the relationship between *Wainohu* and the principles, also derived from ch III, that limit engagement in extra-judicial work by federal judges. It is claimed that *Wainohu* is a legitimate and desirable extension of the *Kable* principle that highlights the profound shift that has occurred in recent decades in the constitutional status of Australian courts and judges. Accepting this is so, an argument is advanced in favour of a conceptually unified approach to the crucial test of incompatibility with federal judicial power that is a common feature of state and federal doctrine in this area.

Part II of this article begins by reviewing the *Kable* principle and its rationale, drawing attention to the close nexus between the principle and the federal separation of powers. Parts III and IV analyse *Wainohu* and the impact of that decision — notably its conception of incompatibility — on the capacity of state judges to undertake three kinds of extra-judicial service: as members of a non-judicial tribunal, as Royal Commissioners, and as executive officials. Service by state Chief Justices as Lieutenant-Governors or other gubernatorial understudies is the subject of two recent studies and is not separately examined here: see Matthew Stubbs, ‘The Constitutional Validity of State Chief Justices Acting as Governor’ (2014) 25(3) *Public Law Review* 197; Rebecca Ananian-Welsh and George Williams, ‘Judges in Vice-Regal Roles’ (2015) 43(1) *Federal Law Review* 119.

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4 See Part II below.
6 (2011) 243 CLR 181.
7 As the *Kable* principle does not impose a general prohibition on the exercise of non-judicial functions by state courts (see below n 36), a state judge may validly discharge at least some functions of this nature as part of their day-to-day work on the bench. The focus of this article, however, is on situations where a state judge exercises non-judicial governmental functions otherwise than when sitting as a judge of their court.
of the incompatibility conundrums that emerge from the preceding discussion, returning to the issue of whether there are, or should be, separate or unified state and federal incompatibility tests.

II The Kable Principle and its Rationale

In Attorney-General (NT) v Emmerson (‘Emmerson’)\(^9\) in 2014, six members of the High Court described the Kable principle as follows:

- because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by state Supreme Courts, state legislation which purports to confer upon such a court a power or function which substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction, is constitutionally invalid.\(^10\)

The principle extends, as the plurality in Emmerson recognised, ‘to all state and territory courts as Ch III courts’.\(^11\) It proceeds on the basis, affirmed by the High Court on more than one occasion, that s 73 of the Australian Constitution requires each state to retain a ‘Supreme Court’.\(^12\) In Kable, it was suggested that the Australian Constitution also requires the states to maintain a system of courts operating beneath the Supreme Court in the judicial hierarchy, but whether this is so is unclear.\(^13\)

In the context of the Kable principle, ‘institutional integrity’ — whether of a Supreme Court or other state court — describes the essential features such a court must possess in order to meet ch III requirements.\(^14\) The High Court has cautioned that institutional integrity is ‘not readily susceptible of definition in terms which will dictate future outcomes’.\(^15\) At its core is the condition that a state court must retain ‘both the reality and appearance of independence and impartiality’.\(^16\) A court
must also afford parties a fair hearing, and provide reasons for the substantive decisions it makes. In the case of a Supreme Court, it must retain authority to review the decisions of lower state courts and tribunals for jurisdictional error.

Writing extra-curially, Chief Justice French has identified ‘decisional independence from the Executive and from other external influences’ as ‘perhaps the most important of the characteristics of a court’. Not every modification to the general operation of these features will violate the Kable principle, however, and much depends on the circumstances of the case.

Like the federal separation of judicial power, the Kable principle is an implication from the terms and structure of the Constitution. The principle stems from the ‘integrated Australian judicial system’ established by ch III, notably the capacity of state courts to exercise federal judicial power and the resulting ‘necessity to ensure the integrity of … [those] courts’. It derives further force from construction of the ‘constitutional expressions’ ‘court of a State’ (s 77(iii)) and ‘Supreme Court of any State’ (s 73(ii)). As McLeish has pointed out, these two sources of the principle intersect. Judicial power refers, in its archetypal form, to decisions about ‘basic rights which traditionally … are judged by that independent judiciary which is the bulwark of freedom’. The definition of a court likewise reflects historical and common law conceptions of such bodies. Thus, functions incompatible with federal judicial power may also impair an essential feature of a court. Either way, the Kable principle operates in a purposive manner, as Gageler J has explained, ‘[t]o render State and Territory courts able to be vested

22 Kable (1996) 189 CLR 51, 102 (Gaudron J).
23 Ibid 104 (Gaudron J). See also at 102–4 (Gaudron J), 114–16, 118–19 (McHugh J), 126–8 (Gummow J). The High Court’s role, under s 73 of the Constitution, as Australia’s ultimate appellate court was also recognised in Kable as a key feature of this integrated system: at 101 (Gaudron J), 111–15 (McHugh J), 126, 137–9, 142–3 (Gummow J).
26 McLeish, above n 25, 253.
with the separated judicial power of the Commonwealth’.\(^{29}\) In doing so, it directly supports the federal separation doctrine and its rule of law values, including those associated with the role of courts in a federation.\(^{30}\)

It follows that there is a strong case for treating the Kable principle as an integral part of the separation of powers under the Australian Constitution, despite the High Court’s reluctance to do so.\(^{31}\) In Pompano,\(^{32}\) the plurality emphasised that the Kable principle does not subject the states to ‘the separation of judicial power mandated for the Commonwealth by Ch III’\(^{33}\) and that ‘there can be no direct application to the State courts of all aspects of the doctrines that have been developed in relation to Ch III’.\(^{34}\) Thus,

the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth.\(^{35}\)

As discussed later in this article, it is difficult to know what to make of statements such as these if they do more than point to well-recognised differences between the Commonwealth and state judiciaries such as the capacity of state courts, unlike their federal equivalents, to exercise non-judicial power.\(^{36}\) Rather, the oft-repeated statement, also endorsed by the plurality in Pompano, that the

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\(^{29}\) Pompano (2013) 252 CLR 38, 106 [183].

\(^{30}\) See Kuczberski v Queensland (2014) 314 ALR 528, 579 [228] (Crennan, Kiefel, Gageler and Keane JJ) describing ‘the rationale of the Kable principle … as being “to forestall the undermining of the efficacy of the exercise of the judicial power of the Commonwealth”’ (adopting a passage from Gummow J in Kable (1996) 189 CLR 51, 132). See also Kable at 104 (Gaudron J). For discussion of the values served by the federal separation of judicial power, see Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1, 10–13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (‘Wilson’). The legitimacy of the Kable principle remains controversial, however. For one prominent critique, see Jeffrey Goldsworthy, ‘Kable, Kirk and Judicial Statesmanship’ (2014) 40(1) Monash University Law Review 75.


\(^{32}\) (2013) 252 CLR 38.


\(^{34}\) (2013) 252 CLR 38, 90 [125] (Hayne, Crennan, Kiefel and Bell JJ).

\(^{35}\) Ibid. This proposition was endorsed in Pollentine v Bleijie (2014) 311 ALR 332, 342 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). For further statements tending to demarcate the Kable principle from the federal separation of powers, see, eg, Kuczberski v Queensland (2014) 314 ALR 528, 555–6 [103]–[104] (Hayne J); Wainohu (2011) 243 CLR 181, 208–10 [43], [45], 212 [52] (French CJ and Kiefel J); Totani (2010) 242 CLR 1, 86 [221] (Hayne J); French, above n 20, 6, 10–11; McLeish, above n 25, 255–6 (the author noting, however, ‘the beginning of a conceptual convergence’ between the two doctrines).

\(^{36}\) For recognition of this capacity, see Kable (1996) 189 CLR 51, 67 (Brennan CJ), 82, 84–5 (Dawson J), 106 (Gaudron J), 109–10, 117 (McHugh J), 132 (Gummow J). See also, eg, Momcilovic v The Queen (2011) 245 CLR 1, 66–8 [92]–[97] (French CJ); K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). In relation to federal courts, cf R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 (‘Boilermakers’ Case’).
Australian Constitution does not sanction ‘different grades or qualities of justice’\(^{37}\) suggests that the test of incompatibility with institutional integrity, as a component of the separation of powers, should prima facie be the same, whether a state or federal court is involved.\(^{38}\) Wainohu brings this issue into sharp relief.

III  Wainohu v New South Wales

A  The Decision

Wainohu was not a classic extra-judicial functions case. It concerned the validity of the Crimes (Criminal Organisations Control) Act 2009 (NSW), the object of which, in the words of New South Wales Premier, Nathan Rees, was to suppress the activity of ‘violent outlaw motorcycle gangs’.\(^ {39}\) The Act adopted a two-stage process to achieve this goal. First, pt 2 of the Act empowered an ‘eligible Judge’, on application by the Commissioner of Police, to declare an organisation under the Act if satisfied that its members ‘associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity’ \(\text{(s}\ 9(1)(a))\) and ‘the organisation represents a risk to public safety and order’ \(\text{(s}\ 9(1)(b))\).\(^ {40}\) An ‘eligible Judge’ was a member of the Supreme Court acting as a designated person, rather than in their capacity as a Justice.\(^ {41}\) Second, if an organisation was so declared, pt 3 of the Act authorised the Supreme Court, on the Commissioner’s further application, to issue control orders against members.\(^ {42}\) Persons subject to control orders were required to abide by a number of restrictions, including on their freedom of association.\(^ {43}\)

A majority held that the legislation infringed the Kable principle at the first stage with the consequence that the Act as a whole was invalid.\(^ {44}\) The fundamental flaw was s 13(2) of the Act stating that an eligible judge was ‘not required to provide any grounds or reasons’ for making a declaration. Gummow, Hayne, Crennan and Bell JJ found that this impaired the Supreme Court’s institutional integrity as ‘an outcome of what may have been a contested application [for a pt 2 declaration] cannot be assessed according to the terms in which it is expressed’.\(^ {45}\)


\(^{38}\) The Commonwealth’s submissions in Wainohu included a claim along similar lines: (2011) 243 CLR 181, 247–8 [171]–[172] (Heydon J). See also the discussion of Sir Maurice Byers’ argument for invalidity in Kable in Brendan Lim, ‘Attributes and Attribution of State Courts — Federalism and the Kable Principle’ (2012) 40(1) Federal Law Review 31, 42–3 noting that Lim denies that the Kable principle should be regarded as part of the separation of powers: eg at 33.

\(^{39}\) New South Wales, Parliamentary Debates, Legislative Assembly, 2 April 2009, 14440 (Nathan Rees).


\(^{41}\) Ibid 221 [77] (Gummow, Hayne, Crennan and Bell JJ), 245 [168] (Heydon J).

\(^{42}\) Ibid 224 [90] (Gummow, Hayne, Crennan and Bell JJ) describing a declaration by an eligible judge as ‘the factum’ enlivening the Supreme Court’s control order jurisdiction. See also at 222–3 [81]–[82].


\(^{44}\) On the invalidity of the Act as a whole, see ibid 220 [71] (French CJ and Kiefel J), 231 [115]–[116] (Gummow, Hayne, Crennan and Bell JJ).

\(^{45}\) Ibid 229–30 [109].
The Act thereby ‘utilise[d] confidence in impartial, reasoned and public decision-making of eligible judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making’.46

Chief Justice French and Justice Kiefel reached the same conclusion, focusing in more detail on the links between the eligible judge and the Court.47 They emphasised that, under the Act, the functions of an eligible judge and those of the Supreme Court were ‘closely connected’48 and that the scheme led to ‘[t]he appearance of a judge making a declaration … whilst the giving of reasons, a hallmark of that office, is denied’.49 In the context of the Act as a whole, this impermissibly impaired ‘perceptions of the role of a judge of the Court, to the detriment of the Court’.50

B The Significance of the Decision

1 Extension of the Kable Principle

In deciding the case on this basis, the majority in Wainohu accepted, as a matter of ratio decidendi, that functions vested in state judges as designated persons can impair the institutional integrity of state courts contrary to ch III.51 Prior to Wainohu, it remained an open question whether the Kable principle stretched this far.52 The finding that it does is a significant step in development of the principle and is to be supported as consistent with its purposive character. On a substantive approach, ‘personal intermixtures of function’53 clearly have the capacity to undermine the essential features of a court. As Sawer observed of the practice of federal judges, including members of the High Court, engaging in off-court work in the face of the ruling in the Boilermakers’ Case:54

The policy basis of the judicial isolation doctrine is the desirability of complete judicial independence and impartiality, which may be prejudiced if judges are brought into close working associations with other branches of government, and this peril is no less if the association is voluntary.55

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46 Ibid 230 [109] (Gummow, Hayne, Crennan and Bell JJ).
47 This variation in focus when the majority judgments are compared is noted in Rebecca Welsh, “‘Incompatibility” Rising? Some Potential Consequences of Wainohu v New South Wales’ (2011) 22(4) Public Law Review 259, 261 n 25. The references in nn 48–50 below also address the matter.
48 Wainohu (2011) 243 CLR 181, 218 [66].
49 Ibid 219 [68].
50 Ibid and generally at 215–20 [60]–[70].
51 Ibid 192 [7], 210 [47] (French CJ and Kiefel J), 229 [105] (Gummow, Hayne, Crennan and Bell JJ). Justice Heydon dissented from this view: ibid 248 [172].
52 In Kable, McHugh J accepted that the Kable principle applied to functions vested in state judges as designated persons, but Gaudron J denied this: (1996) 189 CLR 51, 117–18 (McHugh J), 104 (Gaudron J).
54 (1956) 94 CLR 254.
Thus, as McHugh J suggested in *Kable*, if a state chief justice was appointed to state cabinet, it is hard to see why this would not seriously impair the Supreme Court’s status ‘as an institution independent of the executive government of the State’. To take a more likely example, *Wainohu* shows that a judge may formally exercise a statutory power as an individual, yet it looks ‘to all the world’ like the court is the relevant decision-maker.

In *Wainohu*, French CJ and Kiefel J went further and doubted the utility at state level of the distinction between a judge acting as a designated person and as a judicial officer. They suggested that the formal location of a function — in a judge as a designated individual or as a member of a court — was just one consideration in assessing whether the function impairs the integrity of the court in question. Gummow, Hayne, Crennan and Bell JJ also hinted at discomfort with the designated person notion in this context. It may be that in future this issue is subsumed into the wider question of the proximity between an impugned function vested in a state judge and the exercise of federal jurisdiction by their court.

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A Unified Incompatibility Test?

(a)  
*The Approaches in Wainohu*

While *Wainohu* extends the scope of the *Kable* principle in this way, it leaves open whether the incompatibility test applicable to state judges as designated persons is the same as that developed in *Grollo v Palmer* (‘*Grollo*’) and *Wilson* to limit extra-judicial work by federal judges. Surprisingly, the majority in *Wainohu* did not in terms address this issue and the two opinions seem, at least in their mode of

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56 (1996) 189 CLR 51, 118 observing that such an appointment, albeit as a designated person, ‘might well be invalid’ (citations omitted).


58 Ibid 205 [36], 218–19 [66]–[68] (French CJ and Kiefel J), 223 [83], [85] (Gummow, Hayne, Crennan and Bell JJ) observing that *Wainohu* involved an application to an eligible judge acting as a designated person that had ‘apparently’ been lodged in the Supreme Court registry and was heard in a Supreme Court courtroom. See also *Hilton v Wells* (1985) 157 CLR 57, 83–4 (Mason and Deane JJ) quoted in *Wainohu* (2011) 243 CLR 181, 205 [36] (French CJ and Kiefel J), 229 [106] (Gummow, Hayne, Crennan and Bell JJ).

59 (2011) 243 CLR 181, 211–12 [49]–[50] (at least where the non-judicial function ‘is conferred upon the judge by virtue of his or her office as a judge’: at 211 [50]).

60 Ibid 211–12 [50].

61 Ibid 222–2 [77]–[78], 229 [106]–[107].

62 Ibid 211–12 [50] (French CJ and Kiefel J). See also at 206 [39], 210 [47], 216 [61], 218 [66] (French CJ and Kiefel J); Welsh, ‘“Incompatibility” Rising?’, above n 47, 262.


64 (1996) 189 CLR 1.

reasoning, to have adopted subtly different positions. The approach of Gummow, Hayne, Crennan and Bell JJ suggested there is a single, unified test. They explicitly invoked federal incompatibility principles in their reasons, describing certain observations of Gaudron J in *Wilson* as ‘determinative of the issue’ before them. In addition, they said that *Wilson* and *Kable* ‘share a common foundation in constitutional principle … [which] has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State’.  

The description of Gaudron J’s observations in *Wilson* as ‘determinative’ is particularly significant as this was not a situation, commonly associated with the decision in *H A Bachrach Pty Ltd v Queensland*, where federal ch III principles were used to dismiss a *Kable* challenge. Rather, the plurality seemed to invoke Gaudron J’s federal incompatibility test to show that the *Kable* principle had been infringed.

In contrast, the approach of French CJ and Kiefel J suggested that somewhat different incompatibility tests might apply, a view consistent with subsequent extra-curial remarks by the Chief Justice. In finding the Act invalid, they did not regard themselves as constrained by the specific tests formulated in *Grollo* and *Wilson*, relying on a more diffuse range of factors, including the degree of association between an eligible judge’s task under the Act and her or his position as a judge, to support their conclusion. They warned that the *Kable* principle ‘is not a surrogate for the application of a separation of powers doctrine to the States’ and must ‘be approached with restraint’. Notably, they also claimed that ‘[a]llowance must be made in assessing incompatibility for the long history in the States of the appointments of judges to extra-judicial roles’. The plurality also acknowledged the relevance of history, though without implying that it might produce different results at state and federal level.

(b) **Towards a Unified Test**

Despite these apparent differences, it is nonetheless possible to reconcile the two approaches in *Wainohu* in favour of a unified state and federal incompatibility test — as discussed below, a desirable outcome — at least for extra-judicial activity.

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66 (2011) 243 CLR 181, 226 [94] (and generally at 225–6 [93]–[94]).
67 Ibid 228 [105]. Justice Gaudron in *Kable* made the same point about the shared rationale of these two doctrines, albeit denying that the *Kable* principle extends to functions exercised by state judges as individuals: (1996) 189 CLR 51, 103–4.
69 French, above n 20, 6 describing the incompatibility tests applicable to extra-judicial work by state and federal judges as separate, but overlapping.
71 (2011) 243 CLR 181, 210–20 [47]–[70].
72 Ibid 212 [52].
73 Ibid. That the tests may differ is also suggested by French CJ and Kiefel J’s observations at 208 [42]–[43].
74 Ibid 225–6 [94] (Gummow, Hayne, Crennan and Bell JJ).
A theme of the Kable authorities is the Court’s insistence that ‘the question presented by the Kable principle’ is ‘evaluative [in] character’75 and that an exhaustive definition of incompatibility in this context is impossible.76 This suggests, in turn, that aspects of the older, federal test, are ripe for review. In particular, in Wilson incompatibility involving harm to public confidence in the courts — the critical issue in most extra-judicial activity cases77 — was expressed by Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in the form of a ‘precisely stated verbal [test]’78 covering matters such as a designated judge’s decisional independence and whether they discharge ‘political discretion[s]’.79 However, the Kable principle’s more fluid conception of incompatibility makes it likely that this formula will, in future, be collapsed into a wider set of factors, mirroring French CJ and Kiefel J’s flexible approach in Wainohu. As noted above, the plurality in Wainohu specifically drew on Gaudron J in Wilson who adopted a more open-textured incompatibility analysis than the joint majority judges in that case.80 On this basis, the two approaches in Wainohu may coalesce.81

Importantly, a unified incompatibility test for extra-judicial activity — weighing and balancing a largely common set of factors in flexible fashion — would not, as some might fear, result in the automatic assimilation of state and federal judges in terms of the scope of their permitted off-court ventures.82 To the contrary, such a test is capable of recognising ‘that state and federal courts are different institutions’83 in the same way that an assessment of incompatibility under the current federal test may legitimately be affected by the distinctive constitutional or statutory features, such as the role or size, of the federal court concerned.84 There is a strong argument, for example, that the range of

76 This view is encapsulated in the frequently quoted observation of Gummow J in Fardon v A-G (Qld) (2004) 223 CLR 575, 618 [104] that ‘the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes’. See also Brendan Lim, ‘Laboratory Federalism and the Kable Principle’ (2014) 42(3) Federal Law Review 519, 530; Welsh, ‘A Path to Purposive Formalism’, above n 65, 88; Chris Steytler and Iain Field, ‘The “Institutional Integrity” Principle: Where Are We Now, and Where Are We Headed?’ (2011) 35(2) University of Western Australia Law Review 227, 234–5.
77 Ananian-Welsh and Williams, above n 8, 141. See also Steytler and Field, above n 76, 262–3.
78 Wainohu (2011) 243 CLR 181, 201 [30] (French CJ and Kiefel J) observing generally that ‘questions of compatibility which require evaluative judgments are unlikely to be answered by the application of precisely stated verbal tests’.
79 Wilson (1996) 189 CLR 1, 17. For discussion of this test, see Stellios, Zines’s The High Court and the Constitution, above n 27, 271–4.
80 See Wilson (1996) 189 CLR 1, 22–6 (Gaudron J).
81 See also Stubbs, above n 8, 210 n 110 observing that the Wainohu majority appeared to find the formulation in the Wilson joint judgment ‘not … helpful’.
83 Lim, above n 38, 43. See generally Lim’s insightful account, which has helped stimulate the argument in this paragraph, of what he terms in his article the ‘attribution of state courts’ (the quoted words are taken from the article title) within the Australian constitutional system.
84 See, eg, Wilson (1996) 189 CLR 1, 46 (Kirby J) observing that ‘[t]he use of judges of final courts of appeal [for extra-judicial work], particularly in federations where the court must be able to discharge its vital constitutional functions, presents questions different from the appointment of other judges to non-judicial duties’ (citations omitted). See also Grollo (1995) 184 CLR 348 where the plurality upheld the validity of provisions of the Telecommunications (Interception) Act 1979.
extra-judicial activities open to members of the High Court is narrower than for other federal judges.85 Among other things, such an approach enables account to be taken, consistently with the view of French CJ and Kiefel J in Wainohu, of the respective histories of participation by state and federal judges in extra-judicial work, a matter pursued in more detail in the case studies below.

The strongest argument for a conceptually unified test is that the same constitutional question is ultimately being asked in both cases: is a particular extra-judicial function at odds with the exercise of federal judicial power whether by a state or federal court?86 To develop separate analytical frameworks to deal with this question in the state and federal spheres seems redundant, especially when the notion of incompatibility is sufficiently adaptable, as just noted, to accommodate the variety of settings in which federal judicial power is discharged.87 A more difficult question is whether an inherently stricter standard of incompatibility applies at federal level. Chief Justice French observed in a speech in 2013 that the constraints on extra-judicial work by federal judges derive ‘from the doctrine of separation of powers which, at least in theory, applies more stringent criteria in the case of federal judges than the Kable principles do in respect of State judges’.88

Yet, accepting the purposive foundations of the Kable principle and that the Australian Constitution does not allow ‘different grades or qualities of justice’,89 a difference in standards is not inevitable and cannot be governed by the labels ‘separation of powers’ and ‘Kable principle’, neither of which is expressly mentioned in the Constitution.90 Rather, the idea of a difference in standards may be more a legacy of regarding, until very recently, the off-court activities of state judges as unaffected by ch III constitutional restraints. As illustrated in the case studies that follow, that legacy is already carried forward to some extent in the relevance, in assessing incompatibility, of historical practice in this area.91 It is thus to that practical process of assessing incompatibility that this article now turns.

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85 Wilson (1996) 189 CLR 1, 46 (Kirby J). There is some support for this in the High Court’s contemporary abstention from extra-judicial work: see Fiona Wheeler, ‘Non-Judicial Functions’ in Tony Blackshield, Michael Coper and George Williams (eds), The Oxford Companion to the High Court of Australia (Oxford University Press, 2001) 502, 503.86 Stellios, Zines’s The High Court and the Constitution, above n 27, 269 (and see 278). See also Stubbs, above n 8, 203–4.87 On the flexibility of the incompatibility test, see generally Welsh, ‘A Path to Purposive Formalism’, above n 65, 88–90.88 French, above n 20, 6. Cf Welsh, “‘Incompatibility’ Rising?”, above n 47, 263.89 Kable (1996) 189 CLR 51, 103 (Gaudron J). The full quote from Gaudron J at 103 is: ‘To put the matter plainly, there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament.’90 The Chief Justice’s qualification ‘at least in theory’ may recognise this.91 See Ananian-Welsh and Williams, above n 8, 144–5.
IV The Impact of Wainohu — Three Case Studies

A Assessing Incompatibility

In light of the preceding discussion of Wainohu and its approach(es) to incompatibility, what extra-judicial activities can state judges continue to perform consistently with ch III? And what activities should they eschew? The uncertainty about what is necessary for a state court to retain its institutional integrity, coupled with the array of factors potentially bearing upon incompatibility with a ‘court’s role as a repository of federal jurisdiction’ — whether or not as part of a unified state and federal test — suggests few easy answers.

It is possible, however, to derive some guiding principles for assessing incompatibility from Wainohu and related decisions. First, High Court cases on the federal designated person principle indicate that certain extra-judicial activities are valid or invalid for federal judges. These cases were decided before Kable and lag behind the ch III developments that Kable has prompted. Even so, as Chief Justice French has said: ‘If a non-judicial appointment conferred upon a State judge does not transgress the federal criteria of incompatibility there should not be a difficulty about validity under the Kable principle’.

Certainly, if the state and federal tests are the same then, in the absence of some distinguishing feature at state level — for example, a time-honoured history of involvement by state judges in a particular function — they would normally produce the same outcome for both state and federal judicial officers. If the tests are not the same, it is generally accepted that the federal incompatibility test would impose a standard at least equivalent to, or higher than, for the states, leading to the conclusion that an extra-judicial function that is valid for federal judges is permissible for state judges also.

Second, while select forms of extra-judicial activity, such as appointment to full-time executive office, can directly distort a court by removing a judge from judicial duties for an extended period, arguments about validity of extra-judicial work commonly focus, as already noted, on the impact of the off-court tasks on perceptions of the court, especially its independence and impartiality.

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93 French, above n 20, 6 (citations omitted).
94 An example might be service by state judges as acting governors: see generally Stubbs, above n 8; Ananian-Welsh and Williams, above n 8.
95 H A Bachrach Pty Ltd v Queensland (1998) 195 CLR 547, 561–2 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); Stubbs, above n 8, 204; French, above n 20, 6; Appleby and Stubbs, above n 65, 82.
96 Stubbs, above n 8, 204; French, above n 20, 6; Appleby and Stubbs, above n 65, 82.
97 See Appleby and Stubbs, above n 65, 82–3.
98 Ananian-Welsh and Williams, above n 8, 141; Steytler and Field, above n 76, 262–3. While use of concepts such as ‘public confidence’ in the judiciary in assessing validity under ch III has been criticised (see, eg, Stellios, Zines’s The High Court and the Constitution, above n 27, 305–6), ‘perceived impartiality’ underpins our judicial system: Stephen Parker, ‘The Independence of the Judiciary’ in Brian Opeskin and Fiona Wheeler (eds), The Australian Federal Judicial System (Melbourne University Press, 2000) 62, 69 (and generally at 64–71). It is hardly surprising then that ‘apparent’, ‘apprehended’ or ‘perceived’ impartiality and ‘public confidence’ in judicial integrity
In situations of this kind, the nexus between the functions exercised by the individual judge and the court, including ‘the extent to which they [the extra-judicial functions] are connected to or integrated with the exercise of the Court’s jurisdiction’, \(^9^9\) may be a significant factor in assessing incompatibility. \(^1^0^0\) This was clearly so in *Wainohu*, where the difficulty in distinguishing between the actions of the eligible judge and the Court, and the functional links between their tasks, led the majority to their conclusion that the Supreme Court’s reputation as a reasoned decision-maker was compromised by the scheme in question. \(^1^0^1\)

Third, given the prominence in this area of incompatibility arguments turning on apprehended confidence in the judiciary, a passage from Gaudron J’s judgment in *Wilson*, quoted with approval by the plurality in *Wainohu*, is of particular assistance. Justice Gaudron claimed that

> public confidence in the courts … depends on their acting openly, impartially and in accordance with fair and proper procedures … And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.\(^1^0^2\)

Her Honour went on to state that Parliament could not validly authorise a federal judge to undertake an activity as a designated person if that activity had ‘the capacity’ to undermine this reputation. \(^1^0^3\) The significance of these statements for present purposes is that the attributes of openness, impartiality and fair process largely replicate the essential features of a court associated with the notion of institutional integrity in the *Kable* cases. \(^1^0^4\) In *Wilson*, Gaudron J also emphasised the importance to Australian federalism of ensuring that judges vested with federal judicial power are not, ‘even in their capacity as individuals, … place[d] … in a position of subservience to either of the other branches of government’, \(^1^0^5\) a concern that likewise resonates with the High Court’s application of the *Kable* principle. \(^1^0^6\) In this way, Gaudron J’s judgment may serve as a bridge between the older federal incompatibility test and a more modern unified state and federal test.

Fourth and finally, Gaudron J’s judgment in *Wilson* may serve as a bridge in another respect. In outlining her approach to incompatibility, Gaudron J recognised history as an additional factor bearing on the validity of extra-judicial

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\(^1^0^1\) See above Part IIIA.


\(^1^0^3\) *Wilson* (1996) 189 CLR 1, 22.

\(^1^0^4\) See above Part II.


\(^1^0^6\) See, eg, the decisions on the facts in *Kable* (1996) 189 CLR 51 and *Totani* (2010) 242 CLR 1.
work by federal judges. Specifically, she accepted that historical practice may play a role in tempering some incompatibility assessments:

there may be functions … which do not satisfy these criteria but which, historically, have been vested in judges in their capacity as individuals and which, on that account, can be performed without risk to public confidence. However, 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.\(^{107}\)

These comments were also approved by the plurality in *Wainohu*\(^ {108}\) and are not inconsistent with French CJ and Kiefel J’s remarks on history discussed above. The plurality in *Wainohu*, in reasoning to its conclusion on the facts, thus made the point that the functions given to individual state judges by pt 2 of the Act were ‘new’ in nature.\(^ {109}\)

Reflecting on this use of history in assessing the validity of extra-judicial activity by individual judges, both state and federal, it is difficult to escape the conclusion that it is essentially pragmatic in nature.\(^ {110}\) As such work by federal judges was, like that of state judges, largely unaffected by constitutional restraints until relatively recently,\(^ {111}\) a degree of historical deference helps to reconcile old behaviours with new norms.\(^ {112}\) However, the joint opinion in *Wilson* signalled a contradictory approach. There, Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ observed that ‘the criteria of incompatibility’ formulated in their opinion ‘have not always been observed in practice’.\(^ {113}\) They continued:

However, disconformity of practice with constitutional requirement is no inhibition against truly expounding the text and implications of the *Constitution*. Indeed, any practice of departure from the constitutional requirement makes the necessity to declare the requirement more imperative.\(^ {114}\)

All members of the *Wainohu* majority were silent on this declaration. It thus lurks in the background as a ‘wildcard’ that can be played to trump reliance on historical analysis in particular circumstances.

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109 Ibid 229 [109] (Gummow, Hayne, Crennan and Bell JJ).
110 On pragmatism and history in this area, see the remarks of Griffith and Kennett, above n 5, 52; and see generally Chief Justice Robert French, ‘Executive Toys: Judges and Non-Judicial Functions’ (2009) 19(1) *Journal of Judicial Administration* 5.
111 See, eg, Sawer, above n 53, 165–6 speculating in 1967 on whether the High Court would use the *Boilermakers’ Case* to place limits on extra-judicial work by federal judges.
112 Griffith and Kennett, above n 5, 52.
114 Ibid.
B  Case Studies

The case studies that follow apply the guiding principles for assessing incompatibility outlined above. They examine the capacity of state judges, post-\textit{Wainohu}, to serve as members of non-judicial tribunals, as Royal Commissioners, and as executive officials respectively. As will be seen, these functions represent a spectrum of activity ranging from ‘probably valid’ to ‘probably invalid’.

1  Non-Judicial Tribunals

Of the forms of extra-judicial activity considered in this article, the widespread practice of appointing state judges to administrative tribunals, such as the various state civil and administrative tribunals (‘CATs’),\textsuperscript{115} is the least constitutionally contentious.\textsuperscript{116} In \textit{Wilson}, the joint judgment affirmed that the appointment of designated federal judges as members of the Administrative Appeals Tribunal (‘AAT’) is consistent with ch III.\textsuperscript{117} Commenting on the AAT’s merits review role, Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ emphasised that the tribunal was ‘constituted upon the judicial model’\textsuperscript{118} and enjoyed decisional independence from government.\textsuperscript{119} In \textit{Kable}, McHugh J said that it would not infringe the \textit{Kable} principle to give functions like those of the AAT to a state Supreme Court, so long as the Court retained sufficient judicial functions to remain a ch III ‘court’.\textsuperscript{120} It follows that for a state judge to serve on a tribunal which exercises independent administrative review functions or analogous quasi-judicial tasks — whether or not the same body also exercises state judicial power — would also be valid, noting that a judge who ‘sits in a different tribunal and has a separate

\textsuperscript{115} See, eg, \textit{Victorian Civil and Administrative Tribunal Act 1998} (Vic) providing that the Victorian Civil and Administrative Tribunal (‘VCAT’) President must be a Supreme Court judge (s 10) and Vice Presidents must be County Court judges (s 11). In 2013–14, 16 County Court judges held office as VCAT Vice Presidents: VCAT, \textit{VCAT Annual Report 2013/14} (2014) 56. For similar provisions in other states, see \textit{State Administrative Tribunal Act 2004} (WA) ss 108, 112, 116; \textit{Queensland Civil and Administrative Tribunal Act 2004} (Qld) ss 175–6, 192; \textit{Civil and Administrative Tribunal Act 2013} (NSW) ss 13, 15; \textit{South Australian Civil and Administrative Tribunal Act 2013} (SA) ss 10, 14, 17–18.

\textsuperscript{116} H P Lee and Enid Campbell state that ‘[t]he utilisation of judges as members of tribunals does not appear to have been a matter of concern, and indeed, in some cases has been applauded’: \textit{The Australian Judiciary} (Cambridge University Press, 2\textsuperscript{nd} ed, 2013) 187. Cf Appleby and Stubbs, above n 65, 82–3 drawing attention to what they term possible ‘breadth of commitment’ issues arising from such appointments.


\textsuperscript{118} \textit{Wilson} (1996) 189 CLR 1, 18 quoting these words as part of a larger extract from the reasons of Brennan J as President of the AAT in \textit{Re Becker and Minister for Immigration and Ethnic Affairs} (1977) 15 ALR 696, 699.

\textsuperscript{119} \textit{Wilson} (1996) 189 CLR 1, 18. For a critique of the views expressed by the joint judges in \textit{Wilson} about appointment of federal judges as AAT members, see Griffith and Kennett, above n 5, 52.

\textsuperscript{120} (1996) 189 CLR 51, 117.
position of first position is removed from their court to a significantly greater degree than the judge in Wainohu.

Indeed, it is possible that some state tribunals with non-judicial and judicial functions are in fact ch III courts. In Owen v Menzies, the Queensland Court of Appeal found that the Queensland Civil and Administrative Tribunal, whose President and Deputy President must hold office as Supreme Court and District Court judges respectively, is a ‘court’ able to receive federal jurisdiction under s 77(iii) of the Constitution. Similarly, in K-Generation Pty Ltd v Liquor Licensing Court, the High Court considered, in the context of a Kable argument, whether the Licensing Court of South Australia, constituted by a judge of the District Court, fell within ch III. The High Court held that it did. However, there was no suggestion in the judgments that, were the Licensing Court not such a body, the functions exercisable by its presiding member — which included making and reviewing licensing decisions — were incompatible with the integrity of the District Court as an institution exercising federal judicial power.

Not surprisingly, as one moves away from tribunals ‘constituted upon the judicial model’, it becomes more uncertain whether state judges can validly engage in such work. The evaluative nature of the Kable test calls for ‘close attention to the detail of impugned legislation’ and each case will turn on the specific features of the scheme in question. For example, in Kable, McHugh J ventured that ‘a law that provided for a judge of a State court to be appointed as a member of an Electoral Commission fixing the electoral boundaries of the State would not appear to suggest that the court was not impartial’.

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124 [2013] 2 Qd R 327.
125 Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 175–6 (see also s 192 ‘Appointment of supplementary members’).
127 (1996) 189 CLR 51, 118.
Justice McHugh did not specify such a law, but s 6(2)(a) of the Parliamentary Electorates and Elections Act 1912 (NSW) (‘Elections Act’), which requires one of three ‘Electoral Districts Commissioners’ appointed by the Governor to be a current or retired Supreme Court judge, provides an example. In conducting a redistribution, the Commissioners must apply the electorate size criteria in s 28 of the Constitution Act 1902 (NSW) and follow the steps set out in pt 2 of the Elections Act. Those steps require the Commissioners to seek public submissions on the redistribution generally and on specific boundary changes in draft form, including the reasons for those changes. The Commissioners must also hold a public inquiry into objections to their proposals and take account of prescribed demographic, geographic and social factors. Their final boundary rulings must be reported to the Governor who ‘shall thereupon cause’ the new districts to be proclaimed.

A number of features of this process support McHugh J’s view that a judge could serve as a Commissioner without threatening the Supreme Court’s integrity: its open nature; the fact that it occurs within the confines of a detailed statutory framework; and, crucially, that the Commissioners work at arm’s length from elected members of the legislature and executive. However, the function is quasi-legislative in character and the Elections Act contemplates that the Commissioners will, at least to some extent, be responsive to public opinion, a feature at odds with judicial power. Electoral redistributions are also, as one state Chief Justice recently observed, a subject ‘fraught with the risk of political controversy.’ From the perspective of history, the circumstance that, as originally enacted in 1912, the Elections Act required each Commissioner to hold ‘some office in the Public Service of New South Wales’ (s 6(2)) — a judge not being specifically mentioned — may be further reason for caution. A retired

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132 The other Commissioners are the Electoral Commissioner and the Surveyor-General: Elections Act ss 6(2)(b)–(c). Electoral Districts Commissioners are appointed for the term specified in their commission (Elections Act s 7(1)) and possess ‘the powers and immunities of a Commissioner’ under the Royal Commissions Act 1923 (NSW): Elections Act s 19. The membership of similar bodies in other states, except Tasmania, also includes judges or explicitly permits this to occur: see Electoral Act 1907 (WA) s 16B(1)(a); Constitution Act 1934 (SA) s 78(1)(a); Electoral Boundaries Commission Act 1982 (Vic) ss 3(2)(a), 6; Electoral Act 1992 (Qld) s 6(5).

133 Elections Act, s 17A(1).


135 Ibid ss 14(5)–(11).

136 Ibid s 17A.

137 Ibid ss 15(1)–(3) (the quoted words are in s 15(2)).


139 See David Solomon, ‘Public Opinion’ in Tony Blackshield, Michael Coper and George Williams (eds), The Oxford Companion to the High Court of Australia (Oxford University Press, 2001) 572. See also Wilson (1996) 189 CLR 1, 17 where the plurality identified exercise by a designated judge of a discretion ‘on political grounds’ as an invalidating factor.


141 The Parliamentary Electorates and Elections Act 1902 (NSW) made identical provision in this regard to the original 1912 Elections Act: s 4(2). Section 6(2) of the Elections Act was amended in
Supreme Court judge, the Hon Keith Mason AC QC, served as a Commissioner for the most recent redistribution in 2013.\textsuperscript{142}

2 \hspace*{1em} Royal Commissions and Inquiries

It is probably still valid, in terms of ch III, for a state judge to serve on a Royal Commission, though not necessarily in all cases.\textsuperscript{143} Were the High Court concerned about the compatibility of this once-common practice with ch III, especially post-\textit{Wainohu}, it might be expected to indicate this in some way. However, the signals from the Court, while guarded, have tended in the opposite direction. In \textit{Wilson}, the joint judges contrasted positively the higher level of independence enjoyed by a judge as a Royal Commissioner with the function of a ‘reporter’ in that case, which the Court held could not be undertaken by a federal judge consistently with ch III.\textsuperscript{144} In doing so, they recognised that a Commission’s terms of reference and supporting statute ‘will be significant’ in assessing incompatibility.\textsuperscript{145} Gaudron J in \textit{Wilson} suggested, albeit without resolving the question, that the history of judicial service on Royal Commissions may show that the practice does not threaten confidence in the courts, hinting that this argument would be stronger in the state, than the federal, sphere.\textsuperscript{146} In \textit{Wainohu}, French CJ and Kiefel J appeared to endorse the comments on Royal Commissions in the \textit{Wilson} joint judgment.\textsuperscript{147}

In the absence of a definitive ruling, however, the position remains uncertain given the fluid nature of the \textit{Kable} principle and the mixed history of judicial engagement in Royal Commissions at state level. A typical Royal Commission presided over by a judge may closely follow ‘judicial process’ with the judge ‘acting openly, impartially and in accordance with fair and proper...
procedures’. Yet a judge appointed as a Royal Commissioner may also be ‘liable to removal by the [Executive] … before the report is made’ and enjoy surprisingly few formal protections for their independence from government. Moreover, while a Royal Commission is institutionally segregated from the courts, a Commission report often includes policy recommendations that could be seen to align a judge, on return to their court, with a particular policy outlook or enmesh the judge in ‘political controversy’. Royal Commissions that involve ‘inherently political matters’ pose a particular risk in this regard. In extreme cases, the appointment of a judge as a Royal Commissioner may (mis)use the judge’s status as an independent decision-maker to promote the political goals behind an inquiry. This may damage perceptions of the independence of the courts, especially if — notwithstanding the formal separation of Commission and court — the judge’s judicial title and status are strongly linked to their role as Commissioner.

It was the possibility of a Royal Commissioner being thrust into political contestation that led the Supreme Court of Victoria in the 1920s to adopt a policy of not providing judges for such work. Though some members of the Court have

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149 Wilson (1996) 189 CLR 1, 18–19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (citations omitted) describing the situation of a reporter in that case.

150 Leonard Arthur Hallett, Royal Commissions and Boards of Inquiry (Law Book, 1982) 49: ‘Commissions and Boards probably have no true legal independence, but in practice operate independently … [they] are appointed at the initiative of the executive government and, it seems, can be terminated at its initiative’ (and generally at 48–51). See also Australian Law Reform Commission, Making Inquiries: A New Statutory Framework, Report No 111 (2009) 54 [2.15] n 16 noting ‘[t]he requirement of independence is not set out in Australian legislation establishing public inquiries’. The Royal Commissions Act 1923 (NSW) and the Commissions of Inquiry Act 1950 (Qld), for example, give a Commissioner the same immunity as a Supreme Court judge (ss 6 and 20(1) respectively), but do not otherwise specifically protect a Commission’s independence. Administrative law may provide some protection though: North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146.

151 To underscore this ‘it is accepted practice that judges not sit as judges while their royal commission is current’: Athol Moffitt, ‘Judges, Royal Commissioners and the Separation of Powers’ (2000) 44(5) Quadrant 36, 38. However, the public may struggle to differentiate a Royal Commission and a court: Lee and Campbell, above n 116, 189–91.

152 Moffitt, above n 151, 38. See also the detailed discussion in Hallett, above n 150, 66–73.

153 Brian Mason, ‘Falling Asleep At Its Master’s Feet? The Kable Principle and Royal Commissions’ (2015) 22(3) Australian Journal of Administrative Law 177, 197 nominating the Petrov Royal Commission as a possible example of an inquiry that, given its political dimensions, could no longer be validly undertaken by state judges.


presided over Royal Commissions since then,\textsuperscript{157} its resolve has largely held.\textsuperscript{158} Conversely, the Supreme Court of New South Wales has historically supplied many state and federal Royal Commissioners and other inquiry heads.\textsuperscript{159} The remaining states have, over time, adopted positions between these two models.\textsuperscript{160}

The High Court eschewed participation in Royal Commissions from the 1920s,\textsuperscript{161} though other federal courts provided a ready source of Royal Commissioners for the Commonwealth until the decisions in \textit{Grollo} and \textit{Wilson} tightened the restrictions on such work.\textsuperscript{162} It is now the position of the Federal Court that its members will ‘generally’ not serve on Royal Commissions.\textsuperscript{163} In light of the experience of judicial participation in Royal Commissions and like inquiries over recent decades, the leading Australian text on judicial ethics now counsels against judges accepting these roles.\textsuperscript{164}

In the face of these competing considerations, whether the appointment of a state judge as a Royal Commissioner offends the \textit{Kable} principle will ultimately turn on the specific statutory and administrative framework, including the terms of reference, underpinning the Commission in question.\textsuperscript{165} To the extent that history is relevant, it does not tell a single story and can potentially be used both for and against validity. Yet, French CJ and Kiefel J’s claim in \textit{Wainohu} that ‘[a]llowance must be made … for the long history in the States of the appointments of judges to extra-judicial roles’\textsuperscript{166} may serve — despite the position of the Victorian state judges — to tilt the scales in favour of judges of other states continuing to conduct at least some inquiries. Thus, while the \textit{Kable} principle gives the High Court the capacity to end the longstanding use of state judges as Royal Commissioners, it seems that the Court may demur from drawing a definitive line under the practice at present.

\textsuperscript{157} McInerney and Moloney, above n 156, 12–19.


\textsuperscript{159} McInerney and Moloney, above n 156, 19–22, 73–7 listing New South Wales Royal Commissions and inquiries conducted by judges between 1870 and 1984. Many of the Commonwealth inquiries noted by McInerney and Moloney at 83–7 were also undertaken by members of the New South Wales Supreme Court. For justification of the different practice in New South Wales, compared to Victoria, see Moffitt, above n 151, 38. The Chair of the Commonwealth-State Royal Commission into Institutional Responses to Child Sexual Abuse established in 2013 is Justice Peter McClellan of the New South Wales Court of Appeal: Commonwealth, Gazette: Special, No G00083, 15 January 2013.

\textsuperscript{160} McInerney and Moloney, above n 156, 31–2, 77–83. The Supreme Court of Queensland adopted a stance against involvement of its judges in commissions of inquiry in 1987: James Thomas, \textit{Judicial Ethics in Australia} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2009) 196 (though cf Lee and Campbell, above n 116, 191–2 on the 2011 appointment of Justice Catherine Holmes of the Queensland Court of Appeal to conduct the Queensland Floods Commission of Inquiry).

\textsuperscript{161} Fiona Wheeler, ‘“Anomalous Occurrences in Unusual Circumstances”? Extra-Judicial Activity by High Court Justices: 1903 to 1945’ (2013) 24(2) Public Law Review 125, 132–5, but see at 134–5 the wartime inquiry conducted by Justice McTiernan in 1943.

\textsuperscript{162} McInerney and Moloney, above n 156, 32–3, 83–7.

\textsuperscript{163} Australian Law Reform Commission, above n 150, 138 [6.72]. A federal judge, Justice Jennifer Coate of the Family Court, is one of six Commissioners appointed to the Royal Commission into Institutional Responses to Child Sexual Abuse: Commonwealth, Gazette: Special, No G00083, 15 January 2013.

\textsuperscript{164} Thomas, above n 160, 195–201.

\textsuperscript{165} As Appleby and Stubbs observe, ‘each commission must be examined on its own facts’: above n 65, 84. See also, to the same effect, Martin, above n 140, 211; Mason, above n 153, 196–7.

\textsuperscript{166} (2011) 243 CLR 181, 212 [52].
3 Executive Positions

The appointment of a state judge to a substantive executive position, without first resigning their judicial commission, may infringe the Kable principle, though again much turns on the nature of the office concerned. State judges have accepted such positions on several occasions in the past. Justice Geoffrey Reed of the Supreme Court of South Australia served from 1949 to 1950 as foundational Director-General of the Australian Security Intelligence Organisation (‘ASIO’), working under the Chifley and Menzies Governments to set up the spy agency. Among other things, Reed helped frame the preamble to the Communist Party Dissolution Act 1950 (Cth). Chief Justice Sir Edmund Herring of the Supreme Court of Victoria took leave for a year in 1950 to serve as Commonwealth Director-General of Recruiting. In 1984, Justice Donald Stewart of the Supreme Court of New South Wales became Chair of the National Crime Authority (‘NCA’). His Chief Justice, Sir Laurence Street, believed that running a criminal investigative agency was at odds with judicial office and made these views publicly known. Justice Stewart stepped down as a state judge shortly into his NCA term.

Focusing on the NCA example, while Sir Laurence Street’s objections to a state judge serving as NCA head were based on prudential considerations, there is a strong argument that today the same appointment would infringe ch III. This is so even assuming that incompatibility standards leave greater scope for extra-judicial action at state, as opposed to federal, level. Putting aside issues arising from a judge’s unavailability for judicial service for several years, the

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168 Horner, above n 167, 139.


170 McInerney and Moloney, above n 156, 24.

171 For a detailed account of this controversy, including Sir Laurence’s views, see ibid 22–31.


173 See generally McInerney and Moloney, above n 156, 22–31. Interestingly, it appears that these objections were not shared at the time by the Chief Judge of the Federal Court, Sir Nigel Bowen. According to Stewart’s autobiography, Bowen told Stewart that he (Bowen) ‘would welcome’ Stewart’s appointment as NCA head to the Federal Court were this to occur, observing that Justice Woodward of the Federal Court had served as ASIO Director-General: Stewart, above n 172, 122 (though cf McInerney and Moloney, above n 156, 29). Stewart was not made a Federal Court judge, but after resigning from the Supreme Court of New South Wales retained the title ‘Justice’ under special federal legislation: McInerney and Moloney, above n 156, 26–7; Brown, above n 172, 63–4.

174 The Kable principle necessarily limits Commonwealth power as well as state power: Kable (1996) 189 CLR 51, 115–16 (McHugh J).

175 As to which, see Part V below.
NCA was conceived as a sophisticated, high-level ‘crime-fighting organisation’, formed — in the words of its parliamentary oversight committee — to ‘put important or significant criminals behind bars’. While apolitical in character, it was, by its very nature, aligned with state interests in the investigation of crime, receiving references to investigate ‘relevant criminal activity’ from state and federal governments, and obliged to refer ‘evidence that would be admissible in the prosecution of a person’ directly to the relevant Attorney-General or state or federal law enforcement body, including the police. Much of its work was necessarily done behind closed doors and subject to confidentiality requirements.

While such a body is distinct from the courts, there remains a serious risk that placing a judge at the helm of ‘a revolutionary crime-fighting organisation’ will undermine the perception of the judiciary in general, and the court to which the judge belongs in particular, as providing a dispassionate forum for the adjudication of criminal cases. This is especially significant for state courts in which most criminal prosecutions, in federal and state jurisdiction, are heard. The volume of information passing across the desk of a NCA chief, coupled with secrecy considerations, would also make it very difficult for a judge returning to the bench to manage apprehended bias issues arising from their former role. Justice Stewart maintained that the NCA’s functions were sufficiently akin to those of a Royal Commission for his appointment to be seen as part of the extensive history in New South Wales of judges engaging in this form of public service. Yet, it is hard to deny Sir Laurence Street’s view that the NCA’s purposes, powers

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176 Stewart, above n 172, 214. Stewart deals with the NCA generally in ‘The Rise and Demise of the National Crime Authority’ (ch 16).
177 Described as ‘the primary objective’ behind the NCA’s creation: Joint Committee on the National Crime Authority, Parliament of Australia, The National Crime Authority — An Initial Evaluation (1988) 31 [2.40].
178 Stewart, above n 172, 217. See National Crime Authority Act 1984 (Cth) s 11 (‘Functions of Authority’).
179 Ibid s 11(2), 13–14. The NCA could also initiate its own investigations: s 11(1)(b).
180 Ibid s 12(1)(a). See also ss 59(7)–(8).
181 Ibid ss 25(5), (7), (9) (‘Hearings’), 51 (‘Secrecy’), but see ss 60 (‘Public sittings and bulletins’), 61 (‘Annual report’). See Stewart, above n 172, 215; Joint Committee on the National Crime Authority, above n 177, 68–9 [4.32]–[4.34].
182 Stewart, above n 172, 214.
183 As Sir Laurence Street recognised: McInerney and Moloney, above n 156, 22–4.
184 In Grollo, in concluding that designated federal judges could issue telecommunications interception warrants consistently with ch III, the plurality said that apprehended bias issues could be dealt with by ‘appropriate [recusal] practice’: (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ). Full-time commitment to the position of NCA chair would presumably raise such issues on a greater scale, however.
185 Stewart, above n 172, 120–1.
and processes placed it more deeply in the executive branch than a quasi-judicial commission of inquiry.\textsuperscript{188}

The appointment of a federal judge in their personal capacity to an organisation like the NCA would today clearly breach the federal incompatibility test.\textsuperscript{189} Given that in \textit{Wainohu}, a provision that an eligible judge need not give reasons was found to damage the integrity of the Supreme Court by ‘utilis[ing] confidence in impartial, reasoned and public decision-making of eligible judges … as members of the Supreme Court to support inscrutable decision-making’,\textsuperscript{190} it is hard not to extend the same conclusion, as regards involvement of a state judge, to the NCA. The nexus between the designated judge and their court is not so proximate in the case of the NCA that one could potentially be mistaken for the other as in \textit{Wainohu}. But the departure from ordinary judicial process is significantly greater and occurs over a sustained period. In light of the preceding discussion, the appointment would be invalid.

\section{Conundrums of Incompatibility and Convergence}

The fact that today constitutional norms could prevent a state judge heading a body like the NCA — an argument that seems not to have occurred to anyone at the time of the controversy over Justice Stewart’s appointment — highlights \textit{Kable}’s ongoing effect in redefining the relationship between state courts and the other arms of government, state and federal. Among other things, the \textit{Kable} principle serves as a brake on what Reid in 1978 described as ‘Executive Imperialism’ — situations where the executive seeks ‘to use members of the Judiciary to its own advantage’.\textsuperscript{191} Reid was concerned about the explosion in the number of state and federal judges then engaged in extra-judicial work and the impact of this on the integrity of the judicial branch.\textsuperscript{192} More recent uses by state governments of state courts, exemplified by the \textit{Community Protection Act 1994} (NSW) invalidated in \textit{Kable},\textsuperscript{193} illustrate other ways in which legislatures and executives can seek to deploy ‘the capital of the judicial system’\textsuperscript{194} to address sensitive or controversial issues. Though

\begin{itemize}
\item \textsuperscript{188} Ibid 120–1. See also McInerney and Moloney, above n 156, 28–9; Joint Committee on the National Crime Authority, above n 177, ch 3 (‘Performance’), 63–4 [4.21].
\item \textsuperscript{189} In \textit{Grollo}, the plurality maintained that ‘judicial participation in criminal investigation’, even as a designated person, would ‘compromis[e] the judiciary’s essential separation from the executive government’: (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ); Wheeler, ‘Federal Judges as Holders of Non-Judicial Office’, above n 138, 470–1. See also \textit{Hussain v Minister for Foreign Affairs} (2008) 169 FCR 241, 277 [152]–[153] (Weinberg, Bennett and Edmonds JJ). On the expiry of Justice Stewart’s term as NCA head, he was replaced in 1990 by a federal court judge, Justice John Phillips: Brown, above n 172, 64. The Australian Crime Commission has now superseded the NCA.
\item \textsuperscript{190} Ibid 120–1. See also McInerney and Moloney, above n 156, 28–9; Joint Committee on the National Crime Authority, above n 177, ch 3 (‘Performance’), 63–4 [4.21].
\item \textsuperscript{191} Reid, above n 154, 90. This is not to suggest that the involvement of judges in extra-judicial work is necessarily exploitative of the judiciary or that many judges have not made valuable contributions to public life in these roles — they clearly have. For a defence of this form of public service by individual judges, see Kirby J’s dissent in \textit{Wilson} (1996) 189 CLR 1.
\item \textsuperscript{192} Ibid 120–1. See also McInerney and Moloney, above n 156, 28–9; Joint Committee on the National Crime Authority, above n 177, ch 3 (‘Performance’), 63–4 [4.21].
\item \textsuperscript{193} See also, eg, s 14(1) of the \textit{Serious and Organised Crime (control) Act 2008} (SA), which was held invalid in \textit{Totani} (2010) 242 CLR 1.
\item \textsuperscript{194} \textit{Grollo} (1995) 184 CLR 348, 392 (Gummow J).
\end{itemize}
this differs in some respects from off-court work — jurisdiction is imposed on a
court whereas extra-judicial functions are typically assumed voluntarily — both can
trade on the reputation of the judiciary in an attempt ‘to cloak’ the functions of the
other branches ‘in the neutral colors of judicial action’.195

Taken as a whole, the Kable principle reflects the basic notion that the rule
of law, which Dixon J said underpins the Constitution,196 could not be fulfilled
without a system of courts bound to administer the law in a fair and impartial
manner.197 As such, the case is as significant for the theory and practice of
Australian constitutionalism as the views on the separation of powers expressed in
the Boilermakers’ Case over half a century ago — probably more so.198 While the
full ramifications of the Kable principle remain a work-in-progress, the analysis
here of the effect of the decision in Wainohu draws attention to several matters that
remain unsettled in relation to this particular branch of Kable jurisprudence. Their
resolution is important — not only for knowing what off-court activities state
judges can validly undertake, but also because of the potential for Wainohu to
serve as a bridge between the separation of powers at state and federal levels.199 To
this end, four concluding observations on incompatibility and the ‘convergence’200
of state and federal ch III doctrine follow.

First, the case studies above, despite their efforts at prediction, show that the
Kable principle gives the High Court considerable latitude as to the types of
extra-judicial activities it will in future allow individual state judges to discharge.
The same can be said about the Kable principle and functions conferred on state
courts proper,201 though extra-judicial work poses distinct challenges for the
coherent application of an open-textured incompatibility test. As seen in this
article, such work can be for state or Commonwealth governments, form part of a
detailed legislative scheme or flow from executive action alone. It may also
include activities conducted in public or private, short term or long term, and with
or without historical precedent for their performance by judges. Disagreement at
the level of professional standards about what extra-judicial tasks judges can
properly undertake adds to the overall uncertainty.202 The High Court has difficult

195 To rework the frequently quoted passage from Mistretta v United States (1989) 488 US 361, 407
(Blackmun J for the Court) as reproduced, eg, in Grollo (1995) 184 CLR 348, 392 (Gummow J).
196 Australian Communist Party v Commonwealth (1951) 83 CLR 1, 193.
197 Forge (2006) 228 CLR 45, 123 [197] (Kirby J describing the Kable principle as ‘a practical and
necessary counterpart to that other fundamental principle, stated by Dixon J … that “the rule of law
forms an assumption” upon the acceptance of which the Australian Constitution is framed’); Totani
(2010) 242 CLR 1, 91 [233] (Hayne J stating that the Kable principle is ‘to be seen as giving
practical effect to the … assumption [of the rule of law]’ which ‘then invites attention to what the
rule of law requires’). See also Totani at 155–6 [423]–[424] (Crennan and Bell JJ).
198 On the Boilermakers’ Case, see Fiona Wheeler, ‘The Boilermakers Case’ in H P Lee and George
199 As recognised in Welsh, “Incompatibility” Rising?, above n 47, 263.
200 Adopting McLeish’s term, though his discussion of ‘convergence of legal principles applicable to
courts and judicial power at a State and federal level’ proceeds on a wider basis than relevant here:
above n 25, 252.
201 See, eg, Appleby and Williams, above n 55, 28–9.
between professional and constitutional restraints in this area and noting ‘the absence of bright-line
rules’ around these restraints: at 197 [21]. The tendency in judicial conduct standards is, however,
choices to make and while the federal cases of *Grollo* and *Wilson* provide some guidance, those decisions date from a generation ago and are liable to reinterpretation in light of contemporary ch III developments. With relatively few ‘bright-line[s]’ to guide it,\(^{203}\) the normative question of what extra-judicial activities Australian judges should, or should not, undertake is likely to lurk close to the surface of High Court decision-making in this area.\(^{204}\)

Second, there is a need for greater clarity concerning the relationship between the federal and state incompatibility tests. If the tests that apply to extra-judicial activity are essentially the same in terms of the factors to be weighed and the threshold required for invalidity — at least as regards incompatibility arising from threats to public confidence in the integrity of the courts — this should be spelt out. As argued above, a unified test flows from a like need to safeguard the exercise of federal judicial power, but is also capable of recognising that a body is a state court and that it, and its judges, operate in a different historical and constitutional setting to federal courts and judges.\(^{205}\) However, if the state test imports an incompatibility standard that is inherently less strict than for extra-judicial activity by designated federal judges, then the basis for this divergence should be made explicit as a matter of constitutional analysis. Either way, the High Court in *Wainohu* has laid the groundwork for using history to support state judges doing somewhat more off-court work than their federal colleagues. Care is needed, though, in not pushing this too far. Australia lacks detailed histories of the participation of its judges in these types of activities.\(^{206}\) Moreover, a recent study of the early High Court justices — Australia’s first federal judges — shows that, relative to their small number, they did more extra-judicial work than often supposed.\(^{207}\)

Third, until now this article has put to one side notions of ‘practical incompatibility’\(^{208}\) flowing from the proposition in *Grollo* that ‘[i]ncompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable’.\(^{209}\)

While in *Wainohu*, Gummow, Hayne, Crennan and Bell JJ briefly discussed this form of incompatibility in a way that assumed it affects state judges,\(^{210}\) its transmission to the states via *Kable* may not be assured. In *Grollo*, the basis of ‘practical incompatibility’ was not explored. In *Wilson*, the joint judgment seemed to suggest that it stems from a clash with s 72 of the *Constitution*, the judges observing that ‘[a] Justice appointed pursuant to s 72 is a public officer whose

\[^{204}\] Cf ibid 196–7 [21], 200–2 [27]–[30] (French CJ and Kiefel J).
\[^{205}\] The work of Lim on the *Kable* principle may prove important here: see generally above n 38.
\[^{206}\] In relation to the High Court, see Wheeler, ‘“Anomalous Occurrences in Unusual Circumstances”?’, above n 161, 126–7.
\[^{207}\] This is the general thesis in ibid.
\[^{208}\] Walker, above n 31, 159.
\[^{210}\] (2011) 243 CLR 181, 225 [93].
duties must be discharged during his or her tenure’. 211 Yet, for a state judge seconded to a Royal Commission or executive post for several years with little prospect of returning to the bench, 212 s 72 is irrelevant. Moreover, their absence from their court does not necessarily compromise its institutional integrity — judges take leave for many reasons and new appointees can be added — unless its membership is so depleted that its work is imperilled. 213 The contention that loss of a judge distorts the integrity of a court would also need to confront the finding in Forge 214 that appointment of acting judges to a Supreme Court does not have this effect. It may be that this is one area where conceptual merger of the state and federal incompatibility tests cannot be achieved. 215

Finally, as McLeish has highlighted, the larger choice for the High Court in dealing with these issues is whether it promotes a course of convergence ‘creep’ 216 between state and federal ch III doctrine or, alternatively, seeks to hold the line on existing Kable developments, placing fresh emphasis on the constitutional differences between state and federal courts. 217 Wainohu’s significance for this bigger picture has been recognised by Welsh, commenting that the decision ‘clears a path to a uniform conception of’ incompatibility with potentially ‘fundamental consequences for separation of powers principles’. 218 Those consequences could include a return to the pre-Boilermakers’ Case position whereby an incompatibility test controls the non-judicial functions exercisable by federal courts. 219 This would subject such courts to the same general principles concerning non-judicial work as now apply to state courts and judges and also to federal judges acting in their personal capacity. 220 As there were persuasive reasons to support the reversal of the Boilermakers’ Case before the Kable principle took its current form, 221 the argument is even stronger today.

211 (1996) 189 CLR 1, 14 n 55 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
212 See generally the examples in Walker, above n 31, 162.
213 Cf Grollo (1995) 184 CLR 348, 389 (Gummow J); Appleby and Stubbs, above n 65, 83.
215 Common law rules of incompatibility of office also address this issue, though how closely they mirror federal incompatibility doctrine is unclear: Wilson (1996) 189 CLR 1, 15–16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also Wainohu (2011) 243 CLR 181, 221 [77] (Gummow, Hayne, Crennan and Bell JJ).
216 To adapt Twomney’s reference to a process of ‘Kable creep’: Anne Twomney, ‘The Limitation of State Legislative Power’ (2002) 4(1) Constitutional Law and Policy Review 13, 14. In relation to possible future convergence arguments, it is notable that the High Court in Duncan v New South Wales left open the question of ‘[t]he existence and scope of any implied limitation on the ability of a state parliament to exercise judicial power’: (2015) 318 ALR 375, 378 [4] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ). It has been speculated that the Kable principle may give rise to such a limitation: see, eg, Martin, above n 140, 202–3.
217 McLeish, above n 25, especially at 265–6. See also generally Lim, above n 38.
218 Welsh, ‘“Incompatibility” Rising?’, above n 47, 263.
219 Ibid. On the pre-Boilermakers’ Case position, see R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556.
221 See, eg, Stellios, Zines’s The High Court and the Constitution, above n 27, 327–31.
VI Conclusion

Whether or not the High Court retreats from the *Boilermakers’ Case*, the constitutional principles that have evolved under ch III of the *Australian Constitution* to regulate extra-judicial activity by state and federal judges will continue to play a role in navigating the swirling eddies of ‘[d]ivergence and convergence’\(^{222}\) that lie ahead. Given that the principles focus on the judge in their individual capacity, rather than as a Justice of their court, they necessarily emphasise substance over form.\(^{223}\) In doing so, they help to bring to light the purposes served by the *Constitution’s* exclusive placement of federal judicial power in state and federal courts — what Zines described as the ‘values’ underlying s 71 and associated constitutional provisions.\(^{224}\) As this article has maintained, arguments about the relationship between state and federal ch III doctrine are not always assisted by identifying, without more, one as the ‘Kable principle’ and the other as the ‘separation of powers’ since the two are intimately linked in terms of the language, structure and values of ch III. The test of incompatibility with federal judicial power in its application, following *Wainohu*, to the extra-judicial activities of both state and federal judges brings this to the fore.

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\(^{222}\) McLeish, above n 25, 252.


\(^{224}\) Ibid 221, 298–9.