# Application of Chapter III to the States

Often OPCA litigants demand to be heard in a *"lawful court under Chapter III of the constitution*" as opposed to the *"unlawful star chamber"* court they are being heard in. You can find many of these cases on this website under the Tag "***Chapter III court***".

Extract from ***Fardon v Attorney-General (Qld) [2004] HCA 46; 223 CLR 575*** (from 36, per McHugh J. analysis of ***Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51***):

**Application of Chapter III to the States**

*"The doctrine of the separation of powers, derived from Chapters I, II and III of the Constitution, does not apply as such in any of the States, including Queensland. Chapter III of the Constitution, which provides for the exercise of federal judicial power, invalidates State legislation that purports to invest jurisdiction and powers in State courts only in very limited circumstances. One circumstance is State legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III [1]. Another is the circumstance dealt with in Kable: legislation that purports to confer jurisdiction on State courts but compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction invested under Ch III impartially and competently. Subject to that proviso, when the Federal Parliament invests State courts with federal jurisdiction, it must take them as it finds them*

- *[1] The Commonwealth v Queensland (1975) 134 CLR 298 at 314-315 per Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing.*

*Cases in this Court have often demonstrated that, subject to the Kable principle, the Parliament of the Commonwealth must take State courts as it finds them [2]. Thus, the structure of a State court may provide for certain matters to be determined by a person other than a judge – such as a master or registrar – who is not a component part of the court. If the Parliament of the Commonwealth invests that court with federal jurisdiction in respect of those matters, the investiture does not contravene Ch III of the Constitution, and that person may exercise the judicial power of the Commonwealth. Thus, in **The Commonwealth v Hospital Contribution Fund (1982) 150 CLR 49**, this Court held that, notwithstanding that a Master of the Supreme Court of New South Wales was not a component part of that Court, under the Supreme Court Act 1970 (NSW), orders made by the Master were orders of that Court in both State and federal jurisdiction. Gibbs CJ said [3]:*

> *"He was the officer of the court by whom the jurisdiction and powers of the court in the matter in question were normally exercised, and an order made by him, if not set aside or varied by the court, would take effect as an order of the court. Although he was not a member of the court he was, in my respectful opinion, part of the organization through which the powers and jurisdiction of the court were exercised in matters of State jurisdiction, and through which they were to be exercised in matters of federal jurisdiction also, once the court was invested with federal jurisdiction."*

- *[2] See, eg, Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander (1912) 15 CLR 308 at 313 per Griffith CJ; Le Mesurier (1929) 42 CLR 481 at 496-498 per Knox CJ, Rich and Dixon JJ; Adams v Chas S Watson Pty Ltd (1938) 60 CLR 545 at 554-555 per Latham CJ; Peacock v Newtown Marrickville and General Co-operative Building*

*Society No 4 Ltd (1943) 67 CLR 25 at 37 per Latham CJ; Kotsis v Kotsis (1970) 122 CLR 69 at 109 per Gibbs J; Russell v Russell (1976) 134 CLR 495 at 516-517 per Gibbs J, 530 per Stephen J, 535 per Mason J, 554 per Jacobs J; The Commonwealth v Hospital Contribution Fund (1982) 150 CLR 49 at 61 per Mason J.*

- *[3] Hospital Contribution Fund (1982) 150 CLR 49 at 59.*

*Furthermore, when investing a State court with federal jurisdiction, the Federal Parliament cannot alter the structure of the court by making an officer of the Commonwealth a functionary of the court and empowering the officer to administer part of its jurisdiction [4]. Nor can it invest State courts with federal jurisdiction and, contrary to the open justice rule, require those courts to conduct proceedings in closed court [5]. Nor can the Parliament require a State court invested with federal jurisdiction to have trial by jury when the court is so organised under State law that it does not use that form of trial when exercising State jurisdiction [6]. For example, Magistrates' Courts in this country do not provide for trial by jury. If the Parliament, acting under s 77(iii) of the Constitution, enacted a law purporting to invest a Magistrates' Court of a State with jurisdiction to hear indictable offences and the law, expressly or impliedly, sought to require trial by jury in the Magistrates' Court, the law would be invalid because a law that invests a State court with federal jurisdiction must take the court as it finds it. In any event, s 80 of the Constitution, which requires trial by jury for federal indictable offences, would operate to invalidate the law.*

- *[4] Le Mesurier (1929) 42 CLR 481 at 496-497 per Knox CJ, Rich and Dixon JJ*
- *[5] Russell (1976) 134 CLR 495 at 506 per Barwick CJ, 520 per Gibbs J, 532 per Stephen J.*
- *[6] Brown v The Queen (1986) 160 CLR 171 at 199 per Brennan J.*

*Moreover, as Gaudron J pointed out in **Kable** [7]:*

> *"[T]here is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth."*

*Nor is there anything in the Constitution that would preclude the States from legislating so as to empower non-judicial tribunals to determine issues of criminal guilt or to sentence offenders for breaches of the law. The Queensland Parliament has power to make laws for "the peace welfare and good government" of that State [8]. That power is preserved by s 107 of the Commonwealth Constitution. Those words give the Queensland Parliament a power as plenary as that of the Imperial Parliament [9]. They would authorise the Queensland Parliament, if it wished, to abolish criminal juries and require breaches of the criminal law to be determined by non-judicial tribunals. The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State. If a State legislates for a tribunal of accountants to hear and determine "white collar" crimes or for a tribunal of psychiatrists to hear and determine cases involving mental health issues, nothing in Ch III of the Constitution prevents the State from doing so. Likewise, nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts. The powers conferred on the Queensland Parliament by s 2 of the Constitution Act 1867 (Q) are, of course, preserved subject to the Commonwealth Constitution. However, no process of legal or logical reasoning leads to the conclusion that, because the Federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.*

- *[7] (1996) 189 CLR 51 at 106.*

- *[8] Constitution Act 1867 (Q), s 2.*
- *[9] Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 10.*

*The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised.*

*The pejorative phrase – "repugnant to the judicial process" – is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures. State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances as well as the departure from the traditional judicial process indicate that the State court might not be an impartial tribunal that is independent of the legislative and the executive arms of government.*

***Conclusions***

*In my opinion, **Kable** does not govern this case. Kable is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts. Kable was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the Community Protection Act pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired. The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in Kable is unlikely to be repeated. The Kable principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions, rather than in the context of Kable-type legislation.*

*In this case, it is impossible to conclude that the Queensland Parliament or the executive government of that State might be working in conjunction with the Supreme Court to continue the imprisonment of the appellant. Nor is it possible to conclude that the Act gives rise to a perception that the Supreme Court of Queensland might not render invested federal jurisdiction impartially in accordance with federal law. The Act is not directed to a particular person but to a class of persons that the Parliament might*

*reasonably think is a danger to the community [10]. Far from the Act giving rise to a perception that the Supreme Court of Queensland is acting in conjunction with the Queensland Parliament or the executive government, it shows the opposite. It requires the Court to adjudicate on the claim by the Executive that a prisoner is "a serious danger to the community" in accordance with the rules of evidence and "to a high degree of probability". Even if the Court is satisfied that there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody, the Court is not required to order the prisoner's continued detention or supervised release. Furthermore, the Court must give detailed reasons for its order [11], reasons that are inevitably subject to public scrutiny. It is impossible to hold, therefore, that the Queensland Parliament and the executive government intend that the appellant's imprisonment should continue and that they have simply used the Act "to cloak their work in the neutral colors of judicial action." [12] On the contrary, the irresistible conclusion is that the Queensland Parliament has invested the Supreme Court of Queensland with this jurisdiction because that Court, rather than the Parliament, the executive government or a tribunal such as a Parole Board or a panel of psychiatrists, is the institution best fitted to exercise the jurisdiction.*

- *[10] See, eg, Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q) Explanatory Notes, (2003) at 1; Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 3 June 2003 at 2484 per Welford; Queensland, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Q), Amendments in Committee, Explanatory Notes, (2003) at 1.*
- *[11] Section 17.*
- *[12] Mistretta v United States 488 US 361 at 407 (1989).*

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***Lazarus v Independent Commission Against Corruption [2017] NSWCA 37; 94 NSWLR 36; 341 ALR 483; 265 A Crim R 352; 317 FLR 164*** (Leeming JA at 106):

> *"However, a further difficulty arises from the fact that the applicants' challenge is to the validity of a State law. The applicants' submission must not be grounded merely in a breach of separation of powers, for the separation of powers found in Chapter III of the Commonwealth Constitution does not apply to a State: **Kirk [2010] HCA 1** at [69]. Thus State validating laws were upheld in **H A Bachrach Pty Ltd v The State of Queensland (1998) 195 CLR 547; [1998] HCA 54**, and **Re Macks; ex parte Saint (2000) 204 CLR 158; [2000] HCA 62**. Instead, in order to invalidate a State law, it is necessary to identify a function which compromises or is repugnant to the integrity of the court, in accordance with the principles considered in **Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51** and **Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46**."*

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***Attorney-General (Qld) v Lawrence [2013] QCA 364; [2014] 2 Qd R 504***, (at 2):

> *"For ease of reference these reasons refer to the potential ground of invalidity described in those questions as "the Kable doctrine". That doctrine was first formulated in **Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51** (Kable) and it was later considered and applied by the High Court in **Fardon v Attorney-General (Qld) (2004) 223 CLR 575** ("Fardon"), **Gypsy Jokers***

***Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532*** *("Gypsy Jokers"),* ***K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501*** *("K-Generation"),* ***International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319*** *("International Finance"),* ***South Australia v Totani (2010) 242 CLR 1*** *("Totani")* ***Wainohu v New South Wales (2011) 243 CLR 181*** *("Wainohu") and* ***Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458*** *("Pompano").*

*In Pompano at [123]-[126], Hayne, Crennan, Kiefel and Bell JJ described the Kable doctrine in the following passage:*

*"The relevant principles have their roots in Ch III of the Constitution. As Gummow J explained in Fardon, the State courts (and the State Supreme Courts in particular) have a constitutionally mandated position in the Australian legal system. Once the notion is rejected, as it must be, that the Constitution 'permits of different grades or qualities of justice', and it is accepted that the State courts have the constitutional position that has been described, it follows that 'the Parliaments of the States [may] not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth' (emphasis added). As Gummow J further pointed out, and as is now the accepted doctrine of the Court, 'the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'.*

*Three further points must be made about this 'essential notion'. First, 'the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes'. Second, the repugnancy doctrine 'does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III'. Third, content must be given to the notion of institutional integrity of the State courts, and that too is a notion not readily susceptible of definition in terms which will dictate future outcomes.*

*Something more must be said about the second and third points. Independence and impartiality are defining characteristics of all of the courts of the Australian judicial system. They are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence. In particular, the courts cannot be required to act at the dictation of the Executive. In this respect, clear parallels can be drawn with some aspects of the doctrines that have developed in relation to federal courts. But because the separation of judicial power mandated by Ch III does not apply in terms to the States, and is not implied in the constitutions of the States, 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. More particularly, 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.*

*Two related consequences follow from these propositions and should be noted. First, in applying the notions of repugnancy and incompatibility it may well be necessary to accommodate the accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of the judicial power of the Commonwealth. Second, the conclusions reached in this matter cannot be directly translated and applied to the*

*exercise of the judicial power of the Commonwealth by a Ch III court. As pointed out by this Court in Bachrach (HA) Pty Ltd v Queensland, the 'occasion for the application of Kable does not arise' if the impugned State law would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court. But because '[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State', that a State law does not infringe the principles associated with Kable does not conclude the question whether a like Commonwealth law for a Ch III court would be valid. It is not necessary for the resolution of this case to pursue those matters further."*

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***Attorney-General for the State of Qld v Harvey [2012] QSC 173; 263 FLR 433***, (at 27):

*"So far there have been only five occasions on which legislation has been struck down through application of the principle in **Kable**. They are:*

*(a) The **Community Protection Act 1994** (NSW) in Kable itself. In that case the New South Wales Parliament had enacted legislation which applied only to Mr Kable and which effectively sought to detain him legislatively.*

*(b) The **Criminal Proceeds Confiscation Act 2002** (Qld) which was held to be unconstitutional in **Re Criminal Proceeds Confiscation Act 2002 [2004] 1 Qd R 40**. because it obliged the court to hear the State's application for a restraining order ex parte.*

*(c) In **International Finance Trust Company Limited & anor v New South Wales Crime Commission & ors (2009) 240 CLR 319**, the **Criminal Assets Recovery Act 1990** (NSW) was held to be invalid as offending the Kable principle to the extent that it compelled the court to proceed ex parte with respect to a restraining order.*

*(d) In **State of South Australia v Totani (2010) 242 CLR 1** that part of the **Serious and Organised Crime (Control) Act 2008** (SA) which effectively required the Magistrates Court to be engaged in "an essentially executive process" was inconsistent with its fundamental characteristics as a court.*

*(e) In **Wainohu v State of New South Wales (2011) 243 CLR 181**. the **Crimes (Criminal Organisations Control) Act 2009** (NSW) was invalid because, by generally exempting eligible judges from any duty to give reasons in connection with the making or revocation of a declaration that a particular organisation was a declared organisation, that Act was repugnant to or incompatible with the court's institutional integrity.*

*Other attempts to engage the Kable principle have failed: see **Fardon v Attorney-General (Qld) (2004) 223 CLR 575**, **Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police (2008) 234 CLR 532**, **K-Generation Pty Ltd v Liquor Licensing Court (2008) 237 CLR 501**, and **Thomas v Mowbray (2007) 233 CLR 307**."*

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***QPS v Earthey [2011] QMC 56*** (from 46):

> *"I point out that this case is heard in a State court exercising State jurisdiction, not federal jurisdiction. Therefore I do not believe this is a matter involving the Australian Constitution or involving its interpretation where Notices are required to be served on the Commonwealth and State Attorney-Generals under section 78B of the Judiciary Act 1903 by the defendant.*
>
> *However, I note decisions of the High Court, commencing with **Kable**, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system: **[1996] HCA 24**; (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J, 116-119 per McHugh J, 127-128 per Gummow J; **HA Bachrach Pty Ltd v Queensland [1998] HCA 54; (1998) 195 CLR 547** at 561-562 [14]; **Baker v The Queen [2004] HCA 45**; (2004) 223 CLR 513 at 519 [5] per Gleeson CJ; **Fardon v Attorney-General (Qld) [2004] HCA 46**; (2004) 223 CLR 575 at 591 [15] per Gleeson CJ. This constitutional principle has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts. The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality. (See **Wainohu v New South Wales [2011] HCA 24** at 107) Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle. (See **Wainohu v New South Wales [2011] HCA 24** at 109) As explained later, it is also a defining characteristic of a court that it generally gives reasons for its decisions.*
>
> *Hayne J made the same point in **South Australia v Totani (2010) 242 CLR 1** at 81 [201]:*
>
> *"Kable dealt with one respect in which the Constitutions of the States are affected by the federal Constitution: the legislative powers of the States are not unlimited. The relevant limitation is not one which follows from any separation of judicial and legislative functions under the Constitutions of the States. Rather, it is a consequence that follows from Ch III establishing, in Australia, 'an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth'."*
>
> *Nor do I believe it necessary to explain in length the Australian system of government suffice to say we have a federal system with a Constitution designed to protect the autonomy of the states and cede only particular and limited powers to the federation. It does this by prescribing the powers of the federal government with the residual powers left to the states.*
>
> *Generally, the parliament of Queensland has plenary power to make laws for the peace, order and good government of the State subject to express and implied limitations from the Commonwealth Constitution and the Australia Act 1986 which leaves that State the freedom to legislate on the terms chosen by them: **Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 9-10; 82 ALR 43; 62 ALJR 645**. It would be 'almost impossible to use wider or less*

*restrictive language' than the phrase 'peace, welfare (or order) and good government': **McCawley v R (1920) 28 CLR 106; [1920] AC 691** at 712; (1920) per Lord Birkenhead, PC. See also **Ibralebbe v R [1964] AC 900** at 923; [1964] 1 All ER 251; [1964] 2 WLR 76 per Viscount Radcliffe. They have been held to admit of no inquiry by the courts as to whether, as a matter of fact or law, a particular statute is or is not a prudent exercise of the power, or is calculated to attain its particular end or object: **Riel v The Queen (1885) 10 App Cas 673**, 678; **Bone v. Mothershaw [2002] QCA 120** per McPherson JA at page 4.*

*As to what I think Mr Earthey is saying is the facilitation of proof provisions removes the capacity of the court to exercise its judicial function in that it interferes with the presumption of innocence and the burden of proof.*

*This, I infer because Mr Earthey has cited the Cambodian "Boat People" case, breaches the doctrine of the separation of powers which refers to the distinct separation of the three branches of Government – the legislature, the executive and the judiciary. The legislature exercising legislative power enacts the laws, the executive exercising executive power administers the laws and the judiciary through the exercise of judicial power, interprets and adjudicates upon the laws.*

*The Defendant's submissions are based on a misapprehension. The doctrine of the separation of powers does not exist in its classic form at the state level: **Gilbertson v Attorney-General (SA) [1978] AC 772, 783; (1977) 14 ALR 429; 51 ALJR 519**; **City of Collingwood v Victoria (No 2) [1994] 1 VR 652**. The relevant provisions of the Constitution of Queensland 2001 are very different to the provisions of the Commonwealth Constitution.*

*It is well established that Parliament may legislate to prescribe rules of evidence or procedure, and to cast a burden of proof on a defendant in relation to an element of an offence, without in any way infringing upon the separation of powers. For example, High Court case law upholds the power of parliament to change the onus of proof (**Williamson v Ah On (1926) 39 CLR 95; (1927) 33 ALR 13**; **Milicevic v Campbell (1975) 132 CLR 307**) in a criminal case or to declare that a state of facts is presumed to exist: **R v Hush; Ex parte Devanny (1932) 48 CLR 487**. In **Commonwealth v Melbourne Harbour Trust Commissioners (1922) 31 CLR 1** at 12; **28 ALR 325**, Knox CJ, Gavan Duffy and Starke JJ said that a law does not usurp judicial power simply because it regulates "the method or burden of proving facts".*

*In **Nicholas v The Queen (1998) 193 CLR 173**, 188-189, Brennan CJ said that: The practice and procedure of a court may be prescribed by the court in exercise of its implied power to do what is necessary for the exercise of its jurisdiction but subject to overriding legislative provision governing that practice or procedure…A law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power."*

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