

Ch III

Intro:

At federal level, high court imposed very strict separation of judicial power from other branches of government

Implication drawn from structure and text of Constitution particularly separation of Ch III (Boilermakers)

1. Only Ch III courts can exercise judicial power
2. Ch III courts can't exercise non-judicial power

(non-judicial power can't be vested in a Ch III body (federal courts, high courts, or other courts vested with federal jurisdiction s 71) Boilermakers)

non judicial body with judicial power is in breach of Wheat

However, there are exceptions: persona designate

At state level, separation believed not to exist until

- Held in Kable that State courts must be seen to be independent as repositories of federal jurisdiction
- Most recently enunciated test is that state courts can't be vested with power that undermines their institutional integrity (Fardon, Totani)

State parliament attempted to confer implied powers

- Whilst nothing suggests regulation of separation of powers at State level in state constitution
- Effect of Cth constitution (Ch III) may be to limit type of powers states can confer on state courts (Ch III courts)
- Ex:
 - o Vic sup court is vested with federal jurisdiction per s 71 of constitution
 - o CJ of Vic SC is Ch III court per Hilton
 - Federal court judge is tantamount to federal court

Kable implied variation on federal Boilermaker's principles to test whether institutional integrity of court has been compromised by state's conferral

*if lack tenure, can't be a Ch III court

Institutional integrity:

Test emphasizes importance of judicial independence and impartiality in upholding integrity of SC

Doesn't target 1 person (ad hominem as in Kable)

- Kable doctrine not limited as conceived in Baker and Fardon (Totani, IFT, Wainohu)

Courts need for transparency and open exercise of judicial discretion (Wainohu)

- CJ may have discretion etc
- Certain affairs need not be carried out publicly (Hogan v Hinch)

However, on balance, institutional integrity may be compromised by Act's denial of discretion and transparency that are characteristic of a court

Fact that public is excluded may be for a valid reason

- Respect for commercial confidentiality may not indicate courts aren't acting independently

Wide discretion held in Wainohu to undermine institutional integrity