MCCAWLEY AND OTHER CASES IN THE LIGHT OF KIRK: ARE THERE UNRECOGNISED POSSIBLE LIMITS ON THE STATE'S POWERS OF CONSTITUTIONAL AMENDMENT DERIVED FROM THE *CONSTITUTION*?

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The title of this paper gives away the point of it. But I should begin by warning you not to expect too much. There is no ticking time bomb about to explode on current thinking about the limits of the State's powers of constitutional amendment, at least as far as I know.

With that disclaimer, may I dive into the topic by starting at the chronological end, namely the 2009 judgment of the High Court in *Kirk v Industrial Court of New South Wales*.[1] The relevant constitutional question arose in *Kirk* because of section 179 of the *Industrial Relations Act 1996* (NSW). The section provided that a decision of the Industrial Court was final and might not be appealed against, reviewed, quashed, or called into question by any court or tribunal. It expressly extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise.

Section 179 provided:

> (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.
>
> (2) Proceedings of the Commission (however constituted) may not be prevented from being

brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) …

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section:

decision includes any award or order.

On the constitutional question, the court held that section 179 was invalid as beyond the legislative power of the State to alter the constitution or character of its Supreme Court, so that it would cease to meet the constitutional description of 'the Supreme Court of a State' that appears in section 73 of the *Australian Constitution*. Section 73 provides:

> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the

> Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:
>
> (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
>
> (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State,
>
> (iii) of the Inter-State Commission, but as to questions of law only;
>
> and the judgment of the High Court in all such cases shall be final and conclusive.
>
> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
>
> Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

There were two steps in the reasoning process in *Kirk*. The first step was to identify the principle or limit upon state legislative power. The second was to characterise section 179 as infringing that principle.

As to the first step, the principle was succinctly stated in paragraph 96 of the reasons of the plurality. Their Honours said:

> In considering State legislation, it is necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the

> constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description': *Forge* (2006) 228 CLR 45 at 76 [63].[2]

The second step was equally important. The gist of it is set out in paragraph 99 of the reasons of the plurality. The critical part, in my view, appears in the second half of that paragraph:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[3] (footnote omitted)

Having said that, the plurality immediately went on to say, does not mean no legislation can affect the availability of judicial review in a Supreme Court of a State. The distinction between what is within legislative power and what is outside it is the distinction between jurisdictional error and non-jurisdictional error, so that legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond state legislative power.[4]

The *Kirk* principle is directly derived from the principles expounded in *Kable v Director of Public Prosecutions (NSW).*[5] Other decisions stemming from *Kable* can be seen to turn on this notion of the constitutionally guaranteed institutional integrity of the Supreme Court. One example in Queensland is that legislation by which the Attorney-General would have been able to reverse a decision of the Supreme Court made under the

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) was held to be invalid.[6] The point of interest for this paper is that the Court of Appeal rejected an argument that the *Kable* principle is limited to provisions that confer a power on a court that is repugnant to the court's institutional integrity.[7]

There is another relevant case that deals with the limit of the power of a State Parliament to make legislative changes to the Supreme Court. It is the 2006 decision of the High Court in *Forge v Australian Securities and Investments Commission*.[8]

The question in *Forge* was whether it was beyond the legislative power of the State of New South Wales to provide for the appointment of an acting Judge as a Judge of the Supreme Court. Specifically, the question was whether section 37 of the *Supreme Court Act 1970* (NSW) that permitted such an appointment was invalid. It provided, in part:

> (1) The Governor may, by commission under the public seal of the State, appoint any qualified person to act as a Judge, or as a Judge and a Judge of Appeal, for a time not exceeding 12 months to be specified in such commission.
>
> (2) In subsection (1) ***qualified person*** means any of the following persons:
>
> (a) a person qualified for appointment as a Judge of the Supreme Court of New South Wales,
>
> (b) a person who is or has been a judge of the Federal Court of Australia,
>
> (c) a person who is or has been a judge of the Supreme Court of another State or Territory.
>
> (3) A person appointed under this section shall, for the time and subject to the conditions or limitations specified in the person's commission, have all the powers, authorities,

> privileges and immunities and fulfil all the duties of a Judge and (if appointed to act as such) a Judge of Appeal.

The High Court held that section 37 was valid. The High Court proceeded by the same two-step reasoning process followed in *Kirk*. The first step as to the principle was the same as in *Kirk*.

One important point about *Forge* is that it reframed the constitutional principle articulated in *Kable* in a way that more directly applies to assessing the limit of a state's constitutional power to affect its Supreme Court.

The way that was done appears in paragraph 63 of the reasons of the plurality:

> Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in *Kable*. The legislation under consideration in *Kable* was found to be repugnant to, or incompatible with, 'that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'. The legislation in *Kable* was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislation required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court acted as an instrument of the Executive. The consequence was that the Court, if required to perform the task, would not be an appropriate

> recipient of invested federal jurisdiction. But as is recognised in *Kable*, *Fardon v Attorney-General (Qld)* and *North Australian Aboriginal Legal Aid Service Inc v Bradley*, the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[9]

Thus, the principle has emerged that the question is whether the amendment would impermissibly interfere with the institutional integrity of the Supreme Court.

On the second step of the reasoning in *Forge*, there were a number of reasons for the conclusion that a power to appoint some acting Judges does not affect institutional integrity, and I do not need to set them out. One obvious point was that even at the time of federation, there had already been numerous appointments of acting Judges of Supreme Courts. In fact, two of the first three Justices of the High Court had been acting Judges of a Supreme Court at some point, as were other later appointees.[10]

The other important point about *Forge* is what was said by the plurality in paragraph 73.[11] I will summarise the first two steps in the reasoning. First, the way that the *Supreme Court Act 1970* (NSW) distinguished between acting and permanent appointments would not permit the appointment of so many acting Judges that the Court was predominantly or chiefly composed of acting Judges. Second, that limit could be seen as following either from the words of the Act, or as reinforced or

required by constitutional considerations. And it is a conclusion that proceeds from an unstated premise about what constitutes a court.

It is the next two sentences of paragraph 73 that are of most interest for present purposes:

> Thus, the conclusion may proceed from a premise that a court, or at least the Supreme Court, of a State must principally be constituted by permanent Judges (who have tenure of the kind for which the Act of Settlement provided: appointment during good behaviour for life, or, now, until a set retirement age with no diminution of remuneration during tenure). Or the conclusion may proceed from a premises that is stated at a higher level of extraction: that the courts, and in particular the Supreme Court, of a State must be institutionally independent and impartial.

I would make two observations about that passage. First, this reasoning at the least suggests that the scope of the power of the State to alter the constitution of the Supreme Court by providing for the appointment of acting Judges for a limited term is not absolute. Second, the reference to 'permanent Judges' who have tenure to a set retirement age raises a relevant diversion. At the time of federation, the Judges of the Supreme Courts of the States were appointed for life, by words that appointed them 'during good behaviour'.[12]

The first Australian legislation that required a Judge to retire at age 70 years was passed in Queensland in 1921.[13] Some may think that a retirement age of 70 or similar years is a logical thing, to prevent those of waning powers from continuing, when they should retire. Perhaps, in part, that was a reason for the Queensland legislation.

But, in fact, the legislation in Queensland had a second purpose. As part of a long running antagonism between the government of the day and the Supreme Court, compulsory retirement was applied to the existing members of the Supreme Court, and brought about the immediate retirement of three of the five judges of the court. *McCawley's* case, itself, was an earlier part of this long running antagonism.[14] The Queensland legislation may be contrasted with other similar retirement legislation, such as the 1977 amendments to section 72 of the *Australian Constitution* that did not apply to existing judges.

In 1915, TW McCawley was the Crown Solicitor. McCawley was an admitted barrister who had never practised. He was handpicked as the Under-Secretary for Justice by TJ Ryan, the then Premier and Attorney-General, who was a skilled practising barrister although not then a silk.[15] On 12 January 1917, aged 35 years, McCawley was appointed as a Judge and President of the new Court of Industrial Arbitration under the *Industrial Arbitration Act of 1916* (Qld). Section 6(6) of that Act provided:

> Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court the Governor in Council may appoint the President or any Judge of the Court to be a Judge of the Supreme Court.
>
> The President or any Judge of the Court, if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a Judge of the said Supreme Court during good behaviour, and be paid such salary and

> allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a Judge of the Supreme Court or be less than the salary and allowances of a Puisne Judge of the Supreme Court; and upon such direction the said payments shall become a charge upon the Consolidated Revenue.
>
> The President and each Judge of the Court of Industrial Arbitration shall hold office as President and Judge of the said Court for seven years from the date of their respective appointments, and shall be eligible to be reappointed by the Governor in Council as such President or Judge for a further period of seven years.

Under section 6(6), the appointment was for a period of seven years from the date of the commission. On 12 October 1917, also under section 6(6), McCawley was additionally appointed a Judge of the Supreme Court of Queensland. It was generally accepted that the additional appointment as a Supreme Court Judge should be construed as being for a term of seven years, being so long as he was appointed a Judge of the Court of Industrial Arbitration.[16]

On 6 December 1917, McCawley presented his commission to the Chief Justice but there was objection to its validity. The case for McCawley was argued personally by TJ Ryan. The ongoing antagonism between the government and the Supreme Court can be seen in some of the exchanges between Ryan and the court during argument.

The main argument for invalidity was that section 6(6) of the Act was *ultra vires* and contrary to the provisions of the Constitution of Queensland.[17] The relevant section of the *Constitution Act*, section 15, provided:

> The commissions of the present judges of the Supreme Court of the said colony and of all future judges thereof shall be, continue, and remain in full force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of her heirs and successors any law usage or practice to the contrary thereof in anywise notwithstanding.

There were some procedural hiccups but, ultimately, on 25 April 1918, the Supreme Court made an order that McCawley was not entitled to take a seat as a member of the Supreme Court.

On 27 September 1918, the High Court dismissed an appeal, by a majority of 4:3. It decided that section 6(6) was invalid because it was inconsistent with section 15 of the Constitution of Queensland. The effect of section 15 was that the commission of a Judge of the Supreme Court shall be during good behaviour and impliedly for life, not for a fixed term. The provision had not been repealed. Because section 6(6) purported to authorise an appointment of a Judge of the Supreme Court for seven years, it was inconsistent and invalid.

You will get the flavour of how the case was dealt with by the majority from a passage from Griffith CJ's reasons:

> These limitations, it will be observed, introduced as part of the Constitution granted to Queensland what has always been regarded as a great constitutional principle introduced by the Act of Settlement, namely, that the tenure of office of the Judges of the superior Courts should be for life during good behaviour. The law of 1867 is still part of the Statute law of Queensland. The Parliament of Queensland had not, therefore, in my opinion, any authority under the Order in Council as so amended, any more than before the amendment or before the Australian

> Constitution, to enact any law providing for the appointment of a judge of the Supreme Court with any other tenure of office…[18]

The point of the majority judgments was not that it was beyond the power of the State Parliament to alter the Supreme Court in a way that affected the institutional integrity of the Supreme Court. It was, that before Parliament could alter the tenure of the appointment of a Judge of the Supreme Court by some other Act, an amendment had to be made to the Constitution of Queensland first, so as to avoid inconsistency.

Before leaving the High Court in *McCawley* behind, one other point to note is that both Griffith CJ and Barton J referred to section 106 of the *Australian Constitution* which provides:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

This, Sir Samuel said, gave the provisions of the Constitution of Queensland that reflected the *Act of Settlement* the force of an Imperial Statute.[19] Justice Barton also referred to section 106 as giving support to the character of the Constitution of Queensland as a constitution.[20]

On 8 March 1920, the Privy Council allowed McCawley's appeal from the High Court.[21] From what I have said so far, you might be expecting that when the case got to the Privy Council it would have focused on some of the questions I have mentioned about the detailed operation of the Constitution of Queensland and perhaps consideration of its context in the *Australian Constitution*. Not in the least bit.

The dispositive reasoning of the Privy Council begins at pages 114 and 115 with the distinction their Lordships drew between a 'controlled' constitution and an 'uncontrolled' constitution.[22] They continued with this passage:

> It is of the greatest importance to notice that where the Constitution is uncontrolled the consequences of its freedom admitted no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the Constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the Constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary common place that in the eye of the law legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject matter.

I have always wondered whether the Privy Council would have used the example of amendment by the Dog Act if they had been talking of amendment of a fundamental British constitutional Act rather than the Constitution of Queensland.

One source I have read says that McCawley's counsel were not called on in the oral argument of the appeal.[23] The Attorney-General for England intervened in the appeal and his counsel made submissions about the extent to which the Imperial Parliament had intended to devolve constitutional power on colonial Parliaments when erecting those colonies. These points do not appear in the report in the Law Reports.[24]

Nowhere in the Privy Council's reasons is any reference made to the fact that the Constitution of Queensland was the Constitution of a State[25] and subject to the *Australian Constitution* under section 106.[26] So far as the Privy Council was concerned, the ability of the Australian colonies to amend their own constitutions was entrenched by the *Colonial Laws Validity Act 1865* (Imp), section 5, that provided:

> Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

The result was that on 3 May 1920 McCawley took up office as a Judge of the Supreme Court. Within two years, as I have already mentioned, three of the judges who had sat on *McCawley's* case in the Supreme Court were removed from office, effective 31 March 1922, by an Act based on the holding in *McCawley's* case that an ordinary Act could repeal the constitutional provision for the life tenure of a Judge.

From what I have said so far, however, one might think that the only relevant question raised by the reasoning in *Kirk* and *Forge* concerns the constitution of the Supreme Court of any

State. But although I acknowledge that the next step goes out on a limb, there might be a bit more to it.

Some may remember the appointment of Senator Albert Patrick Field during the turbulent period between 1973 and 1975. On 30 June 1975, Queensland Labor Senator Bert Milliner died. The Queensland Parliament comprised of the Legislative Assembly led by Premier Joh Bjelke-Petersen appointed Field, who was a public servant immediately before his appointment. A challenge in the High Court of Australia was mounted. In any event, famously or infamously, depending on one's view, on 11 November 1975 there was a double dissolution and Field was not elected at the 13 December 1975 election.

The underlying point of that history is that as at 1975, section 15 of the *Constitution* provided in part:

> If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as herein-after provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified…

Note the reference to the 'Houses of Parliament of the State', plural. Of course, since 1922, there has been no Legislative Council of the Parliament of Queensland even though there was one, as provided for in the Constitution of Queensland, at the time of federation.

As you may know, in the 1977 constitutional amendments,[27] section 15 was replaced. It now provides for the contingency if there is only one House of the Parliament of the

State for which the Senator is to be chosen. The relevant part of the current section provides:

> If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified…

But having regard to *Kirk* and *Forge*, what might have been the consequences of the statutory assumption in section 15, as originally enacted, that there would be Houses of Parliament, plural, of a State?

This part of the journey around the cases begins with *Taylor v Attorney-General*,[28] another Queensland case brought to the High Court in 1917. It was another case that arose during the long period of antagonism between the government of the day and the Supreme Court. Ryan, as Attorney-General and Premier, again argued the case for the government. The question was whether the *Parliamentary Bills Referendum Act 1908* (Qld), which I will call the *Referendum Act*, was valid to permit the passage of a Bill to amend the Constitution of Queensland, by abolishing the Legislative Council, without the Bill passing the Legislative Council.

Bear in mind that this case was decided only a year before *McCawley's* case. The leading judgment was that of Barton J, who said in the following key passage:

> There is power to make laws "respecting the constitution" of the legislature, and this, if passed, is such a law. The means of making it a law are provided validly by the Referendum Act. It seems to me,

> therefore, that I cannot but hold that there is power to abolish the Legislative Council…[29]

Justice Barton held that section 5 of the *Colonial Laws Validity Act 1865* (Imp) gave full power to make laws respecting the constitution of the legislature meaning, the composition, form or nature of the House of the legislature where there is only one House or of either House if the legislative body consists of two Houses. He held that power covered the provision in the *Referendum Act* that a Bill passed by the Legislative Assembly in two successive sessions, that has in the same two sessions been rejected by the Legislative Council may be submitted by referendum to the electors and, if affirmed by them, may be presented to the Governor for royal assent.

Ultimately the Legislative Council was got rid of in Queensland, but it was not by the mechanism of a referendum under the *Referendum Act*. There was such a referendum on 5 May 1917 but it was lost by the government. In 1921, after *McCawley's* case, the government swamped the Legislative Council by appointing additional members, who voted in favour of a Bill to abolish the Legislative Council.[30] In that way, Queensland became a unicameral Parliament.

One point of interest, for present purposes, is that at that stage no one seems to have thought that the assumption in section 15 of the *Australian Constitution* that there would be two Houses of State Parliaments, might restrict the ability of a State Parliament to abolish its Legislative Council (or, for that matter, its Legislative Assembly).

Perhaps two other contextual points should be made. One is that although each of the Australian colonies that became a State was erected with a bicameral Parliament, some of the Canadian Provinces as at federation had only one House,[31] so the concept

of a representative democracy with one House of Parliament was not unknown. The other is that *Taylor's* case and *McCawley's* case were decided before the *Engineers'* case.

There were later cases about the extent of the powers of a State Parliament to legislate for or against the abolition of the Legislative Council. In particular, in 1931 in *Attorney-General (NSW) v Trethowan*,[32] there was a successful challenge in the High Court to the validity of legislation to abolish the Legislative Council of New South Wales that did not comply with section 7A of *Constitution Act 1902* (NSW) which set up a requirement for a referendum before the Legislative Council could be abolished.[33]

Section 7A provided:

> (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section.
>
> (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.
>
> (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature.
>
> (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes.

> (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent.
>
> (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section …

As can be seen, the section provided that the Legislative Council of New South Wales could not be abolished unless the Bill first passed through both Houses, and then was approved by a majority of votes at a referendum.

However, in 1960 there was a more interesting case, for present purposes, in *Clayton v Heffron*.[34] The main question in *Clayton* was whether section 5B of the *Constitution Act 1902* (NSW) was invalid. Section 5B was introduced to deal with the contingency that the Legislative Council of New South Wales might refuse to pass a Bill under section 7A, and provided a mechanism to by-pass that House and go directly to referendum, like the earlier *Referendum Act* in Queensland.

In effect, the High Court held that both sections 7A and 5B were 'manner and form' provisions that would have to be complied with under section 5 of the *Colonial Laws Validity Act 1865* (Imp) and therefore operated outside the ability of the Parliament of the State to amend the Constitution of New South Wales by an ordinary Act.

But of interest here is that the validity of both section 5B and section 7A, as a method to abolish the Legislative Council, was challenged based on the reference in section 15 of the *Australian Constitution* to the 'Houses of Parliament'. The plurality described this as a 'somewhat curious point'. Their Honours said:

> It is obvious that the provision [s 15] supposes that there will be two Houses of Parliament in every State:

> it is argued that it necessarily implies that there shall continue to be two Houses of Parliament accordingly. The contention means that the Federal Constitution deprives the State legislature of the power to abolish one House. This argument seems clearly enough to be ill founded. The supposition that there will be two Houses implied no intention legislatively to provide that the Constitutional power of the State to change to a unicameral system, if the power existed, should cease. One can understand the section being relied upon as evidence that it was not supposed that the power to make the change existed. But that is all. Even that is not a very cogent argument.[35]

Summarising, I started with an argument, now accepted as good constitutional law, that the reference to the Supreme Court of any State in Chapter III of the *Australian Constitution* assumes and requires that there shall be a Supreme Court of the State, with the consequence that the power of a State Parliament to legislate with respect to the Supreme Court is constrained, to the extent that the institutional integrity of the Court is not diminished. That principle crystallised in 2005 and 2010 from beginnings in earlier cases, particularly *Kable*.

Yet that point was not an argument that was raised at the time of the great debate about the extent of the State's power to amend its constitution to interfere with the constitution of the Supreme Court by appointing judges for a limited term, in *McCawley's* case.

On the other hand, there was an analogous argument that the references in section 15 of the *Australian Constitution* as to the Houses of Parliament of a State assumed the continued existence of those houses, with the consequence that the State's power to legislate to abolish one of the Houses of Parliament is

constrained, so that the institutional integrity of the Parliament is not diminished.

That point, too, was not an argument raised in the great debates in the cases between 1916 and 1931 about the power of a State Parliament to legislate to abolish its Legislative Council. But unlike legislation affecting the Supreme Court of any State, when that argument was raised about legislation affecting the Houses of Parliament of a State, it was summarily rejected.

Perhaps this particular arguable inconsistency never needs to be resolved. In a practical sense, the 'Houses of Parliament', *plural*, argument disappeared in 1977 with the amendment of section 15 of the *Australian Constitution*.

But is this the end of similar arguments? Up to this point there has not been a great deal of exploration of the limitation of the legislative powers of the State Parliaments created by making the constitutions of the States subject to the *Australian Constitution*, under section 106 of the latter.

The question that remains is where will *Kirk* take us from here, if anywhere at all? The suggestions I would offer up are as follows.

First, it must at least now be arguable that in the light of *Kirk* and *Forge*, *McCawley's* case was wrongly decided, to the extent that it suggests that the Parliament of a State may generally appoint judges of the Supreme Court for a term, such as seven years. This may matter. For example, if some new reforming government desired to appoint judges of a Supreme Court for a limited term and to require them to face re-election for extensions, as has happened in a number of states in the United States of America, I am encouraged to think that *Kirk* and *Forge* may trump *McCawley's* case.

Second, there may still be scope for an argument, in some other context, that the interrelationship of the polities of the states and the Commonwealth under section 106 of the *Australian Constitution* creates other restrictions on the State's powers to amend their constitutions, and that older cases that may have turned on the characterisation of State constitutions as uncontrolled constitutions of the colonies, may have to be reconsidered.

Endnotes

1 (2010) 239 CLR 531.

2 Kirk (2010) 239 CLR 531, 580 [96].

3 Ibid 581 [99].

4 Ibid 581 [100].

5 (1996) 189 CLR 51, 100–102, 117 and 137–143.

6 *Attorney-General (Qld) v Lawrence* [2014] 2 Qd R 504.

7 Ibid 530–531 [43].

8 (2006) 228 CLR 45.

9 Ibid 76 [63].

10 Ibid 63–64 [31].

11 Ibid 79 [73].

12 See, eg, *Constitution Act of 1867* (Qld), s 15.

13 *Judges' Retirement Act 1921* (Qld), s 3.

14 *McCawley v R* (1918) 26 CLR 9.

15 Ryan and McCawley had travelled together to the Privy Council in 1916 to argue a case for the government: *Fowles v Eastern and Australian Steamship Co Ltd* [1916] 2 AC 556.

16 Higgins J dissented from this view in the High Court.

17 Whether the relevant provisions were confined to the *Constitution Act 1867* (Qld) or included the Imperial Order in Council of 6 June 1859 is irrelevant to this discussion.

18 *McCawley v R* (1918) 26 CLR 9, 22.

19 Ibid.

20 Ibid 33.

21 *McCawley v The King* (1920) 28 CLR 106.

22 Ibid 114–115.

23 D J Murphy, *T. J. Ryan – A Political Biography* (University of Queensland Press, 1975) 477.

24 *McCawley v The King* [1920] AC 691.

[25] Only one reference is made to Queensland being a State under the Commonwealth Constitution. That was in the course of describing the judgment of Griffith CJ at (1920) 28 CLR 106, 112.

[26] And covering clause 5.

[27] *Constitution Alteration (Senate Casual Vacancies) Act 1977* (Cth).

[28] (1917) 23 CLR 457.

[29] *Taylor v Attorney-General* (1917) 23 CLR 457 at 470.

[30] *Constitution Act Amendment Bill 1921* (Qld).

[31] For example, British Columbia.

[32] (1931) 44 CLR 394.

[33] In 1932, that case went to the Privy Council: (1932) 47 CLR 97.

[34] (1960) 105 CLR 214.

[35] Ibid 249.