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Comparative Constitutional Law and the *Kable* Doctrine

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I Introduction

The High Court of Australia has a long history of making reference to comparative constitutional developments. From its inception, the High Court has looked to the decisions of other Commonwealth jurisdictions as a potential source of guidance in the development of the common law. To date, however, the High Court has made relatively limited use of comparative constitutional *experience* – or comparative constitutional developments outside overseas courts. Comparative constitutional experience is often more difficult for courts to assess and comprehend than comparative constitutional decisions. It may also call for the admission of evidence at first instance, rather than the assessment of relevant development by an appellate court. Yet it can provide a rich source of potential learning for judges in a variety of areas – including in an area, this chapter argues, as distinctly unique to Australian constitutional law as the *Kable* doctrine.

At the heart of the *Kable* doctrine is an idea that there are certain kinds of powers and functions, of a non-judicial nature, that, if conferred on a court, would substantially impair that court's integrity and independence. This is a judgment that will inevitably be made differently in different countries and depend on the particular constitutional matrix and culture. At the same time, it is a question that has at least some more universal qualities or dimensions: it is about what is at the heart of an institution being 'court-like', and received by a democratic public to have that quality. This is also a question that naturally lends itself to comparative inquiry – and of a kind that goes beyond comparative constitutional law jurisprudence.

Over time, the High Court has attempted to provide important guidance as to the application of the *Kable* doctrine. In doing so it has identified a number of indicia of whether or not the doctrine will be violated. Yet the application of the doctrine remains subject to significant individual interpretive discretion, or subjective judicial judgment, in ways that raise inevitable concerns about judicial legitimacy.[1] These concerns are also amplified by the lack of clear textual support for the doctrine in the Australian Constitution, and the difficulty of overriding or displacing its

1 Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677.