

THE AUSTRALIAN JUDICIAL SYSTEM: JUDICIAL POWER OF THE COMMONWEALTH

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This paper describes the judicial system which evolved in Australia during the first century after Federation, and the doctrines which have developed in relation to the 'judicial power of the Commonwealth' in Chapter III of the *Australian Constitution* ('the Constitution'). It also discusses changes which might occur in the years to come.

I THE JUDICIAL SYSTEM FOLLOWING FEDERATION

At Federation, each self-governing colony had a Supreme Court and one or two levels of courts below the Supreme Court. Appeals from the Supreme Courts lay to the Judicial Committee of the Privy Council. Federation brought about two important changes: provision for the establishment of the High Court of Australia ('High Court'), and 'federal jurisdiction'.

A The High Court of Australia

The High Court was established in 1903. Section 71 of the Constitution described it as the 'Federal Supreme Court'; its functions under the Constitution were to involve both appellate and original jurisdiction.

It was intended to be the final court of appeal for Australia, but that took many years to achieve, because appeals lay from the High Court to the Privy Council, and also because some appeals from the State Supreme Courts could go directly to the Privy Council, thus bypassing the High Court.

The High Court's position as the final court of appeal for Australia was established gradually. In the first place, part of the jurisdiction exercised by State courts, following Federation, was federal. The jurisdiction was invested in those courts by s 39(2) of the *Judiciary Act 1903* (Cth), a condition of investment being that no appeal lay from them to the Privy Council. An early controversy between the Privy Council and the High Court about the validity of that condition was resolved in favour of the High Court's view that the condition was

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valid.¹ There were, however, appeals *from* the High Court to the Privy Council. These were by special leave, but s 74 of the Constitution allowed the Commonwealth Parliament to make laws limiting the matters in which special leave could be granted. This was done by the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth). That left only appeals from the High Court on inter se constitutional issues, but in those cases a certificate from the High Court was required under s 74. The provision for a certificate fell into a kind of constitutional desuetude: it was described as 'obsolete' by the High Court in 1985,² and I am sure it is now dead. The final avenue of appeal – that is, direct to the Privy Council from the Supreme Courts of the States exercising State jurisdiction – was abolished in 1986 by the *Australia Acts*.³

The position, and public perception, of the High Court as an ultimate appellate court was reinforced by the abolition of civil appeals to it as of right. (Criminal matters always required leave.) This occurred gradually in relation to the courts of the States but was completed in 1984. Appeals from federal courts, or from the courts of the States when exercising federal jurisdiction, were already subject to this requirement. The consequence of the need for special leave was that (with presently immaterial exceptions) the High Court's appellate jurisdiction became discretionary. It could choose the cases which it entertained, and thus influence the direction and pace of legal change. The principal criteria for determining whether to grant special leave were the general or public importance of the issue, how arguable the issue was, and whether the particular case was a suitable vehicle for its resolution.⁴ The interests of justice were served by the fact that in cases not otherwise meriting consideration, the Court would grant special leave if apparent injustice warranted its intervention.

The matters referred to above brought about profound changes in the way in which the High Court performs its appellate function. Because criminal and civil matters were on an equal footing, the proportion of criminal appeals taken increased. There are now few unimportant appeals, and every case is likely to bring about change, refinement or confirmation of an aspect of the law. The Court also regards itself as free to depart from its earlier decisions when appropriate, and to depart from earlier decisions of the Privy Council. The absence of appeals to the Privy Council has meant that the Court has felt more free to develop an 'Australian' view of the law: one which responds to the history and conditions of this country, rather than to those of the United Kingdom, or to a common denominator for the former Empire, or Commonwealth.

The need for special leave means that the Court can control the number of appeals that it hears. There has been a very great increase, however, in the number of applications for special leave to appeal. Measures – such as prior written submissions, time limits for oral argument, two (rather than three)

1 *Baxter v Commissioner of Taxation* (1907) 4 CLR 1087.

2 *Kirmani v Captain Cook Cruises Pty Ltd [No2]* (1985) 159 CLR 461, 465.

3 *Australia Act 1986* (Cth); *Australia Act 1986* (Imp).

4 See also *Judiciary Act 1903* (Cth) s 35A.

Justices sitting to hear applications, and additional special leave sittings – have been used to alleviate the problem, but the problem of the number of applications remains. It may be that in the end all special leave applications are dealt with on the papers, but this is not a popular course; it takes away the sense of the ‘day in court’ for clients, and oral argument on special leave applications can clarify facts and issues, and be decisive.

A consequence of the requirement for special leave, of course, is that the intermediate appeal courts are the final courts for almost all cases.

All courts in Australia are bound to apply the Constitution,⁵ and in its appellate jurisdiction under s 73 of the Constitution, the High Court may, and does, deal with constitutional matters. Very often, however, constitutional matters come before it in its original jurisdiction, to which I now turn.

The High Court’s original jurisdiction falls into two categories: that which is conferred on it directly by the Constitution (and which cannot be taken away by Parliament), and that which may be conferred by Parliament. The former, entrenched, jurisdiction is found in s 75 of the Constitution, namely in matters:

- (i) Arising under any treaty;
- (ii) Affecting consuls or other representatives of other countries;
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) Between States, or between residents of different States, or between a State and a resident of another State;
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The most important provisions are ss 75(iii) and (v), and the issues which may arise under them may, but need not, be constitutional in nature. Two aspects of practical importance are that firstly, ‘the Commonwealth’, in s 75(iii), is given a wide meaning, to include agencies and instrumentalities of the Commonwealth;⁶ and secondly, it was held at an early point that members of the federal judiciary were ‘officers of the Commonwealth’ for the purposes of mandamus and prohibition under s 75(v). Their position in relation to injunctions is not so clear. There is thus a mode, in addition to appeal, for review of decisions of such courts.

The other source of the High Court’s original jurisdiction is s 76, which empowers the Parliament to make laws conferring original jurisdiction on the High Court in matters:

- (i) Arising under this Constitution, or involving its interpretation;
- (ii) Arising under any laws made by the Parliament;
- (iii) Of Admiralty and maritime jurisdiction; and
- (iv) Relating to the same subject-matter claimed under the laws of different States.

Parliament has exercised that power by s 30 of the *Judiciary Act 1903* (Cth). As matters now stand, not all the jurisdiction referred to in s 76 is conferred on the High Court, but, importantly, the High Court has been given original

5 Australian Constitution covering cl 5.

6 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 75 ALJR 363.

jurisdiction in 'all matters arising under the *Constitution* or involving its interpretation'.

A significant part of the High Court's work in its original jurisdiction is in hearing and determining constitutional questions, often in proceedings for a declaration of invalidity.⁷ Whilst such questions could come before the Court exercising original jurisdiction under any of the paragraphs of s 75, some constitutional questions could not; an example being a claim by a resident of a State that a law of that State was a duty of excise under s 90 of the Constitution. It would be possible, of course, for the Commonwealth Parliament to reduce the Court's jurisdiction to that extent by repealing the provision of s 30 conferring jurisdiction on the High Court in s 76(i) matters. It is, I think, unlikely to do so, because the 'gain' by doing so is unlikely to advance any interest of the Commonwealth.

The result of the preceding discussion is that the High Court has two principal functions. First, it is the final appeal court for Australia in all matters; and secondly, it is the court in which significant constitutional matters may be commenced and disposed of. I use the expression 'significant constitutional matters' because the Court has power to remit to other federal or State courts matters within its jurisdiction but which involve anterior or additional questions, or matters with which the Court thinks it inappropriate to deal.⁸

The High Court is also given power by the *Judiciary Act 1903* (Cth) to remove to itself constitutional issues arising in other courts.⁹ It has no choice but to do so if a polity in the federation, by its Attorney-General, seeks that result.¹⁰

Whilst its procedures will change from time to time, it is unlikely, in my view, that the role of the High Court, as now established, will alter significantly in the foreseeable future. A national appellate court is a desirable institution where so much of the law is judge-made. It is desirable too to resolve differences of interpretation arising between courts, or benches in the one court, at the present intermediate appeal court level. And in a federation, where no polity has complete power, the existence of a final court having the status and security of tenure of the High Court serves the central function of defusing constitutional issues – so often with significant political overtones – by submitting them for impartial adjudication at the highest level.¹¹

7 Although the Court is exercising original jurisdiction, the final hearing of constitutional cases is before the Full Court (eg, on demurrer, or by the use of s 18 of the *Judiciary Act 1903* (Cth)), rather than before a single Justice.

8 *Judiciary Act 1903* (Cth) s 44.

9 *Judiciary Act 1903* (Cth) s 40.

10 *Judiciary Act 1903* (Cth) s 40(1). This is the unusual instance where the Court does not have a discretion whether to entertain the matter.

11 'Devolution' in the United Kingdom has produced calls to establish a constitutional court for the United Kingdom with properly identified, tenured and explicitly independent judges: see, eg, Aidan O'Neill QC, 'Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council' (2001) 64 *Modern Law Review* 603, 618.

B Federal Jurisdiction

The creation by the Constitution of the new polity, the Commonwealth, having legislative, executive and judicial power, had the concomitant that there would be subjects for judicial activity which would be 'federal' – matters arising under a law of the Commonwealth are a simple example – and subjects which would be 'State'.

The ambit of such 'federal jurisdiction' – apart from the High Court's appellate jurisdiction under s 73 – consists of the 'matters' in ss 75 and 76. They are variously described, some narrowly (eg, s 76(iii)), some very broadly (eg, s 76(ii)). It is established, however, that they define exhaustively the ambit of federal jurisdiction.¹²

The Constitution provides that such federal jurisdiction might be exercised by the High Court, or by other federal courts to be created by the Commonwealth Parliament, or that it might be invested in the courts of the States: see ss 71 and 77. For much of the first 100 years, the course adopted (with some exceptions, such as bankruptcy and Commonwealth industrial law) was 'the autochthonous expedient',¹³ namely to invest federal jurisdiction in the courts of the States. It was, however, an expedient and it was inevitable that at some point the Commonwealth would move towards establishing its own system of courts. This occurred in 1976, with the establishment of the Family Court of Australia ('Family Court'),¹⁴ and in 1977, with the establishment of the Federal Court of Australia ('Federal Court').¹⁵ These two courts, of equivalent status to the Supreme Courts of the States, had both original and appellate federal jurisdiction. Each has a large number of judges, spread throughout the Commonwealth.

The Family Court's jurisdiction, originally only in matrimonial and associated matters, has been expanded somewhat to deal with children more generally, and with some bankruptcy, administrative law and taxation matters. The Federal Court, which initially had jurisdiction only where it was conferred specifically by Commonwealth statutes, now has jurisdiction in all civil matters arising under any laws made by the Parliament, and has much of the same jurisdiction as the High Court under s 75(v).¹⁶

A Federal Magistrates Service has recently been established.¹⁷ Its areas of jurisdiction include family law and child support, administrative law, bankruptcy law and consumer protection law. A hierarchy of federal courts is thus developing.

The courts of the States remain, but they have increased in numbers greatly in the century since federation. New South Wales, Queensland and Victoria have established permanent Courts of Appeal. All States, with the exception of

12 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

13 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*').

14 *Family Law Act 1975* (Cth).

15 *Federal Court of Australia Act 1976* (Cth).

16 *Judiciary Act 1903* (Cth) s 39B.

17 *Federal Magistrates Act 1999* (Cth).

Tasmania, have District or County Courts. All have Magistrates Courts or their equivalents. Many also have specialised courts at various levels. Although the range of matters dealt with by the State courts has diminished to a degree by reason of the establishment of the large federal courts, the volume of their work has increased very greatly. They remain the courts dealing with Commonwealth, as well as State, indictable offences.

The self-governing territories, the Australian Capital Territory and the Northern Territory, have Supreme Courts and Magistrates Courts. Their position is essentially equivalent to that of the courts of the States. Although established pursuant to laws made by the Commonwealth under s 122 of the Constitution, they are not federal courts. 'Territory jurisdiction', and Territory appeals to the High Court, stand outside Chapter III.

There is one striking feature of federal jurisdiction that I would mention. It is the conferral on the Federal Court of jurisdiction to review Commonwealth administrative decisions brought about by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Taken with the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Freedom of Information Act 1982* (Cth), the extent to which Commonwealth administrative decisions may be reviewed is very broad. The role of the courts in developing administrative law has been considerable.

I do not think that the *roles* of the courts other than the High Court will change very significantly in the immediate future, although I expect that the influence of the federal courts will become greater. As federal legislation becomes more pervasive, more matters fall within federal jurisdiction.¹⁸ I think also that in time one will see federal offences being dealt with by federal courts at all levels. It seems in a way curious that that is not being done already.

II THE JUDICIAL POWER OF THE COMMONWEALTH

Under the previous heading, I discussed the ambit of federal jurisdiction. I now turn to a number of aspects relating to the manner of exercise of that jurisdiction, and the persons by whom it may be exercised.

The expression 'judicial power of the Commonwealth' is found in s 71 of the Constitution. Attempts to define the concept of judicial power exhaustively, however, have not been successful; although it is possible to describe the aspects most commonly present, as in the following description from *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*:

18 This can be demonstrated by reference to the Federal Court's original jurisdiction. Initially, that jurisdiction was provided for by s 19(1) of the *Federal Court of Australia Act 1976* (Cth): '(1) The Court has such original jurisdiction as is vested in it by laws made by the Parliament'. The number of laws conferring such jurisdiction steadily grew from approximately 13 to nearly 150 in the period 1976 to 2000: Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 (Cth) and Related Legislation*, Report No 92 (2001) 135, [4.9]. In 1997, the jurisdiction was much enlarged by the enactment of s 39B(1A) of the *Judiciary Act 1903* (Cth) which conferred jurisdiction in any civil matter 'arising under any laws made by' the Commonwealth Parliament.

[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.¹⁹

It would be difficult to assert, however, that the indicia of legislative or executive functions will *never* intrude into the exercise of judicial power, or that the exercise of judicial power *precludes* elements of administrative and legislative functions.²⁰ Where the line is drawn often depends not only upon legal analysis, but also upon historical practice and social considerations.²¹ Judges 'make' law (often by taking into account policy considerations), they make orders that effectively create new rights and duties,²² and they exercise discretionary powers. There are also instances where a power might have been given to either a judicial or an administrative body, where the character of the body to which it is given is determinative of the characterisation of the power. There have been very few occasions in fact when a conferral of power on a court by the Parliament has been held to be the conferral of non-judicial power.²³ The attack more often (and more often successfully) has been on the basis that a power which is judicial has been given to a body which is non-judicial.

I suspect that attempts to define judicial power exhaustively will prove no more successful in the future than they have in the past. The courts should be careful not to expand the range of matters which *of their nature* attract judicial power because, as is discussed below, that means that the issue can *only* be dealt with judicially. On the other hand, the courts should not be averse to the notion that conferral of a jurisdiction on a court may attract judicial power simply because of the fact of such conferral. There are many occasions where the public would prefer to see issues dealt with by a *court* – the perception being that it will be resolved fairly, impartially, and independently of government.

Fairness, impartiality and independence from the executive government are hallmarks of the judicial function. They may be seen in the development of notions of natural justice or procedural fairness; in the broad approach taken to apparent bias in judicial officers;²⁴ and in the readiness of the High Court to uphold the Constitution, even when to do so is not in accord with currents of popular opinion, or prevailing notions of convenience. *Kable v Director of*

19 (1970) 123 CLR 361, 374.

20 *Precision Data Holdings v Wills* (1991) 173 CLR 167.

21 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27, 67.

22 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 172.

23 The last successful such attack in the High Court is *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312.

24 See *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277, 279, [6].

Public Prosecutions ('Kable')²⁵ and, earlier, *Australian Communist Party v Commonwealth* ('Communist Party Case')²⁶ are clear examples of the High Court upholding the law in the face of strong support for legislative initiatives from vocal sections of the community. More recently, the High Court, in striking down the Commonwealth-State 'cross-vesting' scheme in *Re Wakim; Ex parte McNally* ('Re Wakim'),²⁷ emphatically repudiated the notion that public policy or convenience justified blurring constitutional imperatives. The invalidation of the State tobacco licensing regimes as duties of excise in *Ha v New South Wales*²⁸ is another example.

It will be seen that ss 75-77 refer to the conferral of jurisdiction in terms of 'matters'. Until *Abebe v Commonwealth* ('Abebe'),²⁹ the view generally taken was that federal jurisdiction could not be conferred unless it was conferred in respect of the whole 'matter'; that is, the whole legal controversy, irrespective of particular forms of procedure which might be adopted. *Abebe* held that jurisdiction might be conferred on a federal court with respect to part only of a 'matter'. This is an obviously convenient result. It will allow jurisdiction to be conferred in much more flexible ways in relation to judicial power.

There are several further aspects in relation to Commonwealth judicial power. One is that the only persons who may exercise that power are those to whom s 71 relates. In so far as s 71 relates to judges of federal courts, the judges must be appointed and hold office in a manner and for a term compatible with s 72. Judges of federal courts cannot be appointed for a term of, say, ten years, and there cannot be acting judges of federal courts.

Secondly, federal judges may only exercise functions compatible with that office. This issue has arisen because Parliament or the executive government has sought to use judges, and the skills and expertise which judges derive from interpreting laws and documents, assessing the credibility of witnesses and the like – matters characteristic of the exercise of judicial power – by appointing individual judges to preside over various tribunals or inquiries.

One can readily understand why this course is regarded as desirable; importantly, it gives an air of greater independence and accountability to decision-makers. It is necessary, however, to ensure that the function is not incompatible with judges' performance of judicial functions, or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. Such incompatibility might arise in several ways, including:

- (a) where the judge is required to give such permanent or complete commitment to the performance of non-judicial functions such as to render his or her performance of substantial judicial functions impracticable;

25 (1996) 189 CLR 51.

26 (1951) 83 CLR 1.

27 (1999) 198 CLR 511.

28 (1997) 189 CLR 465.

29 (1999) 197 CLR 510.

- (b) where the capacity of the judge to perform judicial functions is compromised or impaired;
- (c) where the nature of the non-judicial function is such that public confidence in the integrity of the judiciary, as an institution; or
- (d) in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.

The last point was exemplified in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*,³⁰ where the High Court held that a statutory power granted to the Minister to appoint a Federal Court judge to report to the Minister was not compatible with holding office as a judge under Chapter III.

The concept of incompatibility has been taken further, so that States may not confer on their courts functions quite incompatible with those that might be exercised by courts in which the judicial power of the Commonwealth might be invested. This was determined in *Kable*, where New South Wales legislation conferred upon its Supreme Court power to make an order for the detention of a specified person on certain stipulated grounds. The making of such an order, where no breach of the criminal law had been alleged and where there was no determination of guilt, offended the incompatibility condition.³¹ The possible ambit of the *Kable* doctrine remains to be seen. It is likely to be applicable only in rare cases, such as *Kable* itself, because the separation of powers doctrine deriving from Chapter III of the Constitution does not otherwise apply to the States.

One further feature is that the States, even with the consent of Commonwealth by legislation or otherwise, cannot confer on federal courts 'State' jurisdiction. This was the basis of the decision in *Re Wakim*, thus bringing to an end a major part of the 'cross-vesting' scheme which had been in operation since 1987.

III THE FUTURE – SOME VIEWS

As I have noted, I think it unlikely that there will be significant changes in the structures of the court systems in the near future or in the roles of the various courts. The demands for more and more judges, however, have meant that governments have had to look further afield than traditional appointees³² to fill the vacancies, and to provide additional judicial resources. Fewer barristers, in particular, seem willing to take up office as members of the Supreme Court of a State, or on each State's District or County Court. Appointment as a judge was once a relatively prestigious and rare appointment; it remains prestigious but the rarity has gone.

30 (1996) 189 CLR 1.

31 (1996) 189 CLR 51, 98, 107, 124, 143.

32 Traditional appointees were barristers in private practice, or holding government appointments. It has become quite common for solicitors and academics to be appointed and the appointments, in general at least, have been successful, in some cases outstandingly so.

From time to time, there have been suggestions that there should be an amalgamation of the State and federal superior courts, to avoid jurisdictional difficulties, but it would take great political will to do so. The opportunities for patronage presented to a polity by having its own courts are considerable. There is also much to be said for the view that provision of courts to develop and administer the laws of a polity should be a central function of government, with the government of the day bearing political responsibility for so doing.

So far as the Federal Court is concerned, there is a need, in my opinion, for the establishment of a permanent appeal division of that court. The Court is now too big to have appeals dealt with by a bench of judges appointed, *ad hoc*, for that purpose. The issue is sensitive, of course. There are undoubtedly strong views either way³³ but, having appeared many times in many appeal courts, I have no doubt that they are better when their members are appointed permanently for that purpose.³⁴

33 It is said against the permanent appeal court view that judges should have continuing experience as trial judges, otherwise they become too remote from the realities of trials. In favour of permanent appeal courts is the view that appeals are handled more efficiently and consistently by a panel specialising in appeals. The issue is sensitive because if a permanent appeal court is to be created, and not all existing members of the court are to be appointed, the question of who will, and who will not, be a member of the permanent appeal court is divisive.

34 It seems clear, if one compares the judgments in the Courts of Appeal of New South Wales, Queensland and Victoria with those of their predecessors, that the standard of the judgments has improved overall.