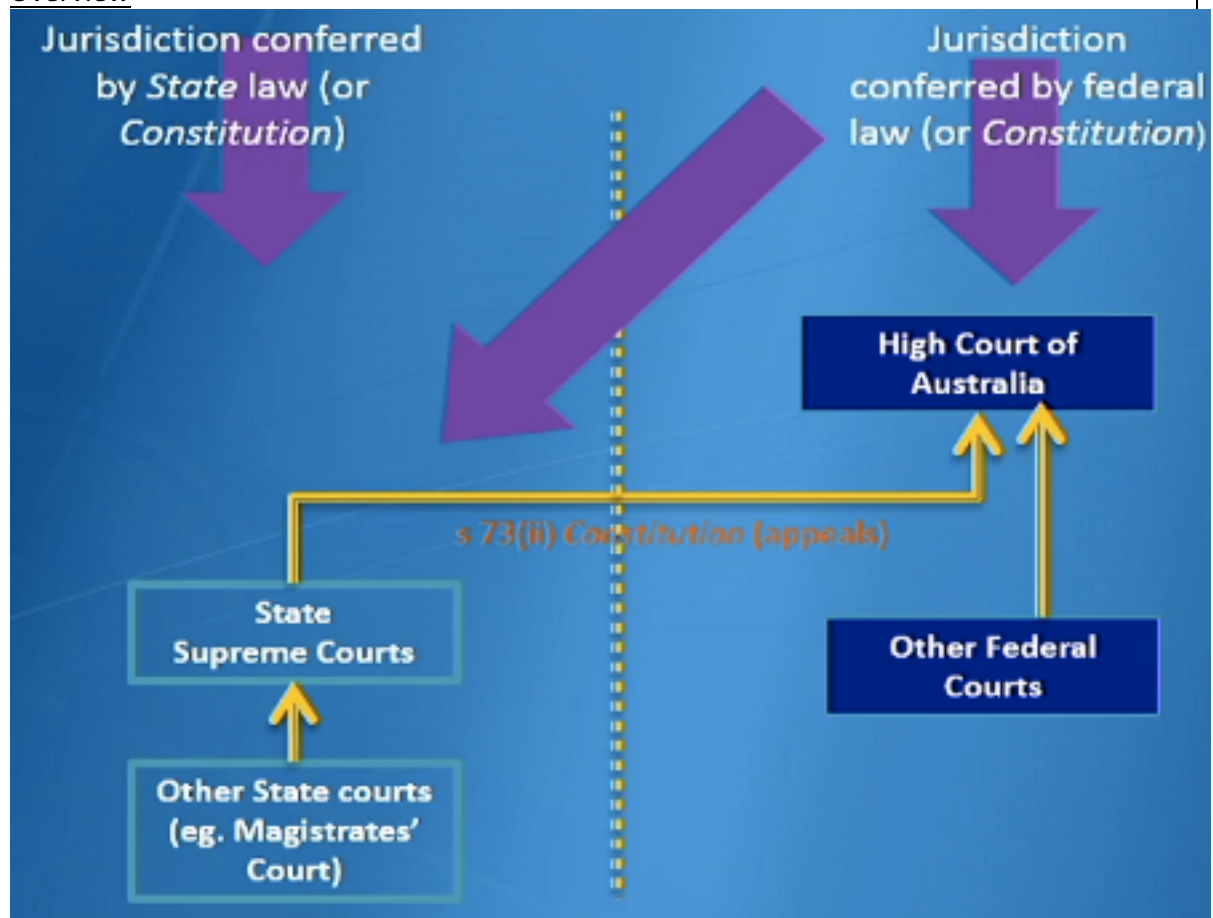


Overview



- Cases may involve questions from both State and Federal law
 - o Thus may need to be in the Federal Courts
- **Constitution s 73(ii), 74**
 - o The Queen in Council

- S 74

Appeal to Queen in Council

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, **unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.**

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, **this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council.** The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

- Appeal can still go to Queen

Separation of powers

Boilermakers' Case Principles

1. Federal Judicial Power may **only** be exercised by Ch III courts

- **NSW v Commonwealth (1915) 20 CLR 54 – the 'Wheat Case'**
 - Provisions of sec 71 are **complete and exclusive**
 - There can't be a third class of Courts which are neither federal Courts nor State Courts invested with federal jurisdiction
- **Wateside Worker's Federation v J W Alexander (1918) 25 CLR 434**
 - President of Cth Court of Conciliation and Arbitration was judge of HC
 - Held office as President for 7 years but appointment to HC was for life (at that time)

2. Federal courts may **only** exercise federal judicial power

- **R v Kirby; Ex Parte Boilermakers' Society of Australia (1956) 94 CLR 254 – 'Boilermakers' Case'**
 - Conciliation and arbitration – **administrative function**
 - Not judicial function
 - HC majority
 - Held Ch III courts prevented from exercising non-judicial functions, unless those functions are **ancillary or incidental** to judicial functions
- Neither **Boilermakers** principles expressly state in **Constitution**
- Implications
 - **Unwritten rules** which are said to be communicated by **Constitution**
 - **Not conventions**
- Constitutional implications controversial
- Separation of judicial powers principles become firmly established feature of Aus public law
- Exceptions:
 - HoP punish for **contempt**
 - Military **tribunals (executive body)** enforce military discipline
 - **White v Dir. Military Prosecutions (2007) 231 CLR 570**
 - Courts marshal
 - Military court?
 - The *persona designate* exception
 - Designated person
 - **Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1**

State and territory Courts

- State supreme courts existed before **Constitution**
 - While there's strong textual and structural basis for separation of powers in **Cth Constitution** same is not true of State constitutions

- But
 - o State supreme courts can and do exercise federal judicial power
 - S 71
 - o State courts also form part of system of courts established by *Constitution*
 - S 73

Kable Doctrine

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

- HC
 - o Held while separation of powers doesn't apply at state level as strictly as at federal level, state sup ct
 - Can't exercise powers that would diminish integrity; and
 - Can't be deprived of essential and defining characteristics
- Constitutional implications

- *Community Protection Act 1994 (NSW)*

- o S 5(1)
 - On application made in accordance with Act, Court may order that specified person be detained in prison for specified period if its satisfied, on reasonable grounds:
 - a) That person is more likely than not to commit seious act of violence; and
 - b) That it is appropriate for protection of particular person or persons or community generally, that person be held in custody

o S 3

- Object of Act is to protect community by providing for preventive detention (by order of Sup Ct made on application of DPP) of Gregory Wayne Kable
-
- Act authorizes making of detention order against GWK and doesn't authorize making of detention order against any other person

- Apply *Kable* doctrine to *Serious and Organized Crime (Control) Act 2008 (SA)*

o S 10

- Attorney-General of SA power to make declaration in respect of organization on basis that its memebtrs involved in 'serious criminal activity'

- o In making such declaration, AG must be satisfied that
 - Significant portion of org associates for purpose of organizing or engaging in serious criminal activity; and
 - Organization represents risk to public safety

o S 14

- Courts empowered to make 'control orders' aagainst members of declared org

- Orders must – at min
 - Prohibit person from associating with other members of declared orgg
 - Prohibit person from possessing weapons
 - Prohibitions on association and communication Court considers appropriate

○ S 14(1)

- Where Commissioner of Police applies to court for control order
 - Court must ... make control order against person (D) if Court satisfied that D is member of declared organisation