

Principles of Public Law

Summary Notes

SEMESTER 2 2017

SEPERATION OF POWERS

S.O.P – Introduction

Three Powers:

1. **Legislative** (Enact, amend and repeal laws)
2. **Executive** (Administration, carries out laws passed by parliament)
3. **Judicial** (Resolution of disputes, interpretation and application of the law).

Separation of Powers: prevents the exercise of arbitrary or tyrannical power by dividing powers between various independent institutions. Rather than one person holding all the power (like in a dictatorship), power is spread between separate people.

The way the Constitution is set out is reflective of the idea of separation of powers. The first three chapters are divided into the parliament (Chapter I), The Executive Government (Chapter II), and The Judicature (Chapter III). To some degree, this is indicative of an implied separation of powers.

Legislative Power

Vesting - s 1 of the *Australian Constitution* vests legislative power in a Federal Parliament consisting of the Queen, a Senate, and a House of Representatives.

Legislature and the Executive <3

- The embedding of the Executive in the Parliament is a defining feature of the Westminster system.
- Actions of the executive government are done with the confidence of Parliament
 - Since the executive government is constituted of members from the majority in the lower house, and since the members of the ruling party as a whole support the policy decisions of the PM and Cabinet, then those decisions effectively have the endorsement of the popularity elected house of Parliament.
- The embedding of the Executive in Parliament has contributed to the executive dominance of Parliament, with only government members having an effective voice in the lower house.

Responsible Government:

‘A system of responsible government traditionally has been considered to encompass “the means by which Parliament brings the Executive to account” so that “the Executive’s primary responsibility in its prosecution of government is owed to Parliament”’ - *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ)

Judicial Power

Vesting: Judicial power vested in Federal Supreme Court (High Court), other federal courts as the Parliament creates, and other courts as it invests with deferral jurisdiction (**s 71**).

(There cannot be a third class of courts i.e. neither federal nor state courts invested with federal jurisdiction)

State courts invested with deferral jurisdiction under **s 77(iii)**

- Classes of courts in s 71 is exclusive and complete. There cannot be a third class of courts i.e. neither federal nor state courts invested with federal jurisdiction).
- Attempts to vest judicial power of the Commonwealth in any other body but a Court will be entirely ineffective – *Alexander’s Case* (Griffith CJ)

Chapter III Courts (s 72)

Requirements for justices :

- (i) Appointed by Gov-General
- (ii) Can't be removed except by Gov-General on the grounds of proved misbehaviour or incapacity
- (iii) Tenure until 70 years old.

e.g. in *Alexanders Case*, Judge of Commonwealth Court of Conciliation and Arbitration was not able to exercise federal judicial power as he was only appointed for 7 years, not appointed under s 72.

Boilermaker's

Facts:

The Boilermakers' Society of Australia and the Metal Trades Employers' Association had been parties to an arbitration process in the Arbitration Court, which set the employment terms and conditions for boilermakers around Australia. Subsequently, the Association alleged that the Society had breached those terms and conditions, and applied for an injunction-type order from the Arbitration Court, ordering that the Society comply. Such an order was granted, but the Society was alleged to have continued to breach the terms and conditions. Accordingly, the Arbitration Court found the Society guilty of contempt, and fined it. **The Boilermakers' case was about the Society challenging the Arbitration Court's power to make such a finding of contempt.**

Issues:

- Was the Arbitration Court a non-judicial body, because of its arbitral focus?
 - If so, could it be granted judicial powers by the Commonwealth Parliament, like the power to issue injunctions, or the power to find people guilty of contempt?
 - Did this breach the separation of powers?

Judgement

Judicial Power v Arbitral Power

Majority cited *Alexander's Case* for distinction:

"Judicial power is concerned with the ascertainment, declaration, and enforcement of the rights and responsibilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what, in the opinion of the arbitrator, ought to be the respective rights and liabilities of the parties in relation to each other."

Main Purpose – Judicial or Arbitral?

"Plainly the Arbitration Court remained a tribunal established and equipped primarily and predominantly for the work of industrial conciliation and arbitration." (Majority)

Thus, said the majority, it was not a judicial body. So, did the Constitution permit a non-judicial body to exercise judicial power?

Can a non-judicial body exercise judicial power?

Majority decided that if Parliament wanted to give particular powers to a federal court, it must be able to point to something in Chapter III that allowed them to do that.

Chapter III does not allow powers that are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth.

The Arbitration Court could not exercise both its arbitral functions, and judicial functions, like granting injunctions, or finding people in contempt. Given that its dominant function had been as an arbitral tribunal, the Arbitration Court's judicial powers could no longer be validly exercised.

Impact & Conclusion ('limbs') – Copy out word-for-word:

- 1) Only Chapter III courts can exercise Commonwealth judicial power; and
- 2) Chapter III courts cannot exercise any other powers other than federal judicial power.

Defining Judicial Power (Indicia & Chameleon Powers)

Indicia of Judicial Power

- *Power derived from **sovereign authority** (*assume unless told otherwise*) (*Issue of warrants not judicial power*) – *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330, 357.
- A controversy about **existing legal rights** and duties: a 'matter' – *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265-6
- **Inter partes** - parties will be there and represented by court and court will consider all the parties submissions
- **Ascertainment of law** as it is – *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1980) 123 CLR 361
- **Determination of facts** as they truly are – *As above*.
- ***Binding and authoritative** decision (*unless there's no appeal de novo – if "possibility for fresh hearing", not binding*) - *Brandy*
- Performed in a **judicial manner**
 - Appropriate level of **judicial discretion** - *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165
 - In accordance with **judicial process** (*rules followed, balance of probabilities*) – *Nicholas v The Queen* (1998) 193 CLR 172, 207

Chameleon Powers

- Some powers are absolutely judicial, however there are some that are not. Some of these 'chameleon powers' can be given to either a court or an executive body, however the consequences of which it is given to is significant. – *Re Dingjan*
- The purpose is what gives it its legal power; - *Re Rranger Uranium Mines Pty Ltd*
 - Object is the ascertainment of legal rights and obligations = judicial
 - Object to ascertain what rights and obligations should exist = arbitral

Common Elements	Court	Tribunal
	<i>Common elements, plus:</i>	<i>Common elements, plus:</i>
<ul style="list-style-type: none"> • Dispute about existing rights and obligations/'matter' • Finding of fact • Interpretation of law • Application of law to fact • Decision 	<ul style="list-style-type: none"> • Judicial Process • Rules of Evidence • Binding and enforceable decision (albeit subject to appeal) 	<ul style="list-style-type: none"> • Flexible procedure • Not bound by rules of evidence (often) • Must be enforced by Court action • Subject to judicial review

The Choice to Use a Tribunal	
Advantages	Disadvantages
<ul style="list-style-type: none"> • Speed and efficiency (compared to cumbersome nature of judicial proceedings) • Avoid onerous nature of s 72 tenure • Cheaper 	<ul style="list-style-type: none"> • No guarantee of independence through tenure • Modifications to judicial process can reduce fairness

Applying *Indicia*

i. Is a power given to a non-Court judicial power?

Case	Facts	Judgement
<i>Luton v Lessels</i> (2002) 210 CLR 333	<ul style="list-style-type: none"> - <i>Child Support (Assessment) Act 1989</i> (Cth) - On application, Registrar makes assessments of child support to be paid. (s 31) - Registrar determines whether to depart from a set formula if the result is 'unjust and inequitable' (s 117) 	<ul style="list-style-type: none"> - <u>Not judicial power</u> - Not a controversy regarding pre-existing rights and obligations, but involves creation of new rights and obligations for the future. - Not binding and authoritative.
<i>TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia</i> [2013] HCA 5	<i>International Arbitration Act 1974</i> (Cth) provides for the Federal Court to enforce (with limited exceptions) international arbitral awards, implementing the <i>UNCITRAL Model Law on International Commercial Arbitration</i>	<ul style="list-style-type: none"> - <u>Not judicial power</u> - Not a matter of sovereign authority as the determination of a dispute by an arbitrator does not involve the exercise of the sovereign power of the State to determine controversies. - Not binding and conclusive: Not 'binding of its own force' but required the exercise of judicial power to enforce.
<i>Brandy</i>	Bell lodged complaint against Brandy and ATSIC. HREOC conducted an inquiry and determined Brandy and ATSIC were to pay compensation and apologise to Bell.	Prior to the inclusion of the amendments, the HREOC was not exercising judicial power upon making determinations with regards to complaints of discrimination. By allowing determinations to be registered with the Federal Court to effectively become as an order from that court was to make the determinations enforceable. This was thought by the court to be an exercise of judicial power by a body which could not be vested with such power.