

LAWS1205 AUSTRALIAN PUBLIC LAW: COMPREHENSIVE SUMMARY OF COURSE CONTENT

LAWS1205 AUSTRALIAN PUBLIC LAW: HEADS OF POWER

Heads of Power

[State or Commonwealth] Parliament must have had a valid source of power to enact the Act.

State Legislatures – Plenary Grant of Power

- States have a general plenary legislative power - s2(2) *Australia Acts*; s 107 *Commonwealth Constitution*. Without a head of power for the Commonwealth to legislate on [AREA] under s 51 and 52, the State has a residual plenary legislative power over [AREA].
 - With ‘power to make laws for the Peace, welfare and good government’: *Constitution Act 1902 NSW s 5*
 - These words are not words for limitation of state legislative power – *Union Steamship*
 - S 16 *Constitution Act 1975* (Vic) – ‘The Parliament shall have power to make laws in and for Victoria in all cases whatsoever’.
- States also have the power to **amend or repeal their own Constitutions** – s6 *Australia Acts (AA)*
 - Only constrained by S109 of the Cth Constitution (inconsistency) – *Union Steamship*
 - Note that, per *Taylor*, their plenary power does **not** extend to the elimination of the representative character of their Parliaments – they cannot turn themselves into dictatorships.
- State legislation amending an earlier Act impliedly repeals that Act (*McCawley*).

Incomplete list of areas under state responsibility (not under s 51/52 of CC):

- **Schools, Hospitals**
- **Roads and Railways & Public transport**
- **Utilities** – electricity & Water supply
- **Mining and agriculture & Forests**
- **Community services & Consumer affairs**
- **Police & Prisons**

Commonwealth Legislature - Constitutional Heads of Power

S 51() CC gives Cth Parliament a broad legislative authority over _:

- Trade and Commerce –s51 (i)
 - Taxation –s51 (ii) –must not discriminate between states or parts of states. S 99
 - Postal, telegraphic, telephonic & other like services –s51 (v)
 - Defence –s51 (vi)
 - Lighthouses, lightships, beacons and buoys –s51 (vii)
 - Census, statistics – (xi)
 - Currency; Bankruptcy, Corporations –s51 (xxii); (xvii); (xx)
 - Naturalisation; Immigration –s51 (xix); (xxvii)
 - Copyrights, patents – s 51(xviii)
 - **External Affairs** – s51 (xxix)
 - Matters referred to the Cth by States –s51 (xxxvii)
 - Matters Constitution provides for [UNTIL PARLIAMENT PROVIDES]–s51 (xxxvi) [**when section allows**]**
 - Incidental Matters –s51 (xxxix) [**use when section is less relevant**]
- Other relevant Constitutional Sections:
- **Use of phrase ‘**until Parliament otherwise provides**’ or ‘**Parliament may pass laws**’ grants federal Parliament a Head of Power in the area the provision relates to. s51 (xxxvi) CC.

Nationhood Power (legislate in conjunction w/executive)

Although there is no express power given to the Cth over __ Parliament may legislate with respect to any matter incidental to the execution of executive powers ancillary to ss 61 51 (xxxix) CC; *AAP Case Mason J, Davis Wilson and Dawson JJ* (execution and maintenance of the Constitution/laws of the Commonwealth)

The nationhood power permits the Cth Government to undertake activities in areas **appropriate to the character and status** of the Cth as a *national government*, and where suitable for protecting and advancing the nation - *Tampa*

LAWS1205 AUSTRALIAN PUBLIC LAW: THE LEGISLATURE

Constitutional Disputes Concerning the Structure and Election of Parliament

Whether the law that is being challenged as being constitutionally invalid is ‘reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’. (Gummow, Kirby, Crennan JJ in *Roach v Electoral Commissioner*)

Important sources: The Electoral Act, Chapter 1 of the Constitution (esp. s 7 and 24)

Candidates for Election to the Commonwealth Parliament (*Re Canavan*)

Commonwealth Electoral Act

- Under s 163 of the *Commonwealth Electoral Act*, a person is not entitled to be nominated for election as a Senator or a member of the House of Representatives unless they are;
 - (a) At least 18 years old
 - (b) An Australian citizen
 - (c) Is either
 - (i) An elector entitled to vote at a House of Representatives election, or
 - (ii) A person qualified to become such an elector

The Commonwealth Constitution (esp. s 44 and s 45)

- The source of power (to make laws about qualifications of MPs) are s 16, s 34, and s 51(xxxvi).

Section 44(ii) – ‘under sentence’ – see *Re Culleton [No 2]* [2017] HCA 4

Any person who: ...has been convicted and is, under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or by a State by imprisonment for one year or longer...shall be incapable of being chosen or of sitting as a Senator...

- People who have already been sentenced, as well as those who are able to be sentenced (convicted), cease to be eligible, or if already elected, cease to be capable of sitting, until the conviction is annulled or the sentence spent.

Section 44(iv) – ‘office of profit under the crown’ – see *Sykes v Cleary*

Any person who: ...holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

[This] does not apply to the office of any of the [Commonwealth or State] Queen’s Ministers of State... or member of the... navy or army.

- Public servants cannot serve as both public servants and MP’s at the same time.

Section 44(i) – ‘citizen of a foreign power’ – also *Sykes v Cleary*, *Re Canavan*

Any person who: ...is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

- A person seeking to be elected and sit as an MP who holds a foreign citizenship must take ‘all reasonable steps to divest’ themselves of that foreign citizenship (*Sykes*).
- MP’s must also be Australian citizens under s 163 of the *Electoral Act*.
- Dual citizens (determined by the law of the foreign power) are thus ineligible to sit for office (*Canavan*).

Electoral Boundaries – *McKinlay* and *McGinty*

- The *Commonwealth Electoral Act* determines how electoral boundaries are to be drawn up and maintained.
- The source of power to make laws relating to the House of Representative Electoral Boundaries is s 24/s 29 and s 51(xxxvi) of the *Constitutions*. Note ‘until the parliament otherwise provides’ is important.
- [I]t is not for this Court to intervene [with the legislature and its political system] so long as what is enacted is **consistent with the existence of representative democracy** as the chosen mode of government and is within the power conferred by s. 51 (xxxvi.)’ (*McKinley*)

LAWS1205 AUSTRALIAN PUBLIC LAW – THE JUDICIARY

The Nature and Separation of Judicial Power

An Overview of the Australian Judiciary and Chapter III

Federal vs State Court Jurisdiction

- There are four principle federal courts created by or under Chapter III, which exercised federal judicial power (s 71): The High Court (which hears, among other things, appeals (s 73), the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia.
- State and territory courts, which exercise State/territory judicial power include: Supreme Courts, District or County Courts, Magistrates or Local Courts.
 - These courts are able to exercise federal judicial power as well.
- Different constitutional principles, and different sets of case law, apply to federal courts on the one hand and state courts on the other hand.

Key Provisions of Chapter III

Section 71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes...

Section 73 Appellate jurisdiction of High Court

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...

(Section 74 Appeal to Queen in Council)

Section 72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

- shall be appointed by the Governor-General in Council;
- shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
- shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age. the maximum age for Justices of any court created by the Parliament is seventy years.

Section 75 Original jurisdiction of High Court

In all matters:

- arising under any treaty;
 - affecting consuls or other representatives of other countries;
 - in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
 - between States, or between residents of different States, or between a State and a resident of another State;
 - in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
- the High Court shall have original jurisdiction.

Section 76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- arising under this Constitution, or involving its interpretation;
- arising under any laws made by the Parliament;
- of Admiralty and maritime jurisdiction;
- relating to the same subject-matter claimed under the laws of different States.

Section 77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- defining the jurisdiction of any federal court other than the High Court;
- defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- investing any court of a State with federal jurisdiction.

What is the Separation of Judicial Power?

The traditional summary of the main agencies of government, as per s 1, s 61, and s 71 of the *Constitution* is:

- The legislature makes laws;
- The executive administers those laws; and
- The judiciary adjudicates disputes about the meaning and application of laws.
 - The judiciary branch, however, should be kept especially separate.

However, these lines are blurred, especially considering the administration of certain responsible government principles, and the need for certain branches for power originating in others.

Boilermakers

- The Court found two key points:
 - If Parliament is giving federal judicial power to a body or institution, it has to do that through Ch III, and to a body with the relevant Ch III safeguards and requirements.
 - You cannot confer judicial power, for example, on a 'committee' or 'cabinet'.
 - A court created by or under Chapter III cannot exercise both judicial power and non-judicial (in this case, arbitral) power. EXCEPT is that non-judicial power is incidental to the exercise of judicial power.
- These principles act as limitations on the types of laws that the Commonwealth Parliament has the power to enact.
 - No federal laws vesting federal judicial power in anything other than a court identified in s71.
 - No federal laws vesting a federal court with anything other than judicial power (except where incidental).
- NOTE: this case only applies to federal courts

Persona Designata and Incompatibility

- Persona designata (designated person) is an exception to the *Boilermakers* rule.
- Federal judges may be appointed to a position in their personal capacity and can exercise non-judicial power in that position, if three conditions are satisfied:
 1. The legislation must give the power to the judge in their personal capacity, not in their capacity as a judge of a court;
 2. The judge must consent to receiving the power;
 3. The performance of the function mustn't be incompatible with the exercise of the judge's judicial function or with the proper discharge by the judiciary of its judicial function (the incompatibility condition).

Hilton v Wells

- In this case, it was confirmed that the issue of a warrant is a non-judicial power.
- The distinction between conferring power on a judge, rather than on a court (see terminology in the legislation), was highlighted.
- Therefore, in this case, the conferral was on the judges in a personal capacity, rather than the Court, and did not 'conflict with the proper performance of their judicial functions'.
- Note, however, that the decision was only 3:2.
- Amendments were made to the Telecommunications Act in response to this to make this clearer, using words such as 'eligible Judge', 'not all judges', 'a person who is a judge'. *Grollo v Palmer* highlights these changes.

Grollo v Palmer

- It was found that the new legislation in the Telecommunications Act post-*Hilton* was constitutional.
- The majority judges emphasises that no function can be conferred on a judge that is incompatible with the performance of their judicial functions.
- They found that incompatibility may arise in a number of ways:
 1. First, it might be that the judge's commitment to non-judicial functions is 'so permanent and complete' that it becomes impractical for them to perform their normal judicial functions.

Limits on State Parliaments

What limits does the integrated nature of the federal judicial system place on what State Parliaments can do with their State courts?

1. Chapter III of the Commonwealth Constitution requires the continued existence of State courts, especially Supreme Courts.
2. State Parliaments can't confer functions or power on State courts which would be repugnant to, or incompatible with, their exercising Commonwealth judicial power (State courts must retain their institutional integrity). Typically, this will mean particular forms of non-judicial power.

Kable

- Case which established that while the State Parliaments have much more power over courts than the Commonwealth Parliament does, this power is not unlimited and there are certain things that State Parliaments cannot legislate for or else they infringe on certain Commonwealth Constitutional requirements.
- So, note, this was a State court exercising State power in accordance with a law passed by the State parliament. There was no federal jurisdiction involved. The concern was that the same court doing this was one which the Constitution relied on to implement federal judicial power, and that if a State parliament is asking a State court to perform highly inappropriate non-judicial functions, it becomes very difficult for the Commonwealth to comfortably vest its power in that court.
- The issue here is that, basically, this was not a criminal trial that Kable was being held to. Gaudron J said that "They are proceedings which the Act attempts to dress up as involving the judicial process", but that in actuality, they are pursuant to the legislature's decisions and the legislature is attempting to use the courts as tools. In doing so, the legislature was eroding the courts' ability to function as courts - and, as previously discussed, Ch III of the Constitution mandates that there be some body resembling a Supreme Court in each State in which the Commonwealth can vest its federal judicial power.
- **Parliaments of the States [cannot] legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth".**
- Therefore, there will be a problem when:
 - "The law speaks only ad hominem, applies proleptically the criminal law, determines the case by a civil standard, and provides directly for detention in prison. These are striking features of the legislation. There is, before imprisonment, no determination of guilt solely by application of the law to past events being the facts as found."

Fardon

- Conferred that the key is whether the power conferred on the court is inconsistent with the court's institutional integrity.
- Given the details of the Qld legislation, the differences in the legislative scheme were enough to suggest that the Supreme Court was engaging in a truly independent function; no suggestion that the Court was being used as a tool or instrument of government policy..
- Gummow J also said: 'Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity'.
- McHugh highlights the limited application of *Kable*, stating:
 - *Kable* was the result of legislation that was almost unique in the history of Australia. More importantly, however, the background to and provisions of the Community Protection Act pointed to a legislative scheme enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired. The terms, background and parliamentary history of the legislation gave rise to the perception that the Supreme Court of that State might be acting in conjunction with the New South Wales Parliament and the executive government to keep Mr Kable in prison. The combination of circumstances which gave rise to the perception in *Kable* is unlikely to be repeated.

International Finance Trust Co Ltd v NSW Crim Comm (post 2009)

- This case found that to require the court to receive an ex parte application (no effective curial enforcement of the duty of full disclosure) and hear and determine it ex parte is to deprive the court of the important characteristic of judicial power of ensuring fairness between the parties.