Judicial Power

Introduction to Ch III—The Judicature

Within the structure of the constitution, it sets out the separation of powers. The first section for each chapter states “The power is vested in...”

Chapter III for the judicature is not very long, which indicates that a lot of detail is not there so the Courts need to determine what is missing.

Judicial power of the Cth (Cth Constitution s 71):

Commonwealth Constitution of Australia s 71

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.

Federal courts today:
- The High Court by the High Court of Australia Act 1903 (Cth)
- The Federal courts created by the Federal Court of Australia Act 1976 (Cth), Family Court Act 1975 (Cth), and Federal Magistrates Court Act 1999 (Cth).
- State Courts vested with federal judicial power by the Judiciary Act 1903 (Cth) ss 39, 39A

Appointment and removal of High Court judges (Cth Constitution s 72):

The power to appoint High Court judges is wholly in the executive – Governor-General in Council (Cth Constitution s 72), Attorney-General (HCA Act s 6) and the Prime Minister. Usually the Attorney-General provides recommendation to the Governor-General after the cabinet’s approval.

Criteria for appointment:

High Court of Australia Act 1979 s 7

7 Qualification of Justices
A person shall not be appointed as a Justice unless:
(a) he or she is or has been a Judge of a court created by the Parliament or of a court of a State or Territory; or
(b) he or she has been enrolled as a barrister or solicitor, as a barrister and solicitor, or as a legal practitioner, of the High Court or of the Supreme Court of a State or Territory for not less than 5 years.

Removal requires misbehaviour or incapacity (Cth Constitution s 72(ii)) and has proven to be more difficult than appointment. This preserves the independence of the judiciary, as judges cannot be removed simply because someone does not like the way a case has been interpreted or resolved.

Term: premanent role until age 70 or voluntary retirement (for life before 1977)
Original Jurisdiction of the High Court (Cth Constitution s 75):

Commonwealth Constitution of Australia ss 75, 76

75 Original jurisdiction of High Court

In all 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 High Court shall have original jurisdiction.

76 Additional original jurisdiction
The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
(i) arising under this Constitution, or involving its interpretation;
(ii) arising under any laws made by the Parliament;
(iii) of Admiralty and maritime jurisdiction;
(iv) relating to the same subject matter claimed under the laws of different States.

Appellate Jurisdiction of the High Court (Cth Constitution s 73):

The High Court has ultimate power regarding:
• Determining the common law for the country
• Determining the interpretation of legislation, although Parliamentary sovereignty means that general terms legislation override the common law made by judges.
• Determining the meaning of the Constitution
• Invalidating legislation by judicial review (determine whether legislation passed by Parliaments is consistent with the Constitution).

Separation of powers under the Commonwealth Constitution

In the Australian context, the separation of powers refers to the judicial power as separate from the executive and legislature, but the structure of responsible government provides for indistinctiveness of the executive and legislature. This is because the separation of powers is strict with respect to judicial power.

The strictness of the separation is maintained by the 2 limbs:
• First limb: Federal judicial power can only be vested in a Ch III court (The Wheat Case) i.e. Parliament cannot vest federal judicial power in a non-Ch III judicial body (such as commission or tribunal)
• Second limb: only Commonwealth judicial power or ancillary power incidental thereto can be conferred on a Ch III court (The Boilermaker’s Case)
  o A Ch III court can only exercise Cth or Federal judicial power
  o Cannot confer non-judicial functions on a Ch III court
  o Cannot confer State judicial power (Wakim)
Judicial power may only be exercised by Ch III courts (1st limb):

NSW v Commonwealth (1915) 20 CLR 434 [The Wheat case]

Facts

- NSW Government confiscated a wheat ship
- Growers in NSW sold crop to Vic and NSW government seized it under compulsory acquisition powers.
- Argued action of NSW Government not valid, so NSW brought proceedings to HCA arguing the Interstate Commission had no jurisdiction to hear the matter, grant injunction or order the cost.

Outcome: Judgement for Cth

Judgement

Isaacs J

- Interstate Commission is not a Ch III court because term of 7 years, not properly constituted → cannot exercise judicial power because Ch III courts are the sole, exhaustive repository of judicial power.

- Inter-State Commission established under s 101 with “powers of adjudication and administration... relating to trade and commerce”. Adjudication suggests potential judicial power, but because it is not a Ch III court, it merely had the ability to make determinations of questions of fact, not judicial power through applications of law.

- It was in effect an executive branch and involved exercise of discretion which is not part of judicial decision making.

- Courts decision invalidated part of act that created the commission. Power to issue injunction was invalidated, leaving the Commission virtually powerless (so it soon after was abolished)

Waterside Workers’ Federation v J W Alexander Ltd (1918) 25 CLR 434

Facts

- Cth Court of Conciliation and Arbitration was set up to deal with industrial law
- They made awards between the union and employers, and heard petitions and applications if there was allegation of a breach of an award.
- Watersides alleged Alexander company had breached the award, and sought penalty in their favour.
- Company objected by raising competency of Commonwealth Court to hear the matter.

Outcome: Judgement for Waterside

Judgement

- Arbitration power to make industrial awards, and enforcement power in the form of judicial power: the creation of rights or obligations is a law-making power, as opposed to enforcing legislature which is a judicial power. This mixes the 2 functions together and cannot be enacted by the same court.