

FACT SHEET 19

The Separation of Powers - protecting the independence of the Judiciary

It has long been accepted that for courts to exercise their powers in a judicial way (i.e. fairly and without bias), they need to be independent.

The doctrine works both ways. On the one hand, neither the Executive Government nor Parliament can exercise judicial power. Only the courts can do so. On the other hand, the courts must act judicially and cannot exercise legislative or executive power. But as with most things, the rules are not absolute and there are some important exceptions.

Chapter III – exclusive judicial power

Chapter III of the Constitution allows the High Court and any federal courts created by Parliament to exercise federal judicial power. It also lets Parliament permit state or territory courts to exercise federal judicial power. The independence of the federal judiciary is protected by federal judges holding their job until they turn 70. Federal

judges can't be dismissed for making decisions the Government doesn't like. They can only be removed by the Governor-General, after a vote of both Houses of Parliament to remove the judge on the ground of 'proved misbehavior or incapacity'.

'Judicial power' is commonly defined as the power to determine legal controversies between parties, by ascertaining the facts and applying the law, with a result that is binding, authoritative and enforceable, and that has followed established procedure.

Chapter III is exhaustive about who can exercise federal judicial power. In 1918, the High Court held that the Commonwealth Court of Conciliation and Arbitration was invalidly established because its President was appointed for a fixed term, instead of having tenure. This was later corrected and the Court was reconstructed with tenured judges, but in 1956 the High Court held that the Court



of Conciliation and Arbitration could not validly exercise federal judicial power, as Parliament had attempted to confer on it a mixture of judicial and non-judicial powers. The High Court decided that courts established under Chapter III can only exercise judicial power.

The High Court and federal courts can still exercise some powers that have historically been done by a court, such as administering bankrupt estates, because they have historically been done by judges. Some functions have crossover features and could be exercised either by a court or executive body. But other functions, such as determining and punishing criminal guilt, are exclusively judicial.

Exceptions and alternatives

There are also some exceptions, based on history. These include the ability for military tribunals, which are created and operate outside Chapter III, to exercise judicial power, and for the Houses of Parliament to punish people for contempt of Parliament.

Sometimes a judge is needed to bring independence and fairness to a sensitive matter, even though judicial power is not involved. So the judge is appointed in their individual capacity (as 'persona designata'), rather than as a judge of a court. This is how judges are appointed to run royal commissions or to hear applications for phone tap warrants.

The courts have held that this is only permissible if the function is not one which is incompatible with continued public confidence in the judiciary or with the capacity of the judge to continue to exercise their judicial functions in a court. The judge must also consent to the function being conferred upon them. If, for example, the judge was given a function in their personal capacity that required them to act in a political manner, permitted them to behave in a biased or unfair manner, made them subject to direction by politicians, or would undermine public trust in them fulfilling their judicial functions independently and fairly, then this would be an incompatible function that could not be conferred upon them.

Maintaining the integrity of courts and decisional independence

According to former Chief Justice French, courts must maintain their 'decisional independence from influences external to proceedings in the Court'.

Courts cannot be used to 'cloak' the decisions of the legislature or the executive in the 'neutral colours of judicial action'. In short, the courts cannot be used by governments.



The High Court of Australia
Source: High Court of Australia



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State courts and the separation of powers

State Constitutions don't strictly apply the separation of powers. This means that State Parliaments can invest State courts with non-judicial powers. But since Chapter III of the Australian Constitution allows the federal Parliament to invest State courts with federal jurisdiction, State courts must remain appropriate bodies to receive and exercise federal jurisdiction.

State courts therefore must maintain their integrity as 'courts' and their independence. They must continue to have the 'defining characteristics of a court', such as independence and impartiality. The consequence is that even though there is no formal separation of powers in the states, many of the effects of the separation of powers apply to state courts (although they can still exercise non-judicial powers, if these powers are not of an incompatible nature).

Our constitutional express rights, implied rights and freedoms

The Australian Constitution contains very few rights. The people who drafted it considered including some rights from the United States Bill of Rights but dropped most of them as they did not want to entrench phrases in the Constitution, such as due process and equality before the law, when they could not be sure how they would be interpreted in the future.

The few rights that were included were mostly applied as limitations on Commonwealth power – not the States. The three key ones were:

- freedom of religion in [section 116](#);
- the right to trial by jury in [section 80](#); and
- the right in [section 51\(xxxi\)](#) to receive just terms compensation if your property is compulsorily acquired under a Commonwealth law.

The High Court has also, from time to time through case law, implied some rights into the Constitution. The best-established of the implied rights is the freedom of political communication.

Fair compensation for acquired property

Section 51(xxxi) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws about acquiring property from a State or a person, but says that just terms (i.e. fair compensation) must be applied.

For example, the Commonwealth might compulsorily acquire your house because it wants to build or expand an airport, but it must fairly compensate you for it. In the popular 1997 film *The Castle*, a family successfully challenged the compulsory acquisition of their home in the High Court.

This constitutional guarantee applies not only to the compulsory acquisition of land, but also things (e.g. a boat), animals (e.g. a flock of sheep) or certain types of rights (e.g. the right to occupy land, or possess or use property, or an existing entitlement to compensation for being injured). It currently only applies at the Commonwealth level.



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