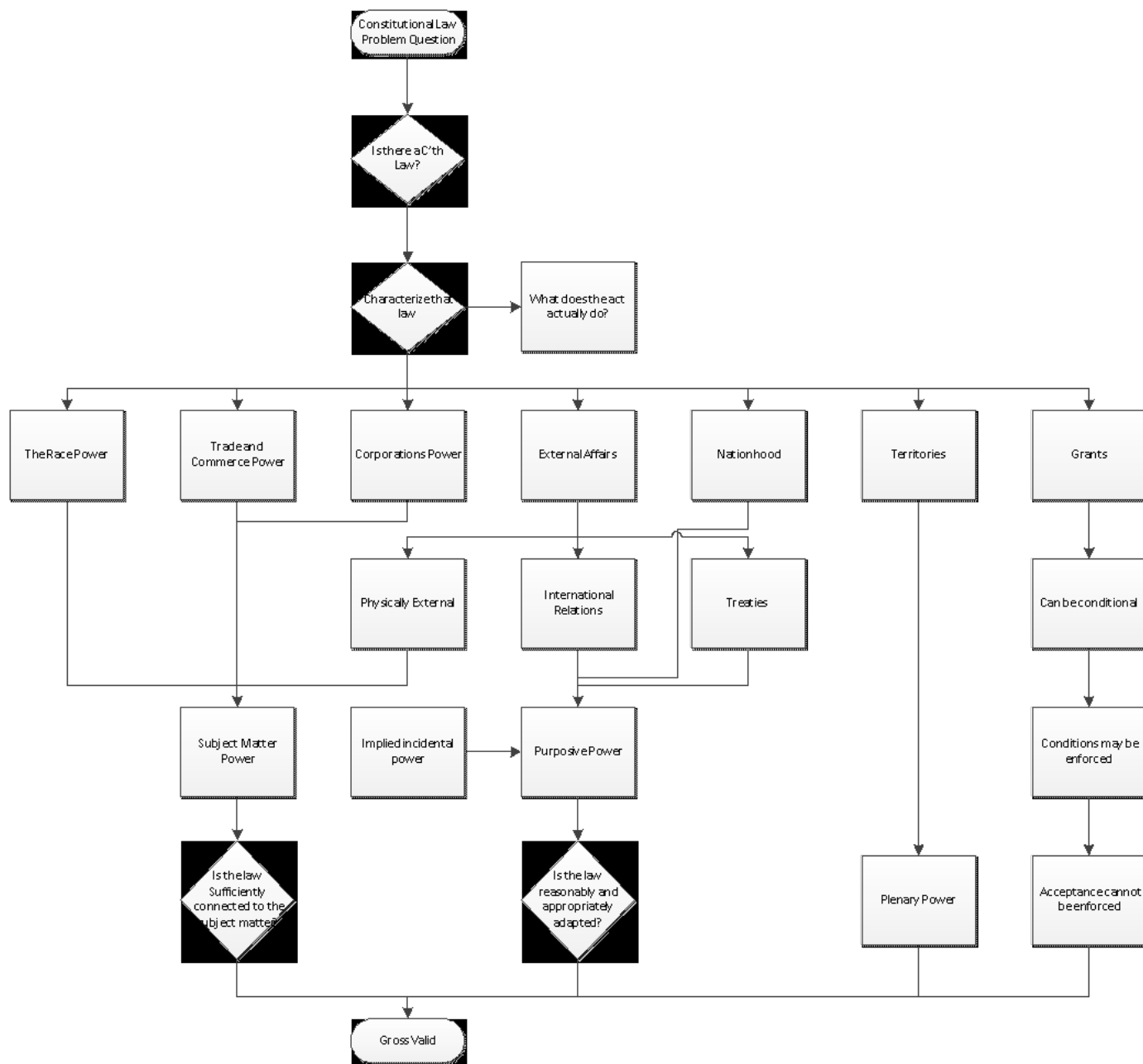


70616 Australian Constitutional Law



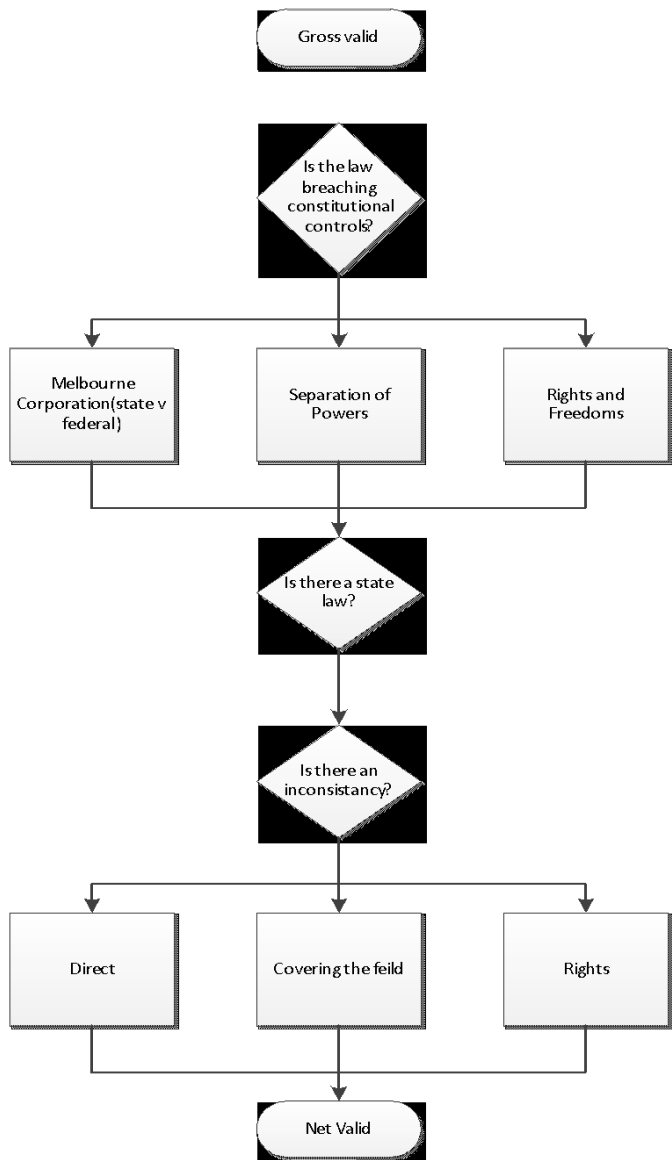


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Topic 2: Judicial Power

3.1 the constitutional separation of judicial power and the structure of the Constitution into chapters with a focus on Chapter III

The separation of powers

The political theory of a separation of powers

Doctrine of separation of powers: asserts that

- governmental functions can be divided into three categories: legislative, executive and judicial;
 - the institutions of government should be similarly divided
 - each function of government should be exercised only by the relevant institution of government, so that the functions and institutions of government are kept strictly separate
-
- The doctrine of the Separation of Powers purports to **prevent the exercise of arbitrary or tyrannical power**.
 - It does so by dividing powers between various independent institutions.
 - Therefore, *rather than one person holding all the power (like in a dictatorship), power is spread between separate people.*
 - E.g. Imagine if the Police Commissioners (members of the executive) were also judges (members of the judiciary). This would mean they could arrest anyone and then convict them automatically, thus exercising arbitrary power. By keeping the executive and the judiciary separate, we limit the possibility of arbitrary use of power.
 - The power of the state is usually separated into three different arms:
 - Legislative (or lawmaking) power - this is the power to **pass laws**. It is entrusted to Parliament (Queen, HoR, Senate)
 - Executive power - this is the power to **enforce or carry out the laws passed by Parliament**. It is entrusted to the **government**, and the **public servants** which the government employ (police, public teachers and doctors, the RTA, etc). (Queen, GG)
 - Judicial power - this is the power to **interpret and judge according to the law made by parliament**. It is entrusted to the courts and judges.
 - *Baron de Montesquieu - The Spirit of the Laws*
 - If the legislative and executive powers are infused in the same institution, there can be no liberty. The same applies when the judiciary is not separated from the legislative and executive.
 - No separation between judiciary and legislature - citizens would be subject to arbitrary control; the judge would be then the legislator.
 - No separation between judiciary and executive - judges might behave with violence and oppression.
 - *Owen Wood Phillips & Paul Jackson - Constitutional and Administrative Law - Separation of powers can be explained as follows:*
 - Legislative –
 - Making, altering or repealing laws
 - Necessary in order to create law which meets modern conditions.
 - Executive –
 - Carrying on of government according to law
 - Framing of policy
 - Choice of the manner in which the law may be made to render that policy possible.
 - Judicial –

- Interpretation of the law
 - Its application by rule or discretion to the facts of particular cases.
- The categories are inclined to be blurred. For example, the Constitution requires the executive to be members of the legislative.
- Complete separation of powers would bring government to a standstill
- What the doctrine must be taken to advocate is **the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another.**
- Gerald Carney - Separation of Powers in the Westminster System
 - There is no current constitutional system which has complete separation of powers.
 - The strict doctrine is only a theory – gives way to the realities of government where some overlap is inevitable.
 - Whilst this overlap exists, a system of checks and balances has developed
 - The naming of the three first chapters of the Australian Constitution (The Parliament, The Executive Government, The Judicature) implies this separation of powers.
 - The overlap mentioned is the fact that in the Westminster system, ministers (executive) are required to sit in Parliament (legislative). This is to adhere with the concept of Responsible Government. This is also present in the Australian system, as according to s 64 of the Constitution.
- **Conceptual difficulty:** lies in the assumption that the functions of government can be neatly divided into three categories □ business of contemporary govt. has such complex characteristics that this is frequently impossible
 - In the Australian context, judicial opinions review taxation assessment, cancel the registration of trade unions and investigate restrictive trade practices
- **Practical difficulty:** a rigorous separation of govt. functions could totally disrupt the affairs of government
 - In the US, their constitution recognises that a substantial exercise of legislative functions by the executive branch □ this is inconsistent with the doctrine of responsible government (requires the executive to be directed by ministers who are members of, and politically supported by, the legislature)
- Whether the constitutional drafters intended to incorporate a separation of powers is unclear
 - What is clear within the convention debates that the framers of the constitution intended to create an independent judiciary
- The constitution also incorporates responsible government □ legislative + executive are effectively united
 - Reflected in ss 44, 62 & 64

The purpose of the separation of powers

- *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10-11
 - “The functions of the judicial branch are constitutionally separated from the functions of the Legislature and the Executive - the political branches of government: "The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes - legislative, executive and judicial". In each branch of government, its proper powers are vested: s1, s61 and s71.
 - The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category - whose character is determined according to traditional British conceptions - are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, **the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed.**”
 - It also ensure judicial independence- **the judiciary is able to act in a way that is independent of the**

influences of the other branches of government- ensures public's perception of and faith in the judiciary

Establishing the separation of judicial power principles

- The federal judiciary is required, by virtue of the separation of powers embodied in the constitution, to be independent from the executive and the legislature, which are the two other arms of government
- **The separation of judicial power guarantees that Ch III courts will not take instructions from the legislature regarding the manner in which their jurisdiction will be exercised, or the result of a case**
- Ch III courts enjoy particular implied or inherent powers that are incidental to judicial activity:
 - **Determine what practice and procedure should be adopted in exercising its jurisdiction** (Nicholas v The Queen (1998) 193 CLR 173 at 188-189 per Brennan CJ);
 - **To refuse to exercise its jurisdiction where to do so would be contrary to law** or would involve the court in sanctioning fraud or oppression, or would permit parties to participate in an abuse of process (Pasini v United Mexican States [2002] HCA 3 at [93]);
 - **To grant bail as an incident of the exercise of their jurisdiction under s 75** (Cabal v United Mexican States [2001] HCA 42 at [15] per Kirby J).

1. **The Commonwealth judicial power can only be exercised by courts referred to in s 71**

- i.e. only s 71 courts can exercise judicial power
- The exercise of judicial power by bodies that are not s 71 courts is held to amount to a breach of the doctrine of separation of powers
- *New South Wales v Commonwealth* (the *Wheat* case) (1915) 20 CLR 54
 - Facts:
 - s 101 of constitution- the Cth can establish an interstate commission, with purpose to arbitrate on matters of trade between the states
 - The interstate commission, as provided for in s 101 of the Constitution, investigated a seizure of wheat, in the course of interstate trade, by the NSW government.
 - The commission issued an injunction to restrain NSW interference.
 - **NSW challenged that the Inter-state Commission did not have jurisdiction to grant the injunction**
 - Held:
 - **The judicial power of the Cth could only be entrusted to courts.**
 - **As the Inter-state commission did not fall within either class of court in s 77 of the Constitution, it could not exercise judicial power**
 - Therefore, it did not have jurisdiction to determine the complaint and issue and injunction. The inter-state commission act was invalid
 - It was not a court created under 93 of the constitution. the problem is – the intention of the frames of the constitution and how they wrote s 101 and 103 it was their view that the commission was to be an administrative body. the way it was set up it had the powers of the court.
 - “the functions of the interstate commission contemplated by the Constitution are executive or administrative, and the powers of adjudication intended are such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication as are incidental and ancillary to those functions”
 - Commentary:
 - The proposition that the judicial power of the Commonwealth should only be entrusted to

courts has never been seriously challenged

- It is consistent with the “rule of law which requires that basic rights granted by the law should be determined by independent judges”

2. **The courts exercising Commonwealth judicial power can only exercise judicial power + incidental judicial power (not non-judicial power)**

- i.e. courts cannot exercise non-judicial power □ the courts cannot discharge non-judicial functions – their role is confined to deciding cases between parties, and cannot extend to giving advice in the abstract or making policy decisions
- *R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers’ Case) (1957)*
 - Facts:
 - Metal Trades Employers’ Association sought to enforce a no-strike clause in an award
 - Arbitration Court ordered the union to *comply with the award* (this is a **non judicial** power)
 - Union disobeyed, court made another order *fining the union for contempt* (this is a **judicial power**)
 - Held:
 - McTiernan J: Ordered judges of the Arbitration Court to explain why a writ of prohibition should not issue on the ground that the vesting of judicial power in a body also exercising non-judicial power was unconstitutional.
 - Dixon CJ, McTiernan, Fullagar and Kitto JJ:
 - ‘When an exercise of legislative power is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III.
 - For that reason **it is beyond the competence of the Parliament to invest with any part of the judicial power anybody or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State**’
 - ‘A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of courts established by or under Chap III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto’ i.e. **there are considerations which indicate the constitution prohibits courts from doing functions which are not a part of judicial power (non-judicial power)**
 - ‘The basal reason why such a combination is constitutionally inadmissible is that **Chap III does not allow powers which are foreign to the judicial power to be attached to the courts or created by or under that chapter for the exercise of the judicial power of the Commonwealth**’
 - **i.e. vesting of judicial power in a body which also exercises non-judicial power is unconstitutional**

- Therefore, the arbitration court cannot enforce the no-strike clause
 - The parliament cannot vest judicial power to anybody except a court as per s 71 and in accordance with s 72
- → Court of Conciliation and Arbitration had been invalidly constituted
- however, measures taken to preserve the validity of all decisions made within that timeframe through amendments to the Conciliation and Arbitration Act
- Commentary:
 - Controversial and as “leading to excessive subtlety and technicality in the operation of the Constitution without...any compensating benefit^[7]”.
 - However, the courts continue to affirm the *Boilermakers Case*. The rationale for that is to protect the individual rights and freedoms of the people.
- *Appeal to Privy Council: Attorney-General (Commonwealth) v The Queen (1957)*
 - The *express mention of one thing means the exclusion of another*.
 - Applying to the text of the Constitution – **Chapter 3 expressly mentions Chapter 3 courts as the only type of court invested with judicial power.**
 - **This excludes non-judicial power, therefore a Chapter 3 court cannot exercise such powers**
- *R v Quinn; Ex Parte Consolidated Foods Corporation (1977)*
 - “The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of parliament and the executive”
 - “But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance for a trial for the determination of criminal guilty is the classic example”

Rights derived from Ch III of the Constitution

- We don't have a bill of rights, and in the absence of this it is necessary to latch onto something structural to have protection of human rights. - implied freedom of political communication similar in this way.
- ‘due process argument’:
 - *Chu Khueng, Polyhukovich* etc □ HC recognized that **certain ‘due process’ limitations flow from the separation of judicial power** effected by Ch III
 - Whereas the separation of powers doctrine was once seen as an ‘institutional imperative designed to foster the supremacy of law over arbitrary power’ □ Wheeler argues that it was subtly transformed into an **‘implication ... protective of individual rights’**
- The following two cases provide the **basis for a new constitutional jurisprudence** imposed by Chapter III **on all laws which diminished individual liberty**.
 - *Chu Kheng Lim*: the involuntary detention of a citizen in custody may **only be ordered by a court as a consequence of a judicial finding of criminal responsibility**.
 - *Kable v DPP*: a state court whose functions include the exercise of Commonwealth judicial power may not be given functions “incompatible” with the exercise of that power.
- However the scope of the above principles remains the issue for the cases which followed. While Ch III limits

the powers of both Cth and State Parliaments, the restraint is not identical due to the lack of any doctrine of separation of judicial power at State level.

- *Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1*
 - Facts: Amendments to the migration act specifically targeted two groups of asylum seekers to be held in custody.
 - Held:
 - The **involuntary detention of a citizen in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of punishing and adjudging criminal guilt.**
 - ‘Every citizen is ruled by the law, and by the law alone’ and ‘may with us be punished for a breach of law but he can be punished for nothing else.’ - this is subject to some qualifications;
 - E.g. The arrest and detention custody, pursuant to executive warrant, of a person accused of crime to ensure that they are available to be dealt with by the courts.
 - Such committal to custody awaiting trial is not seen by the law as it punitive or an exercise of judicial power. Even when this is exercised by the executive, the power to detain someone pending trial is subject to the supervisory jurisdiction of the courts and the ancient common law.
 - Involuntary detention in cases of mental illness or infectious disease – legitimately seen as non-punitive.
 - The citizens of this country enjoy, at least during times of peace, **a constitutional immunity from being imprisoned by Cth authority except pursuant to an order of the court in the exercise of judicial power of the Cth.** > leaving the question open to the scope of the defence power being used to legislate involuntary detention.
 - This immunity did not apply to the plaintiffs for the following reason:
 - An alien differs from the status, rights and immunities of an Australian citizen in a variety of ways - e.g. they can be deported
 - This diminishes the protection of chapter 3 which the Constitution provides
 - The legislative power conferred by s51(xix) encompasses the conferral upon the executive the authority to detain an alien in custody for the purposes of expulsion or deportation. The authority to detain an alien in custody constitutes an incident of that executive power. By analogy also for the purposes of executive powers to receive, investigate and determine an application by that alien for permit / deport = incident of that power.
 - Such limited authority to detain aliens can be conferred on the executive without infringing chapter 3 (exclusive judicial power to courts) because the reason for detaining in custody is neither punitive nor part of the judicial power.
 - However the laws are valid if **they require and authorise what is reasonably capable of being seen as necessary for the purposes of deportation/applications for entry. If the detention is not within this limitation, it will cannot properly confer authority on the Executive and it will be punitive in nature and contravene Chapter III’s insistence that judicial power of the Cth be exclusively vested in the courts.**
 - Significance:
 - Ch III, in relation to detention, plays into consideration of the rule of law and the judiciary is used as a structural means of protecting human rights.
 - Constitutional immunity not to be punitively detained.

The legislative and executive powers – The Commonwealth

- Judicial review is relied upon to **enforce limits on the executive and the legislature.**

- To ensure this, courts must be *entirely independent from the government and the legislature*.
- This applies in both in the state and federal level.
- *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931)
 - The separation of federal judicial power from the other branches of government was discussed
 - Facts:
 -
 - Dixon J suggested two principles of the separation:
 - **Judicial power can only be vested in a court as per under Chapter 3** of the Constitution (s 71)
 - **A court** as per Chapter 3 of the **Constitution can only be invested with judicial power** (NOT non-judicial power)
 - This is *except* for those *additional powers* which were strictly *incidental to its functioning as a court*
 - Thus, judicial and non-judicial power could not be mixed up in the same court.

3.2 the courts created by the Constitution and vested with Commonwealth judicial power

Section 71

- “The **judicial power** of the Commonwealth shall be **vested in**:
 - a Federal Supreme Court, to be called the **High Court of Australia**; and
 - **other federal courts** as the **Parliament creates**; and
 - **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*.”
- The only court created in the constitution is the high court.
 - The discretion to create other courts was granted to the parliament and invest other court with jurisdiction as with state and territory courts.
- By convention, if not by law, the responsibility for appointments to judicial office belongs to the executive government: *A-G (NSW) v Quin* (1990) 170 CLR 1
- Federal courts created under s 71 include: (‘commonwealth courts’)
 - the **Federal Court of Australia**
 - the **Family Court**
 - the **Federal Magistrate Court (Federal Circuit Court of Australia)**
 - s 77(i) of the Constitution states that Parliament may determine the jurisdiction of these courts, subject to the requirement that that jurisdiction relate to the matters listed in ss 75 and 76
- s 71 **permits Parliament to vest State courts with the judicial power of the Commonwealth** – in order to *allow matters involving both State and federal law matters to be heard in one court*
 - Parliament has vested in the State courts only jurisdiction over matters falling within s 76, but this still allows most litigants who have matters involving both State law and federal law to commence the case in their State Supreme Court

Who enforces the constitution?

- Judiciary = Constitutional interpreter, arbiter and ‘enforcer’
- Abolition of appeals from Australian courts to the Privy Council □ HC sits at the apex of the Australia judicial system
- HC appellate jurisdiction = s 73; original jurisdiction = s 75 + 76

3.3 what is judicial power of the Commonwealth and what powers are exercisable by Chapter III courts

Defining judicial power

- Ultimately, the decision in the *Boilermakers Case* has often been circumvented as the **definition of what exactly is ‘judicial power’ is vague enough for manoeuvrability.**
- The classic definition was given in *Huddart, Parker & Co Pty Ltd v Moorehead*
 - Facts:
 - Power given to the Comptroller General of Customers □ required a person to answer questions and produce documents relating to what the Comptroller General believed was an offence against the Act
 - Failure to comply with this attracted a penalty
 - Held:
 - The power was analogous to that of an examining magistrate in deciding whether or not to commit for trial
 - Judicial power is the “...**power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects**, whether the rights relate to **life, liberty or property**. The exercise of this power **does not begin until some tribunal which has power to give a binding and authoritative decision** (whether subject to appeal or not) is **called upon to take action** (1909) 9 CLR 330, 357”.
 - □ judicial power therefore involves the **determination of a dispute about pre-existing rights**
- i.e. **tribunals** (which are considered administrative or executive institutions which are not vested with judicial power) whose **functions might be considered ‘judicial’** have still been **valid, if the particular grant of power can be matched with a legislative purpose.**
- *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970)*
 - Held that **the functions of the Trade Practices Tribunal did not involve judicial power.**
 - Thus, the line between judicial and executive power in can blurred
 - Changing circumstances from 1900 make it harder to draw up a particular definition.
 - Keeping a broad definition of judicial power enables the courts greater leeway
- *R v Quinn; Ex parte Consolidated Foods Corporation (1977) 138 CLR 1*
 - “If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, **the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have on legal rights** rather than from the history of similar legislation reposing the function in a judicial tribunal”
 - court looks at *what is the effect of the exercise of a particular power.*
 - there will be situations where the court looks at the nature of the body exercising the power to determine the nature of the power exercised (so the of the power depends on the nature of the body that is exercising the power). Because the line between administrative function and judicial function has been blurred depending on who is exercising it

Judicial power

- The power of judicial review of legislative and executive action:
 - Court has inherent power to review legislative and executive action
 - Tribunal decides whether correct decision has been made by the decision maker, whereas only a court can determine questions of law (whether something is actually legal or not)
 - *Australian Communist Party v The Commonwealth (1951) 83 CLR 1; Marbury v Madison 1 Cranch 137 (1803)*

- HC declared invalid a *law purporting to give the Governor General the power to make conclusive determination that an organisation threatened the defence of Cth* and was therefore liable to be banned by means of a law passed under the s 51 (vi) defence power
- the legislation was held invalid on the ground that:
 - **only a court** could discharge the judicial function of **making a conclusive legal determination** □ such a function could not be given by legislature to an officer of the executive
 - the legislation purported to remove the High Court's s 75(v) jurisdiction to review the actions of members of the executive
- The power to adjudicate on existing legal rights and liabilities between persons
 - Legal rights and liabilities between people □ exclusive to the court
 - On the other hand, an administrative tribunal has power to educate on future legal rights and liabilities
 - *Waterside Workers' Federation of Australia v J W Alexander Ltd (1918) 25 CLR 434 at 442, 464-465*.
 - the HC invalidated the establishment of the Commonwealth court of Conciliation and Arbitration, which was **staffed by judges serving seven-year terms**
 - This court had the power to arbitrate between disputants, to incorporate its settlement into awards and to penalise breaches thereof.
 - The Cth amended the Act so as to **convert the tenure of judges to that required by s 72**
- The power to determine criminal guilt
 - *Re Tracey; ex parte Ryan (1989) 166 CLR 518 at 580; Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 22*
 - Facts:
 - The HC *considered the validity of amendments* the Migration Act 1958 (Cth) which *defined a particular class of illegal migrant as 'designated persons'*
 - These amendments made conclusive a determination by a member of the executive that a migrant was a 'designated person'; *and prohibited the courts from ordering the release of such persons.*
 - The amendments were designed to target a specific group of migrants whose *applications for release were then pending before the courts.*
 - Held:
 - The court held that the ouster of the court's jurisdiction was invalid
 - It was noted that, even if a person ceased to satisfy the statutory definition of a 'designated person', he or she could nevertheless be detained unlawfully ad infinitum, as the courts would be powerless to intervene
 - The ouster clause was held to infringe s 75(v) because it **purported to give an reviewable power to the executive to make a conclusive determination of legal question**
- Power to not be excluded
 - *Polyhukovich v The Commonwealth (1991) 172 CLR 501*
 - Concerned an Act of Attainder □ legislation in which *Parliament declares a specific persons or person to be guilty of an offence and imposes a penalty on them, all without a court hearing*
 - HC claimed **this would infringe the doctrine of separation of powers, because it would amount to the legislature applying the law and finding guilt – functions that are quintessentially judicial**
- A binding decision: *Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245*

- Facts:
 - The Human Rights and Equal Opportunity Commission was granted the power to applicants who claimed that they had suffered discrimination and, where such claims were proved, to *make a finding that discrimination had occurred and that damages should be paid*
 - Such declarations were expressly stated to be non-conclusive as between the parties
 - However, *the declarations were nevertheless enforceable as an order of court, once registered with the Federal Court, in the absence of any appeal against the order.*
- The court found that **the commission was, in effect, making an enforceable ruling, because the role of the Federal Court was a façade**
- i.e. it was the commission, not the court, that made the ruling, and unless a party took the ruling on review before the court, the ruling would come into effect without the court exercising any judicial discretion
- The legislation was amended and the decision of the commission only becomes enforceable once it is heard by a federal court
- An authoritative, conclusive decision
 - A final and conclusive decision is judicial in nature
 - On the other hand, **a decision that is subject to appeal to a court on matters of law is likely to be non-judicial**
 - **Only a court can make a conclusive determination of law**
- Question of law vs question of fact
 - An **administrative body cannot make a conclusive determination on a question of law**
 - Only a Chapter III Court can make a final determination of mixed questions of law (or mixed fact and law)
 - *Rola Company (Australia) Proprietary Ltd v Commonwealth & Anor (1944) 69 CLR 185 Latham CJ at 210-211*
 - “No-one doubts that the ascertainment or determination of facts is part of the judicial process, but that function does not belong exclusively to the judicial power ... **Unless, however, the determination of facts is an exclusive attribute of judicial power, then it is a matter for the consideration of the legislative body how and to what extent facts should be submitted to administrative tribunals in aid of or to supplement judicial power**”

Non-judicial powers

- Distinction between legal and policy decisions □ a court makes decisions based on the law, not policy
- Judicial power is characterised by the **conclusive ascertainment of existing rights and obligations, rather than the determination of what legal rights and obligations should be created**
 - *Precision Data Holdings Ltd & Ors v Wills (1991) 173 CLR 167*
 - A court determines what rights and obligations currently exist, they don't create future rights and obligations
 - eg. industrial matters- a court cannot create new obligation of an award
- Therefore, administrative tribunals (executive) look to the creation of new obligations

Incidental judicial powers

- i.e. axillary or incidental to the judicial function: Section 51(xxxix) – Parliament power to make laws with respect to matters incidental to the exercise of power by the judicature
 - e.g. administrative actions, giving power to non-judicial functions
- R v Davidson (1954)

- R v Spicer (1957)
- R v Commonwealth Industrial Court (1960)
- Harrison v Caladine (1991)
 - HC held that **the delegation of power to registrars of the Family Court to make orders by consent was not an unlawful delegation of s 71 powers, as long as judges still exercised the judicial power in respect of the more important aspects of cases and had effective supervision by way of appeal or review**
 - “so long as two conditions are observed, the delegation of some part of the jurisdiction, powers and functions of the Family Court as a federal court to its officers is permissible and consistent with the control and supervision of the Family Court's jurisdiction by its judges.
 - The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters.
 - The second condition is that the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court.
 - For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on questions of both fact and law, we consider that the delegation will be valid. Certainly, if the review is by way of hearing de novo, the delegation will be valid.”

What powers are exercisable for Chapter III courts

HC

SECT 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.

SECT 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**.

- Both ss 75 and 76 confer jurisdiction on the Court in respect of 'matters'
 - But there are significant differences between the two sections

- The Court's jurisdiction under s 75 is actual
- The jurisdiction under s 76 is potential
- □ However, together, ss 75 and 76 define **an extensive original jurisdiction for the High Court**
- s 75 provide litigants with a direct avenue to sue the Cth (para (iii)) or to seek judicial review of the acts of one of its officers (para (v))

Matters 'arising under the Constitution or involving its interpretation' – section 76(i)

- s76(i) may be seen as comprising two parts:
 - matters **arising under the Constitution**
 - matters **involving the interpretation of the Constitution**
- The High Court has interpreted each phrase separately.
 - Australian Communist Party v The Commonwealth (1951) 83 CLR 1
 - R v Commonwealth Court of Conciliation & Arbitration; Ex parte Barrett (1945) 70 CLR 141, at 154, per Latham C
- Whilst the High Court has said that a matter **involves the interpretation of the Constitution only when the constitutional issue is necessarily and directly raised**, the Court has nonetheless interpreted that term quite widely.
- In *Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476* Gleeson CJ confirmed the view that **since the Constitution was framed on the Rule of Law □ the Parliament couldn't abrogate or curtail the Court's constitutional functions.**
 - the HC confirmed that because s 75(v) jurisdiction is constitutionally guaranteed, Parliament cannot remove it, and that any ouster clause that attempted to do so would be invalid

Defining a 'matter'

- A matter arises under the Constitution where a **right, title, privilege or immunity is claimed under the Constitution** or matters that **present necessarily and directly and not incidentally an issue upon its interpretation**
 - Re Judiciary & Navigation Acts (Advisory Opinions Case) (1921) 29 CLR 257, Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ at 265 □ no CH III court can give an advisory opinion. because the const requires there to be a dispute in place
- The word **directs attention to the substance of the dispute** rather than to the form in which the relevant proceedings are framed.
 - this has led to narrow rules of standing
 - has also meant courts have not been able to issue advisory opinions
- Advisory opinions
 - *An opinion by a court as to the legality of proposed legislation or conduct*, given in response to a request by the executive, legislature, or some other interested party.
 - Issued in the absence of a case or controversy.
 - They are not binding and carry no precedential value.
 - **The judicial power of the Commonwealth does not extend to the giving of advisory opinions, it is confined to the determination of controversies or 'matters'**
 - *Re Judiciary Act 1903 and Navigation Act 1912 (Advisory Opinions Case)* (1921) 29 CLR 25)
 - Facts: the court invalidated provisions of the Judiciary Act 1903 (Cth) that empowered the Governor-General to ask the High-Court to rule on the validity of Acts
 - Held: The majority held (at 265) that, where s 76 gave Parliament the power to confer jurisdiction on the High Court in respect of 'matters', this mean that there must be a 'subject matter for determination in a legal proceeding' and 'some immediate right, duty or liability, there must be a genuine controversy between parties before the courts can become involved,

and courts cannot give opinions in the abstract

3.4 the *persona designata* and incompatibility doctrine

- **Persona Designata Rule:**
 - Federal judges may occupy non-judicial posts if they do so as ‘designated persons’ not as members of their court: *Hilton v Wells* (1984).
 - You must look at nature of power conferred; if it is judicial than the judge is exercising judicial capacity, if it is administrative than the judge is acting in their personal capacity.
 - Another test is whether in **undertaking their duties being a judge is part of those duties, or whether it is a qualification of them.**
- The majority in *Grollo v Palmer* (1995) affirmed *Hilton v Wells* (1984).
 - *Boilermakers* was reiterated: judges cannot undertake non-judicial roles that would jeopardise their roles as individual judges or as part of the judiciary. However, if the *persona designata* rule applies, it was trusted that a judge would step aside if the case came before them.
 - Brennan CJ, Deane, Dawson and Toohey JJ stated that there are two elements to the *persona designata* rule:
 - The judge must consent to the conferral of non judicial power; and
 - The *persona designata* function cannot be incompatible with the judges performance of their Chap III powers, or powers that would interfere with the judiciary’s function as an institution [at 364-5].

3.5 the extent to which Chapter III applies to the territories

3.6 the *Kable* doctrine and how it limits state and territory courts

- States are not subject to any separation of powers: *BLF v Minister of Industrial Relations* (1986).
 - However, States may not act in a way that is repugnant to the judicial power of the Commonwealth: *Kable v DPP (NSW)* (1996).
 - **Note:** this has only been applied once (in *Kable*). Importantly in *Kable*:
 - The Supreme Court was exercising Federal jurisdiction; and
 - The legislation in question specifically targeted one person.

