



Unit 14: The High Court and Constitutional Interpretation – Year 10 –  
C & C Strand: Laws & Citizens

Topic 10.1: The High Court and Constitutional Interpretation

## The jurisdiction of the High Court of Australia

### Terminology

Intuitively, we would all think that a ‘Supreme Court’ is more important than a ‘High Court’ (as it is, for example, in the United Kingdom). In Australia, at the time of federation, Supreme Courts had existed in each of the colonies for a long time. Rather than change their names, [section 71](#) of the Constitution confers the judicial power of the Commonwealth on ‘a Federal Supreme Court, to be called the High Court of Australia’. The High Court is therefore higher in the legal hierarchy than the State Supreme Courts.

Courts give ‘judgments’ on questions of law, which apply as precedents. Because it is spelled ‘judgment’ in the Constitution (not ‘judgement’), lawyers spell the word without the extra ‘e’ when referring to court judgments.

Judgments set out the facts of the dispute before the court, the reasons for the court’s decision and a ruling on the outcome, including orders about remedies. When a court decides a particular legal point or outcome, we say that the Court ‘held’ that a law was invalid or ‘upheld’ the validity of a law, or ‘held’ that one party should pay the costs of the other. When a judgment is made public, we say it is ‘handed down’ by the Court.

### Status

The High Court of Australia is, at least since 1986, the highest court in Australia. It is sometimes described as the ‘apex’ court, because it sits at the top of the judicial system in Australia. It has the power to resolve all types of legal disputes in Australia, including those under federal law, state or territory law and the common law. Its judgments apply as binding precedents in all lower courts, including federal, state and territory courts.

Justices of the High Court in 1986  
Source: HCA



In the past, some legal disputes could be appealed from the High Court and State Supreme Courts to the 'Judicial Committee of the Privy Council' (known as the 'Privy Council') in the United Kingdom. These paths for appeals were progressively cut off in 1968, 1975 and 1986. The only technically remaining route of appeal lies under [section 74](#) of the Constitution, if the High Court gives a certificate authorising the appeal. The High Court has declared it will never again give such a certificate. This means that in practice, all Privy Council appeals have ceased, and the High Court of Australia is the apex court in Australian law.

## Appellate jurisdiction

The High Court has two types of jurisdiction – appellate and original. Appellate jurisdiction means that it has the power to hear appeals from lower courts. It can hear appeals from federal, state or territory courts in relation to any matters, including those that fall within federal jurisdiction (eg an allegation that a Commonwealth statute has been breached) or state jurisdiction (eg a dispute about the application of a state statute).

As it is not practical for the High Court to hear appeals on every case, there is a system under which a party must seek '[special leave](#)' to appeal to the High Court. This means it has to convince the Court (usually comprised of two or three Justices) in a preliminary proceeding that the matter raises an important point of law that needs to be finally determined by the High Court (eg because it raises an issue of public importance or a legal question had been dealt with inconsistently in lower courts). If special leave is granted, the appeal is heard by the Court.

## Original jurisdiction

Apart from hearing appeals, the High Court also has an 'original jurisdiction'. This means cases on certain matters can start in the High Court, without have been appealed up to it from lower courts. [Sections 75](#) and [76](#) of the Constitution set out the original jurisdiction of the High Court, some of which can be conferred upon it by legislation, such as the [Judiciary Act 1903](#). The High Court has original jurisdiction in 'matters' including those involving constitutional interpretation, challenges to exercises of power by Commonwealth officers, where the Commonwealth is suing or being sued, and where there are disputes between different States or their residents.



Chief Justice Susan Kiefel.  
Australia's first female Chief Justice, appointed in 2017  
Source: HCA

Many of such cases will not be appropriate to be heard by the High Court and will be commenced in lower courts. [Section 44](#) of the *Judiciary Act 1903* (Cth) gives the High Court the power to send a matter off to a lower court to decide.

The High Court primarily deals with resolving complex questions of law. It does not have the time or capacity to hear long cases involving hearing evidence and resolving facts. Accordingly, most High Court cases in original jurisdiction proceed on the basis of a set of facts agreed upon by the parties, to allow the legal questions to be resolved. If the parties cannot agree upon the facts, then the High Court may send the case off to a lower court to hear the evidence and resolve the facts, before the High Court then holds a hearing and decides the legal questions. Two examples of this are the *Mabo* case on native title and the *Palmer* case about the closure of State borders during a pandemic.

The [Mabo case](#) involved the High Court determining a question that had not been raised before it previously, about whether the common law in Australia recognised the legal rights of Aboriginal and Torres Strait Islander peoples to their lands and waters as existed at the time of colonisation. The particular 'matter' involved a claim in relation to the Murray Islands, off the coast of Queensland.



The High Court of Australia |  
Canberra.  
Source: HCA

The High Court referred the matter to Justice Moynihan of the Queensland Supreme Court to decide the facts. He held hearings on the main Island of Mer (also known as Murray Island), on Thursday Island and on the mainland. Justice Moynihan handed down three volumes of detailed findings in November 1990. This was the factual basis upon which the High Court made its finding on the legal question of the recognition of native title in 1992.

In 2020, during the COVID-19 pandemic, Western Australia closed its border. This was challenged by Clive Palmer, a businessman, who wanted to travel to Western Australia to conduct business. He claimed that it breached section 92 of the Constitution. His claim raised questions of what was 'reasonably necessary' to protect public health. As the parties could not agree on the facts, the matter was sent to Justice Rangiah in the Federal Court, to hear evidence from epidemiologists and make findings of fact. Justice Rangiah made his [findings on the facts](#) in September 2020, allowing the High Court then to proceed with determining the constitutional issue of whether there had been a breach of section 92. It held there was not.

The Constitution only gives the High Court original jurisdiction to decide 'matters'. That means that there must be an actual legal dispute between parties. The High Court has held that it cannot decide hypothetical questions or advise the government in advance as to whether a proposed law would be valid or not, because these 'advisory opinions' do not fall within its jurisdiction to decide 'matters'.





## Topic 10.1 Lesson Two



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# Jurisdiction of the High Court

### Time/Lesson

- 1 hour/ 1 Lesson

### Learning Goal

- To understand the jurisdiction of the High Court.
- To research High Court cases.
- To share outcomes of cases where the Constitution was interpreted by the High Court.

### Rationale

Students need to understand the role of the High Court, including in interpreting the Constitution (ACHCK092).

### Success Criteria

Students can explain the details of High Court cases and how the Constitution was interpreted in those cases.

### Teaching Reference Documents:

[TRD 125 The Jurisdiction of The High Court Of Australia](#)

### Resources

#### WEBSITE:

- The Australian Constitution Centre High Court Case Studies <http://www.australianconstitutioncentre.org.au/australian-constitution-centre-resources.html>

#### WORKSHEET

- High Court Interpretation

### Tuning In

- CLASS DISCUSSION: Who makes decisions in your family? What happens if you disagree with the decision? Can you appeal it?
- EXPLAIN: The highest level of decision-maker on judicial matters in Australia is the High Court. Constitutional disputes can occur about whether a power belongs to the Commonwealth or the States. It is important to have an unbiased independent adjudicator to decide.

### Teacher Instruction

READ TRD 125 The Jurisdiction of The High Court Of Australia

Answer the FOLLOWING QUESTIONS:

1. What is appellate jurisdiction?
2. What sort of cases does the High Court hear in its original jurisdiction?
3. Why is there a system of 'special leave' to appeal to the High Court?

### Group/Independent Learning

- RECAP: difference between original intent and dynamic interpretation from Lesson 1.
- GO TO: The Australian Constitution Centre High Court Case Studies <http://www.australianconstitutioncentre.org.au/australian-constitution-centre-resources.html>
- In pairs, choose a High Court case that deals with the Constitution. Explain the case to the class and focus on the constitutional interpretation engaged in by the Court. Why was it important? What approach to constitutional interpretation did the Court take? Did it focus on original intent or was it more concerned with reading the Constitution consistently with current community standards? You can use 'High Court Interpretation' as a template ([10.1 Lesson 2, Activity 1](#)).

## Wrapping it up

- **CLASS DISCUSSION:** Why is it necessary to have an independent court to determine constitutional disputes? Why are constitutional disputes important? How can they affect our lives? (Eg the dispute about the validity of border closures during COVID-19, or the dispute about whether the Commonwealth Parliament could ban the building of a dam on the Franklin River).

## Differentiation

Compare the US Supreme Court's jurisdiction against that of the High Court of Australia (<https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>). What are the similarities (eg certiorari is similar to 'special leave' and both courts deal with constitutional interpretation) and the differences (eg the US Supreme Court's jurisdiction does not extend to State jurisdiction, but the High Court's jurisdiction does).

## Assessment strategies

- Rubric for explanation of High Court constitutional interpretation (Group/Independent Learning)

0	1	2	3	4
No evidence.	Students give a brief overview of High Court case.	Students read High Court case aloud from website, offering no further explanation. They identify original intent and/or dynamic interpretation.	Students describe High Court Case, missing key details. They demonstrate the use of original intent and/or dynamic interpretation in the High Court coming to its decision.	Students clearly explain the details of their chosen High Court. They illustrate that the High Court used original intent and/or dynamic interpretation in coming to its decision, with examples.



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## High Court Interpretation

Go to: The Australian Constitution Centre High Court Case Studies <http://www.australianconstitutioncentre.org.au/australian-constitution-centre-resources.html>

Choose one of the High Court Case studies which concerns the Constitution and answer the following questions:

High Court Case Name:	
Year of Case:	
Explanation of Case details (use your own words)	
Why interpretation of the Constitution was important to the case	
Did the High Court use original intent and/or dynamic inter-pretation as part of its interpretation of the Constitution?	
What precedent did this interpretation create?	

