Teacher Reference Document 66

AUSTRALIAN CONSTITUTION CENTRE

Unit 8: Australia's legal system, the Courts and the Australian Justice System – Years 7-9 - Strand: Laws & Citizens

Topics 7.2 & 9.4: Key features of Government & the Australian Justice System: Separation of Powers and the Judiciary

The Separation of Powers – protecting the independence of the Judiciary (student resource)

The courts have been very active in upholding the aspect of the separation of powers that protects the courts from interference by the Parliament and the Executive Government. 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. There are some exceptions, some grey border areas and some ways around the separation of powers.

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. Judicial independence is protected by giving High Court and federal judges 'tenure'. This originally meant they held their job for life unless they chose to retire earlier. Since 1977 when a referendum on this was held, they hold their job until they turn 70. They 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 misbehaviour or incapacity'.

Early on, the High Court decided this meant that bodies that are not courts recognised by Chapter III, such as the Inter-State Commission, cannot exercise federal judicial power. 'Judicial power' is the power to determine legal controversies between parties, by ascertaining the facts and applying the law, in a manner that is procedurally fair and with a result that is binding, authoritative and enforceable.

The first Chief Justice of the High Court of Australia, Sir Samuel Griffith | painting by Sir William (Bill) Alexander Dargie
Source: High Court of Australia

Justices of the first High Court of Australia
Source: State Library of Queensland

Chapter III is exhaustive about who can exercise federal judicial power. 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 it was struck down again in the *Boilermakers case* because it exercised a mixture of judicial and non-judicial powers. The High Court decided that courts established under Chapter III can only exercise judicial power, and closely associated or incidental powers.

This is where the grey border area is recognised. The High Court and federal courts can still exercise some non-judicial powers, like administering bankrupt estates, because they have historically been done by judges and they are incidental to their judicial powers. Some functions have cross-over 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 operate outside Chapter III, to exercise judicial power, and for the Houses of Parliament to punish people for contempt of Parliament.

Finally, there are sometimes ways around the separation of powers. For example, 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.

But the courts have held that this is only permissible if the function is not one which is incompatible with the person also exercising judicial power in a court.

If, for example, the judge was given a function in their personal capacity that required them to act in a political manner, or permitted them to behave in a biased or unfair manner, or 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.

The first sitting of the High Court | Griffith CJ, Barton and O'Connor JJ
Source: High Court of Australia

Maintaining the integrity of courts and decisional independence

There is sometimes a tension between the courts and Parliament, when Parliament enacts laws telling courts what to do or conferring functions on them that limit their independence. Courts cannot be treated as rubber-stamps for executive decisions or be required to act in a particular way without the ability to exercise judgement and judicial discretion. 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 don't want to be used by governments to do their political work.

Parliament therefore cannot legislate to take away a court's ability to be fair to all parties, or require a court to do what the Executive Government tells it to do, or get a Court to implement executive decisions in a manner that is incompatible with its institutional integrity.

State courts and the separation of powers

State Constitutions don't strictly apply the separation of powers. This means that State courts can exercise non-judicial powers. But Chapter III of the Constitution does allow the Parliament to let State courts exercise federal jurisdiction. This means they must be appropriate bodies to receive and exercise federal jurisdiction.

State courts therefore must maintain their integrity as 'courts' and their independence. They must continue to show they have the 'defining characteristics of a court', such as independence, impartiality, fairness and deciding matters in open court. The consequence is that even though there is no formal separation of powers in the States, most 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).

The Separation of Powers – protecting the independence of the Judiciary (teacher resource)

Unsurprisingly, the courts have been very active in upholding the aspect of the separation of powers that protects the courts from interference by the Parliament and the Executive Government. 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 all things, the rules are not absolute. There are some exceptions, some grey border areas and some ways around the separation of powers.

Chapter III – exclusive judicial power

Chapter III of the Constitution deals with courts and the judicial power of the Commonwealth. Section 71 confers the judicial power of the Commonwealth on the High Court, any other federal courts created by the Commonwealth Parliament, and any State or Territory courts (including State Supreme Courts, established under State laws) which the Commonwealth Parliament 'invests with federal jurisdiction'. This was done because back in 1901 there wasn't enough legal work to justify creating a whole system of federal courts. It was much cheaper and more efficient to use the existing State courts and let them exercise federal jurisdiction as well as State jurisdiction, until such time as the population had grown enough to justify establishing a federal court system.

Section 72 of the Constitution protects judicial independence by giving High Court and federal judges 'tenure'. Originally they were appointed for life, but in a referendum in 1977 this was changed so that they have to retire upon turning 70.

The first Chief Justice of the High Court of Australia, Sir Samuel Griffith | painting by Sir William (Bill) Alexander Dargie
Source: High Court of Australia

Justices of the first High Court of Australia
Source: State Library of Queensland

This tenure means that they can't be dismissed from their judicial office for handing down judgments to which the Government objects. They can only be removed by the Governor-General, after a vote of both Houses of Parliament to do so, on the ground of 'proved misbehaviour or incapacity'. In addition, their pay cannot be diminished during their time in office. Again, this is to prevent the Executive Government from using pay to pressure or punish judges.

In 1915, the High Court decided in *New South Wales v The Commonwealth*, that bodies such as the Inter-State Commission, which are not established or recognised by Chapter III of the Constitution, cannot exercise federal judicial power. Judicial power is the power to determine legal controversies between parties, by ascertaining the facts and applying the law, in a manner that is procedurally fair and with a result that is binding, authoritative and enforceable. Federal judicial power is the power to determine federal legal matters, including those involving the interpretation of the Commonwealth Constitution, the application of Commonwealth laws, the review of acts of the Commonwealth Executive Government, and any case in which the Commonwealth is a party. The High Court held that Chapter III of the Commonwealth Constitution is exhaustive about who can exercise federal judicial power.

Not long afterwards, in *Waterside Workers' Federation of Australia v J W Alexander Ltd* in 1918, the High Court also struck down the Commonwealth Court of Conciliation and Arbitration, because its President was given a 7 year term, rather than life tenure, (even though the President already had life tenure as a Justice of the High Court). As the body was not comprised of judges with tenure, it was not a court and could not exercise judicial power.

Some of the judges were also concerned that the Court of Conciliation and Arbitration could exercise both judicial power and arbitral power. Justices Isaacs and Rich thought that arbitral power, being the power to arbitrate disputes, involves declaring what the rights of parties *should* be, such as by making industrial awards. This was unlike judicial power which determines what those rights already are, according to the law. Their Honours thought arbitration was closer to a legislative function, because the decision-maker is making the law, rather than applying it.

As the majority had found that it was not a court, because of the lack of tenure, this body could still exercise its arbitral function, because it was non-judicial. But it could not exercise a power to enforce its arbitral awards, because this was a judicial power.

In 1926 Parliament passed an Act which reconstructed the Court of Conciliation and Arbitration, replacing the President with a Chief Judge who had tenure in accordance with section 72 of the Constitution. It went unchallenged for 30 years until it was struck down in 1956

The first sitting of the High Court | Griffith CJ, Barton and O'Connor JJ
Source: High Court of Australia

in the *Boilermakers case* (*R v Kirby; Ex parte Boilermakers' Society of Australia*). The High Court decided that courts established under Chapter III can only exercise judicial power, and those powers that are 'incidental or ancillary' to judicial power. 'Chapter III does not allow powers that are foreign to the judicial power to be attached to the courts created by or under that Chapter for the exercise of the judicial power of the Commonwealth'. The High Court considered that arbitration was not incidental or ancillary to judicial power, so it could not be undertaken by a court. Further, arbitration appeared to be the primary role of the body, meaning it was not a court and could not exercise judicial powers.

There are some functions that cross over boundaries. For example, making findings of fact is something that can be done by an administrative body as well as a judicial body. Sometimes courts also exercise functions, like administering bankrupt estates, that are not strictly judicial. They do so because they have been doing it for centuries. Historical usage is therefore important. Justice Kitto said in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* in 1970, that there is a 'borderland in which judicial and administrative functions overlap' so that a function may be treated as administrative or judicial depending upon the body it is conferred upon.

Exceptions and alternatives

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

Finally, there are sometimes ways around the separation of powers. For example, sometimes a judge is needed to bring independence, trustworthiness 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 lead tribunals, to run royal commissions or to hear applications for phone tap warrants.

But the courts have found that this is only permissible if the function is not one which is incompatible with the person also exercising judicial power in a court. If, for example, the judge was given a function in their personal capacity that required them to act in a political manner,

The High Court expands to five Justices in 1906 with the addition of Sir Isaac Isaacs (left) and Henry Bournes Higgins (right)
Source: High Court of Australia

or permitted them to behave in a biased or unfair manner, or 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.

For example, in 1996 in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*, the High Court considered the validity of the appointment of Justice Jane Mathews of the Federal Court to the role of advising the Minister upon whether the place where the proposed Hindmarsh Island Bridge was to be built should be protected as a site of Aboriginal cultural heritage. Local Aboriginal women had stated that the place had special cultural significance to women and that this information could not be given to the (male) Minister. As Justice Mathew's role was not an independent review of the Minister's exercise of power, but rather an integral part of the Minister's exercise of power, it was regarded as incompatible with her role as a judge. The statute under which she was appointed was read narrowly so as to exclude the appointment of judges to such an advisory role.

Maintaining the integrity of courts and decisional independence

There is sometimes a tension between the courts and Parliament, when Parliament enacts laws telling courts what to do or conferring functions on them that limit their independence, such as mandatory sentences. Courts cannot be treated as rubber-stamps for executive decisions or be required to act in a particular way without the ability to exercise judgement and judicial discretion.

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'. An example arose in *South Australia v Totani* in 2010. It concerned laws aimed at suppressing crime by bikie gangs. Under the *Serious and Organised Crime (Control) Act 2008* (SA), the Attorney-General was given the power to declare that an organisation's members associate for the purposes of engaging in serious criminal activity and that the organisation represents a risk to public safety and order. Once such a declaration was made, the Police Commissioner could apply to a court to make a control order against any member of that organisation and the court was obliged to make it, as long as it was satisfied that the person was a member of a declared organisation.

A control order has a serious effect upon the liberty and freedom of association of a person. It can control who the person meets and communicates with. The role of the court, however, was limited to determining whether a person was a member of an organisation, which in most cases is already known. The court had no power to determine whether a control order, or its terms, were appropriate to the relevant person.

Chief Justice French quoted from the first Chief Justice of New South Wales, Sir Francis Forbes, who said in 1827 that even if judges are removed from office by the Executive Government or

Chief Justice French's bench in 2013
Source: High Court of Australia

Parliament, 'the judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law'. Chief Justice French went on to say in *Totani*:

> It is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories. Observance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made.

He was concerned that the courts were being recruited to fulfil, and give a neutral colour to, what is essentially an executive process, as it is the Executive Government that decides to declare the organisation, with the consequence that its members must be made the subject of a control order by a court when requested. The High Court held that this was incompatible with the court's institutional integrity, as it takes away one of its essential characteristics – the appearance of independence and impartiality.

Parliament cannot legislate to deprive a court of its capacity to exercise procedural fairness, or require a court to act as instructed by the Executive Government or enlist a Court to implement executive decisions in a manner incompatible with its institutional integrity.

State courts and the separation of powers

State Constitutions do not impose a separation of powers. This means that State courts can, in some circumstances, exercise non-judicial powers. This was recognised by the High Court in 1996 in *Kable v Director of Public Prosecutions (NSW)*. Courts such as the NSW Land and Environment Court exercise a mix of judicial and non-judicial functions (which cannot be done at the federal level).

But Chapter III of the Commonwealth Constitution allows federal jurisdiction to be conferred on State courts. This means they must be appropriate bodies to receive and exercise federal jurisdiction. Accordingly, they must maintain their integrity as 'courts' and their independence. They must continue to bear the 'defining characteristics of a court', such as independence, impartiality, fairness and deciding matters in open court.

Hence, even though there is no formal separation of powers in the States, many of the effects of the application 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).

Judiciary – how are High Court judges appointed?

The High Court of Australia is the highest court in the country. It decides appeals on the most difficult legal issues and interprets the Constitution. How are its seven judges chosen?

Who makes the appointment?

Section 72 of the Constitution says that High Court judges and judges of other federal courts shall be appointed by the Governor-General in Council (i.e. the Governor-General as advised by Ministers in the Federal Executive Council). In practice the decision is made by the Cabinet, usually upon the nomination of the Attorney-General or sometimes of the Prime Minister.

Qualifications

Legislation sets out other conditions, such as qualifications. For example, section 7 of the *High Court of Australia Act 1979* (Cth) says that to be a High Court judge you must either have been enrolled as a barrister, solicitor or legal practitioner of the High Court or a Supreme Court for not less than five years, or you must be a judge of a federal, State or Territory court. All judges are therefore qualified lawyers. Most have a law degree from university, but some became lawyers through schemes that involve practice and night school, under the Legal Practice Admission Board.

For example, Chief Justice Kiefel left school when she was fifteen and became a secretary. She completed her HSC at night school and her legal training through practice and evening study. She became the first female Chief Justice of the High Court in 2017, showing that no matter where you start, determination, skill and hard work can get you to the top.

Consultation and politics

But how do the politicians know who to appoint to the High Court? Section 6 of the *High Court of Australia Act* requires the Commonwealth Attorney-General to consult with State Attorneys-General in relation to appointments to the High Court before they are made. In practice the Attorney-General usually consults much wider amongst the courts and the legal profession, to find out who are regarded as the best judges and 'barristers' (ie lawyers who specialise in arguing cases in court) in the country.

Chief Justice Susan Kiefel. Appointed in 2017, she was Australia's first female Chief Justice
Source: High Court of Australia

Chief Justice Barwick's bench
Source: High Court of Australia

While political views or positions on particular legal issues are not supposed to affect the decision, sometimes they do.

Appointments of former federal or State Attorneys-General, such as Edward McTiernan, John Latham, Garfield Barwick and Lionel Murphy, to the High Court can sometimes be controversial, because they have been professional politicians with political allegiances which might be hard to put aside. But the first High Court judges had all previously been politicians. Sir Samuel Griffith had been Premier of Queensland, Edmund Barton had been Australia's first Prime Minister and Richard O'Connor had been a Senator. Sometimes political experience about how government works in practice can be useful in constitutional interpretation and in administrative law challenges to ministerial decision-making. But it can also lead to accusations of political bias when sensitive political issues arise.

Controversy can arise about appointments if the proposed judge is considered politically compromised. In 1913, the High Court was expanded from five to seven, and the Labor Government had the opportunity to make two appointments. Albert Piddington was on a ship returning to Australia from London in 1913 when he received a telegram from his brother-in-law (at the request of the Attorney-General, Billy Hughes) requesting his views on Commonwealth versus States' rights. He replied: 'In sympathy with supremacy of Commonwealth powers'. Later, Piddington received a telegram directly from Hughes, offering to appoint him to the High Court. He accepted. Hughes, however, was criticised for stacking the Court and Piddington was attacked for letting his independence be compromised.

Piddington was not yet a senior barrister and was described in The Bulletin as an 'obscure junior'. In the face of criticism from the legal profession and the press, he resigned before ever hearing a case.

At the same time Charles Powers was appointed. He was also criticised, as he had been the Crown Solicitor (i.e. senior government lawyer), but not a barrister. He ignored the criticism and rode out the storm, serving on the High Court for sixteen years.

Representation

When the High Court was first established, only men were allowed to be lawyers in Australia. It was therefore unsurprising that for much of its existence, the High Court was comprised exclusively of men. The first female barristers recorded as appearing before the High Court were Joan Rosanove in 1924 and Roma Mitchell in 1937, although women rarely got to speak.

As Justice McHugh has noted, there was often discrimination against women, so that they did not get senior roles or speaking parts in cases in the High Court – a problem that persists. It was not until 1987, that the first female, Mary Gaudron, was appointed as a Justice of the High Court. As at 2022, the High Court was comprised of four women, including the Chief Justice, and three men. It was the first time in its history that a majority of women sat on the High Court.

For a long time, the High Court was dominated by judges from New South Wales and Victoria, which have the largest numbers of barristers. In modern times, there is greater representation on the High Court of Justices from Queensland and Western Australia. However, as at 2022 there had never been a Justice appointed from South Australia or Tasmania.

When there is a vacancy in the High Court today, there is much talk about balancing representation on the Court, and whether the appointee should be from a particular State or of a particular sex.

What factors should be relevant in choosing a person for appointment to the highest court in the land? Should sex, racial background, religion, sexual orientation, or state of origin be relevant?

On the one hand, we could say that merit should be the sole criterion, so that the judge with the best legal skills who is most capable of deciding difficult legal problems should be appointed.

On the other hand, judging merit can be affected by personal prejudices or structural disadvantages. Judges from different backgrounds may also bring different perspectives, life experience and understanding to their role which improves the decision-making process.

Getting the balance right and ensuring that the High Court's decisions are of the highest quality is a real challenge for Governments.

Judiciary – how are Judges removed?

Tenure and independence

Judges make decisions about the validity of laws and review the legality of decisions made by Ministers. Their decisions therefore have a big impact upon governments, which might be particularly unhappy when decisions go against their interests. There is therefore a risk that the Executive Government might pressure them by threats to their salary or their job.

While judges are appointed by the Executive Government, their independence is protected by giving them 'tenure' (i.e. job security) and protecting their pay from being reduced during their term of office. For Justices of the High Court of Australia and other federal courts, this is achieved by section 72 of the Commonwealth Constitution.

Originally, section 72 gave these judges life tenure – meaning they could hold their office for life, until they chose to retire or died. In the United States, Supreme Court judges still have life tenure and can serve well into their 80s. In Australia, Justice McTiernan served until he was 84 years old and only retired after he broke his hip while trying to catch an annoying chirping cricket. His age and feebleness, when he deputised for the Chief Justice in swearing in members of the Senate, helped convince politicians from all sides to support a referendum to impose a compulsory retirement age of 70 for High Court and other federal judges.

Arguments in favour of compulsory retirement included that it would ensure that there was a regular turnover of judges, and younger Justices with contemporary ideas could be appointed. There was also concern that the mental capacity of judges may decline after a certain age.

Arguments against compulsory retirement included the loss of valuable experience and wisdom, its expense and the unfairness of age discrimination. The referendum was successfully passed in 1977 and since then all new High Court and federal judges have retired at, or before, the age of 70.

States have different compulsory retirement laws for their judges. Most require retirement at the age of 70 or 72, but allow for acting judges (being those who are still in good health and with sharp minds) above that age, often up to 78. New South Wales increased the compulsory retirement age to 75 in 2018, in recognition of improved community health for the ageing and the loss to the State of valued and experienced judges if they have to retire earlier.

Removal of judges

The conditions for the removal of judges are very strict to discourage their use for political purposes. Section 72(ii) of the Commonwealth Constitution says that High Court and federal Justices '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'.

This tells us about both the process and the grounds for removal. In terms of process, the matter must be brought before Parliament, and each House must vote in favour of removal. It then goes to the Governor-General, who formally gives effect to the removal, acting on the advice of the ministers in the Executive Council. This means that majorities in both Houses and the Government must support the removal, and do so upon the grounds set out in the Constitution.

The only grounds upon which a judge can be removed are 'incapacity', which might be physical or mental inability to do the job adequately, or 'proved misbehaviour'.

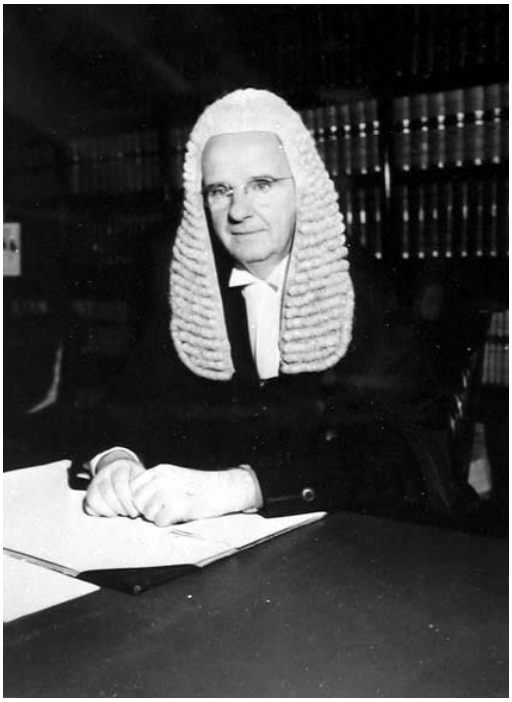
This raises difficult questions about the level of 'misbehaviour', the extent to which it has to be related to the conduct of the judge's office, and who has to decide whether or not it is 'proved'.

For example, what if a judge was involved in a car accident and was convicted of dangerous driving for not paying proper attention to the road? Would that be enough to justify his or her removal from office? What if a judge is accused of matters that do not amount to a criminal offence, but may involve bias or dishonesty? If a court cannot decide what is 'proved', must this be determined by the Houses, and what process should they use for doing so? Should a parliamentary committee decide upon the facts, and if so, should it allow the cross-examination of witnesses? Would it be necessary for it to prove matters 'beyond reasonable doubt' or to a lesser standard? Does each House have to decide, separately, upon what is 'proved', by itself receiving evidence, hearing witnesses and questioning them?

These questions have never been resolved because the issue has so rarely arisen for consideration. Allegations were made against a High Court judge, Justice Lionel Murphy, in the 1980s as a result of recordings from phone taps. Two parliamentary inquiries were held by Senate Committees, but did not resolve the matter. Murphy objected to giving oral evidence before the first committee, in part because his lawyer would be unable to cross-examine witnesses. A second Senate Committee created elaborate rules to ensure procedural fairness and allow cross-examination, but Murphy still refused to appear.

Further allegations were made in the course of the first inquiry, including that Murphy had sought to influence judicial proceedings in favour of a mate. Murphy was then prosecuted on the charge of attempting to pervert the course of justice. He was convicted, but the conviction was overturned on appeal and a new trial was ordered. He was acquitted (i.e. found not guilty) at the second trial.

A Parliamentary Commission of Inquiry, comprised of three retired judges, was then established to review other allegations against Murphy that might amount to 'proved misbehaviour'. It did not complete its investigations because Murphy died shortly afterwards of cancer. All questions about the procedure and what amounts to 'proved misbehaviour' remained unresolved.



Justice Edward McTiernan served on the High Court for 46 years (1930-1976) till he was 84 Source: High Court of Australia. Image taken in 1955

At the State level there have been very few removals, but some States at least have clearer processes. In New South Wales allegations against judges are made to the Conduct Division of the Judicial Commission. Only if it makes a finding that parliamentary consideration of the removal of a judge for proved misbehaviour or incapacity could be justified, can it then go to Parliament. Each House must then decide whether to petition the Governor for removal of the judge. The gatekeeper role of the Conduct Division of the Judicial Commission prevents judges being removed for political reasons and also provides a means of independently establishing the facts and their seriousness before the Houses deal with an issue.

In practice, judges who are likely to be removed usually choose to resign voluntarily, rather than face removal. Accordingly, it is very rare for the Houses to have to face ruling on such matters. Where they do, at least in New South Wales, the practice has been to give Members a 'conscience vote' (meaning that they are not bound by their parties to decide one way or another, but make up their own minds individually on the evidence).

Topic 7.2 & 9.4: Lesson One

Australia's Separation of Powers and an independent judiciary

AUSTRALIAN CONSTITUTION CENTRE

Time/Lesson	Learning Goal
• 1 hour	• To understand the Australian context of the separation of powers. • To explain the importance of an independent judiciary in Australia.
Rationale	**Success Criteria**
Students need to understand how the separation of powers operates in the Australian Constitution and the importance of maintaining the independence of the judiciary.	Students can explain why it is important for the judiciary to be independent in Australia's system of government.

Teaching Reference Document

- TRD 66: Protecting the independence of the judiciary: Separation of powers (Student Resource)
- TRD 67: Protecting the independence of the judiciary: Separation of powers (Teacher Resource)
- TRD 68: Judiciary – How are High Court judges appointed?
- TRD 69: Judiciary – How are judges removed?

Resources

Access to the internet for research

Tuning In

- **Think/Pair/Share**
  - "Why do most team sports have umpires?"
  - "Would the players follow the rules if there were no umpires? Why/why not?"
- **Remember and revise** topic 6.3 & 7.1, Unit 7: TRD 56 'Separation of Powers - Overview: the three institutions or branches of government'.

Teacher Instruction

- **Explain**: In a federal system, a State might want to do one thing (eg build a dam in Tasmania so that it can generate hydro-electricity) while the Commonwealth might have a different view (eg that for environmental reasons a dam should not be built in that place). The Commonwealth Parliament might then pass a law that prevents the State from building the dam, and the State might respond that it thinks the Commonwealth Parliament has no power to make such a law. There needs to be an independent umpire to resolve the dispute and decide who is right. That umpire is the High Court of Australia. It decides disputes between the Commonwealth and the States and Territories about who has power to do particular things. Sometimes the High Court's decisions will be controversial (eg whether the Commonwealth could validly prevent Tasmania from damming the Franklin River; whether the Australian Capital Territory's law permitting same-sex marriage was valid; and whether the Commonwealth's school chaplaincy program was valid).
- **Research**: Students research and write a report on a controversial case that led to politicians criticising the High Court (see examples on the Australian Constitution Centre's website). Students reflect on why it is important to respect the judgments of courts and the independence of the courts, even if one is unhappy with the outcome of a case.

Group/Independent Learning

- **Read**: CEFA TRD Separation of Powers – Protecting The Independence Of The Judiciary (Student Resource).
- **QUESTIONS**:
    - What is a judicial power?
    - How is a judicial power different to the powers of the other branches of government?
    - Why is it important for only courts to have judicial power?

Wrapping It Up

- **CLASS DISCUSSION**: Why is it important to protect the independence of the judiciary?
- **DISCUSS**: If one team in a competition can potentially influence the umpire by reducing the umpire's pay or sacking or penalising the umpire for making a decision they don't like, does that affect the trust that people have in the fairness of the game? How much more important is it that courts are trusted to be independent, impartial and fair? Do judges sometimes have to be brave when they make unpopular decisions? Is it important to protect judges from being sacked just because they make a decision the government does not like?

Differentiation/Enrichment

What sort of person would make a good judge? What sort of skills should they have (eg intelligence, knowledge, integrity, fairness)? Is it important to have representation of different types of people on a court? What factors should be considered (eg sex, race, State of origin)? Does it matter where a judge comes from - should a decision be any different if a judge comes from Tasmania or Queensland? For what reasons should a judge be removed from office?

Assessment Strategies

Assessment based on reports and reflections and engagement in class discussion.

Extension Lessons and Activities

Compare the position in some States in the USA where judges can be removed by a vote of the people if they make unpopular decisions. Is that a good or a bad idea?