

“Who will guard the guardians?”: Assessing the High Court’s role of constitutional review

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Abstract

The High Court of Australia has the power to invalidate Commonwealth legislation if the Parliament is found to have exceeded its legislative powers. However, what mechanisms are available to prevent the High Court from exceeding its own power? This paper examines the impact of the High Court’s role of constitutional review, particularly the negative impact on developments in finance and trade. Three mechanisms that could act as a check on the power of the High Court are examined (amending the *Judiciary Act*, removing a judge and altering the *Constitution*), but ultimately, each is found to be of limited effectiveness.

Keywords

High Court, constitutional review, judicial power, validity of Commonwealth legislation, finance and trade, Inter-State Commission, removal of judges.

Introduction

In determining the constitutional validity of Commonwealth legislation, the High Court has had a profound impact on the political development of the Commonwealth of Australia. Due to this role of constitutional review, the judges of the High Court could be described as the “guardians” of the *Australian Constitution*. But as Juvenal asked in his *Satires* (6.347-48): “*quis custodiet ipsos custodes?*”, that is, who will guard the guardians themselves?

This paper will discuss the impact of the High Court's role of constitutional review, including how this role has been used by the High Court to protect its own judicial power. The impact on the development of the Commonwealth with respect to finance and trade in particular will then be considered. Finally, the various mechanisms available to “guard the guardians” will be assessed. This paper argues that the High Court is able to exercise its role of constitutional review to great effect, often to the detriment of the Commonwealth, and that the guardians are left virtually unchecked because the mechanisms available are of limited effectiveness.

The High Court's role of constitutional review

The High Court's role of constitutional review allows it to invalidate Commonwealth legislation, ensuring that the Parliament does not exceed its powers as enumerated in the *Constitution*. This notion, that the federal judicature should decide the limits of powers of government, was found by the High Court to be necessary for the effective operation of a federal constitution.¹ The importance of the High Court's role was outlined in the Second Reading Speech for the *Judiciary Act 1903* (Cth), where constitutional interpretation was

¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267-8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

expressed to be the Court's "first and highest function".² The *Judiciary Act* confers this jurisdiction for constitutional interpretation and review upon the High Court, as s 30(a) of that Act provides for s 76(i) (see [Addendum](#)) of the *Australian Constitution* in almost identical terms.

Whilst the High Court has recently acknowledged the *Judiciary Act* as the source of its power of constitutional review,³ it has tended to focus on an alternative "source" for this role. In striking down the *Communist Party Dissolution Act 1950* (Cth), Fullagar J stated in the *Communist Party Case* that:

in our system the principle of *Marbury v Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.⁴

The High Court has often referred to Fullagar J's judgment as a basis for invalidating Commonwealth legislation, although the qualification to the axiom (regarding the opinions of the legislative organs in particular) has often been forgotten. This appears to give special significance to the case of *Marbury v Madison*,⁵ in which the Supreme Court of the United States first invalidated a statutory provision by finding that s 13 of the *Judiciary Act of 1789* was unconstitutional. In the *Communist Party Case*, Fullagar J also utilised the metaphor of a stream not rising higher than its source,⁶ that is, that the Commonwealth Parliament could not legislate beyond the heads of power granted to it under the *Constitution*. Yet it could be argued that in relying on a broad principle derived from the United States case of *Marbury v Madison*, it could appear that the High Court is exceeding its own power, or at least claiming

² Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

³ *New South Wales v Commonwealth* (2006) 229 CLR 1, 101 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

⁴ *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 262-3 (Fullagar J) ('*Communist Party Case*').

⁵ (1803) 5 US (1 Cranch) 137.

⁶ *Communist Party Case* (1950) 83 CLR 1, 258.

that the source of its power was somehow broader than that conferred by the *Judiciary Act 1903*.

The High Court's approach to defining the judicial power could similarly be viewed as an attempt to preserve its own power. By holding that the judicial power "can only be defined by reference to what courts do and the way in which they do it",⁷ or by reference to lists of factors that may not be conclusive,⁸ the judicial power is effectively what the High Court finds it to be. Therefore, the "guardians" remain unchecked in their interpretation of both the source of power for their role of constitutional review, and the content of the judicial power that they exercise.

The control of the judicial power and the *Wheat Case*

The High Court's Chapter III jurisprudence has had major ramifications for Commonwealth legislation. The decision in the *Wheat Case*⁹ is a key example of the High Court exercising its power of constitutional review in order to protect the judicial power, and invalidating a constitutionally mandated provision in the process.

In the *Wheat Case*, the High Court held the *Inter-State Commission Act 1912* (Cth) to be invalid because it conferred judicial power on the Inter-State Commission (ISC).¹⁰ This is despite the fact that the *Constitution* provides that "there shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary".¹¹ The decision in the *Wheat Case* was based on the notion that the *Constitution* provided for a separation of powers, and that Chapter III, by virtue of the structure of the

⁷ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

⁸ *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aickin J).

⁹ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*').

¹⁰ *Wheat Case* (1915) 20 CLR 54, 89-90 (Isaacs J).

¹¹ *Australian Constitution* s 101.

Constitution requires a strict separation of the judicial power.¹² A body such as the ISC could not have powers of adjudication as it was not a court, and s 71 (see [Addendum](#)) was exhaustive in relation to which bodies could exercise the judicial power.¹³ As a result, Isaacs J found that “extremely plain and unequivocal language”¹⁴ was required to overcome what could now only be described as a weak implication drawn from the structure of the *Constitution*. Such an interpretation requiring a strict separation of the judicial power is consistent with the High Court’s protection of its own power.

The separation of powers argument looks particularly weak when the structure of the *Constitution* as a whole is examined, rather than simply the first three Chapters. Although Chapters I, II and III *appear* to be dealing with the whole of the legislative, executive and judicial power (respectively), Chapter IV on finance and trade deals with the legislative and executive power as well, so why can it not deal with the judicial power?¹⁵ The fact that s 101 (see [Addendum](#)) is not in Chapter III should not prevent the ISC from exercising judicial power, as there may well have been good reason for s 101 not being in Chapter III. Justice Barton in the *Wheat Case* noted that perhaps the ISC was not necessarily to be a court, and it was up to the Parliament to decide whether it should be.¹⁶ The United States’ ISC was enfeebled without such powers,¹⁷ and so it is likely that it was intended that the Parliament at least have the option of conferring these powers on the Australian ISC. Furthermore, the ISC was to exercise its powers for a specific purpose, that is the execution and maintenance of constitutional provisions related to trade and commerce. Therefore,

¹² *Wheat Case* (1915) 20 CLR 54, 89-93 (Isaacs J).

¹³ *Ibid* 89-92 (Isaacs J).

¹⁴ *Ibid* 93 (Isaacs J).

¹⁵ *Ibid* 103 (Gavan Duffy J).

¹⁶ *Ibid* 74 (Barton J).

¹⁷ *Ibid* 103 (Gavan Duffy J).

s 101 was not in Chapter III because it was to be located together with the relevant provisions that the ISC would execute and maintain in Chapter IV.¹⁸

Section 101 is sufficiently clear that the Parliament has the discretion to establish an Inter-State Commission with the powers that it deems necessary. The removal of this discretionary legislative power from the Parliament is just one example of the impact that the High Court's role of constitutional review has had on the development of the Commonwealth with respect to finance and trade.

The impact of the *Wheat Case* on finance and trade

Given the importance of the provisions in Chapter IV, the powerlessness and eventual disappearance of the ISC as a result of the *Wheat Case* may have led to a completely different functioning of the Commonwealth. One of the main aims of Federation was internal free trade,¹⁹ with the provisions of Chapter IV (especially s 92) being crucial to achieving this aim. The ISC was to use its powers for the purpose of executing and maintaining the provisions of the *Constitution* relating to trade and commerce,²⁰ including s 92 (see [Addendum](#)). It was designed as an impartial body with experience and expertise in trade and commerce matters.²¹ The loss of an expert body such as the ISC could only be seen as a lost opportunity because of the potential roles the ISC could have played. The difficulties faced by the High Court in interpreting s 92 may have been overcome much earlier than in *Cole v Whitfield*,²² where the High Court found that Tasmanian fisheries

¹⁸ Ibid 74 (Barton J).

¹⁹ Cheryl Saunders, 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in Gregory Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books, 1986) 149, 149-50.

²⁰ *Australian Constitution* s 101.

²¹ Michael Coper 'The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731, 733.

²² (1988) 165 CLR 360.

regulations were not laws of a protectionist kind and so did not infringe s 92. This expertise would have also allowed the ISC to investigate the economic impact of all laws related to trade and commerce more effectively than the High Court.²³

It is clear from the text of the *Constitution* that the ISC was meant to play a key role in ensuring that important finance and trade provisions were executed and maintained. The *Wheat Case* has meant that the provisions of Chapter IV have not been realised as intended, and so the effectiveness of these provisions has likely been diminished or delayed.

Further effects on finance and trade

Through its role of constitutional review, it could appear that the High Court has not only protected its own judicial power, but the States as well, often to the detriment of the Commonwealth. In *Peterswald v Bartley*,²⁴ the High Court interpreted s 90 of the *Constitution* (see [Addendum](#)) narrowly, such that a brewer's licence fee was not a duty of excise because it was not imposed at the point of manufacture or production. In doing so, the High Court maintained a revenue base for the States. The consequence of this was to once again undermine one of the main purposes of Federation: the effective operation of a common market. This continued until 1997 when, in *Ha v New South Wales*,²⁵ a bare majority of the High Court found that a licence fee was indeed an excise. For the intervening period (almost a century), not only was the revenue base of the Commonwealth affected due to the denial of exclusivity provided for in s 90 of the *Constitution*, but the operation of an internal free market was being severely undermined. This demonstrates the negative

²³ Coper, above n 21, 745.

²⁴ (1904) 1 CLR 497.

²⁵ (1997) 189 CLR 465.

impact of the High Court's role of constitutional review, where the High Court has unduly limited the legislative power of the Commonwealth.

Mechanisms for “guarding the guardians”

From this small sample of cases, it is evident that the High Court could overstep the bounds of its constitutional review role. Therefore, some mechanisms should be available to “guard the guardians”. Potential mechanisms include amending s 30(a) of the *Judiciary Act*, removing a judge under s 72 of the *Constitution*, and altering the *Constitution* by referendum under s 128.

Amending s 30(a) Judiciary Act 1903 (Cth)

The High Court has acknowledged that its power for constitutional review does not arise from *Marbury v Madison*, but from the provision for s 76(i) of the *Constitution* in s 30(a) of the *Judiciary Act*.²⁶ Section 76(i) is discretionary, in that the Parliament *may* make laws conferring original jurisdiction on the High Court in any matter “arising under this Constitution, or involving its interpretation” (see Addendum). This means that the Parliament could theoretically repeal s 30(a), and in doing so remove the High Court's ability to interpret the *Constitution* and invalidate Commonwealth legislation.

This possibility was raised by the Australian Law Reform Commission (ALRC) in a review of the *Judiciary Act* in 2000, where it was suggested that the High Court's constitutional review role could be diminished by amending s 30(a).²⁷ However, this role was found to be so widely accepted that the option was not even considered as part of the

²⁶ *Work Choices Case* (2006) 229 CLR 1, 101 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

²⁷ Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Discussion Paper No 64 (2000) 46.

review.²⁸ There was even a suggestion that the *Constitution* may impliedly prohibit diminishing the High Court's power through such an amendment.²⁹ While there is evidence that many delegates to the Constitutional Conventions recognised that the High Court would have the power to invalidate legislation,³⁰ there would still need to be some source other than s 76(i) of the *Constitution* if the Parliament is to be unable to revoke that jurisdiction, as suggested by the ALRC. These other sources could include s 71 which sets out which bodies can exercise the judicial power, and s 109 which provides for inconsistencies between State and Commonwealth laws (see [Addendum](#)).

There is an argument that the "judicial power" conferred in s 71 includes the power to invalidate legislation.³¹ However, it appears that the delegates to the Constitutional Conventions did not expressly associate s 71 with judicial or constitutional review.³² Furthermore, s 76(i) alludes to jurisdiction to invalidate legislation and the fact that this provision appears outside of s 71 would suggest that it was not intended that the "judicial power" was to extend to invalidating legislation.³³

Section 109 could be another potential source of this power, where it is accepted that the Court will strike down inconsistent State legislation.³⁴ Although s 109 requires the validity of *State* laws to be determined, s 109 could not be said to provide for the power to invalidate Commonwealth laws. That the High Court assesses whether federal legislation is a

²⁸ Ibid.

²⁹ Ibid.

³⁰ James Thomson, 'Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution' in Gregory Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books, 1986) 173, 194.

³¹ Ibid 194.

³² Ibid 193-4.

³³ Ibid 198.

³⁴ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 6.

valid “law of the Commonwealth” in s 109 matters must therefore be according to its jurisdiction under s 76(i), rather than some separate source under s 109.

The only provision that directly refers to the constitutional interpretation and review role is s 76(i), and s 76 gives the Parliament the discretion to make laws conferring original jurisdiction. This is clearly a grant of legislative power, rather than a constitutional conferral of power.³⁵ As a result, it is clear that the Parliament does have the ability to remove the High Court's jurisdiction for constitutional review completely, if it were to find that the High Court was overstepping the bounds of its role. Yet given the High Court's Chapter III jurisprudence and its history of relying on *Marbury v Madison*, it is not inconceivable that if the Parliament did amend the *Judiciary Act* (which would be an extreme measure in itself), the High Court could take an even more extreme approach and claim that it still had an inherent power to interpret the *Constitution* anyway.

Removal of a judge under s 72

In his speeches on an integrity branch of government, Spigelman CJ referred to the legislature having the “ultimate authority” over the judiciary in its ability to remove judges pursuant to s 72 of the *Constitution* (see [Addendum](#)) for proved misbehaviour or incapacity.³⁶ The concept of integrity involves ensuring powers are exercised for the purposes conferred and in the manner in which they were expected to be exercised,³⁷ so that if a judge were to strike down legislation that was clearly valid, it would be an issue of integrity.

³⁵ Thomson, above n 30, 200.

³⁶ Chief Justice James Spigelman, ‘Jurisdiction and Integrity’ (Speech delivered at the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004)

<http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman050804>.

³⁷ *Ibid.*

However, removal of a judge under s 72 is not a simple task. The greatest difficulty with using removal as a mechanism would be the need to find that a particular interpretation of the *Constitution* or legislation did constitute misbehaviour or incapacity. With this comes the danger of politicisation of the judiciary, calling its independence into question. Even if the politicisation of the removal could be overcome (for example, if there is bipartisan support for the judge's removal), it would be difficult to de-politicise the appointment process for that judge's replacement. Although the provisions of s 72 are viewed as the Parliament having the "ultimate authority", this would not be a successful mechanism to guard against the misuse of constitutional review. It would be unavoidably political, bring the independence of the judiciary into question, and be a reactive mechanism with limited overall benefit. Therefore, while the High Court's check on the legislative arm of government is relatively fast and clean, the legislature's check on the judicial arm is, by comparison, slow and politically difficult.

Altering the Constitution through referendum under s 128

The *Constitution* could be altered under s 128 by referendum (see [Addendum](#)), so as to rectify an incorrect interpretation that has been adopted by the High Court. But the effectiveness of s 128 as a check on the High Court's constitutional review role is questionable. For example, what alterations could be made to remedy the decision in the *Wheat Case*? The High Court has chosen to look to implications from structure rather than the actual text of s 101, so to alter the text may have little effect. Ultimately, the High Court is still interpreting the *Constitution*, and as the few cases discussed in this paper demonstrate, words such as "adjudication" and "excise" seemed sufficiently clear, yet were interpreted differently by the High Court. In this sense, s 128 as a mechanism to guard the

High Court's role of constitutional review may seem futile. This, in conjunction with the great costs involved and historically low success rates, makes alteration by referendum a relatively ineffective mechanism to guard against the High Court overstepping its bounds.

Conclusion

The High Court undoubtedly has impacted and will continue to impact upon the development of the Commonwealth through its role of constitutional review. As a result of the High Court's interpretation of ss 90 and 101 in particular, the powers of the Commonwealth Parliament have been unnecessarily restricted – to the detriment of the operation of a common market, internal free trade and the economic aims of Federation generally.

Of the mechanisms available to “guard the guardians”, those provided for in the *Constitution* (alteration by referendum and the removal of judges) are reactive and slow, and may be of little practical effect. It would seem that the only way to truly “guard the guardians” would be to amend the legislation that gives the judges of the High Court the power to interpret the *Constitution* in the first place – the *Judiciary Act*. However, given the High Court's Chapter III jurisprudence and its tendency to rely on independent sources of power for constitutional review (such as *Marbury v Madison*), this mechanism may also prove to be an inadequate check.

Acknowledgements

This paper was submitted as part of the elective unit LAW441: Politics and the Constitution.

The author wishes to thank Dr Margaret Kelly and the anonymous referees for their helpful comments.

Addendum

Relevant sections of the *Australian Constitution*

Section 71 **Judicial power and Courts**

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Section 72 **Judges' appointment, tenure, and remuneration**

The Justices of the High Court and of the other courts created by the Parliament:

- (i) shall be appointed by the Governor-General in Council;
- (ii) 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;
- (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges) 1977* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

Section 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.

Section 90 Exclusive power over customs, excise, and bounties

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Section 92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Section 101 Inter-State Commission

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Section 109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Section 128 Mode of altering the Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of

Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, ***Territory*** means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.