Australia's Constitutional and Judicial System

Stephen Gageler*

Introduction

Chief Justice Imasaki, Justices of the Supreme Court of Japan, Secretary General Ujimoto, President Tejima, Judges of the High Courts, District Courts and Family Courts of Japan, thank you for welcoming me into your judiciary with warmth and for inviting me to speak.

The topic of my lecture is the Australian constitutional system and the place of the Australian judiciary within that system. The topic is large. My modest aim is to leave you with an understanding of the history and structure of the Australian Constitution and of the role of the High Court of Australia as its national supreme court. In the final part of my lecture, I will speak about how the High Court functions in practice and how it has adapted to technological change.

The history of the Australian Constitution

It is important that I begin by acknowledging that the traditional owners of the land of Australia, Aboriginal and Torres Strait Islander peoples, have had their own laws and customs from time immemorial. The history of which I am qualified to speak began with British colonisation in the aftermath of the American Revolution.

Between the end of the eighteenth century and the end of the nineteenth century, a total of six British colonies were established within the territory that is now Australia: New South Wales, Tasmania, Victoria, Queensland, South Australia and Western Australia. By the end of the nineteenth century, each of these colonies had become self-governing. Each had: (a) its own colonial constitution, deriving legal effect from an Act of the British Parliament; (b) a bicameral legislature, empowered in accordance with the colonial constitution to make laws for the "peace, order and good Government of the Colony"; (c) an executive government, headed by a Governor who was appointed to represent the British Monarch but who in practice acted on the advice of local Ministers who had the confidence of the lower, popularly elected house of the legislature; and (d) a judiciary, at the apex of which was a colonial "Supreme Court".

By the end of the nineteenth century, a popular movement had arisen for these six colonies to unite into a single nation. The movement was not revolutionary but rather evolutionary. The movement was driven by a sense of common destiny and by a desire to enlarge the powers of self-government that had already been granted to the individual colonies. The outcome was the drafting of the Australian Constitution in a series of inter-colonial conventions during the last decade of the nineteenth century. The Australian Constitution as so drafted was approved by the legislatures of each colony as well as by the

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* Chief Justice of Australia. This is a slightly revised version of a lecture given to the Japanese Judiciary at the Supreme Court of Japan in Tokyo on 3 March 2026. Thanks are due to Matthew Traeger, Tristan Taylor and Tiger Lin for their assistance in its preparation.

electors of each colony voting in referenda and was submitted to and enacted into law by the British Parliament.

The Australian Constitution accordingly took its original legal force from having been enacted into law by an Act of the British Parliament known as the *Commonwealth of Australia Constitution Act 1900* (UK), the preamble to which referred to the "people" of the former colonies having agreed to "unite in one indissoluble Federal Commonwealth". The last official act of Queen Victoria before her death was to sign the proclamation under that Act by which the people of the former colonies were "united in a Federal Commonwealth under the name of the Commonwealth of Australia" with effect from 1 January 1901.[1]

So it was that by force of that Act of the British Parliament embodying the agreement and reflecting the aspiration of the Australian people, the then British dominion and now independent nation known as the Commonwealth of Australia came into existence on the first day of the twentieth century. On that day and by legal force of that Act, each former colony was transformed into an Australian "State",[2] the "people" of each State also became the "people" of the Commonwealth of Australia,[3] and the Australian Constitution and laws made by the Commonwealth Parliament under the Australian Constitution became "binding on the courts, judges, and people of every State and of every part of the Commonwealth".[4]

Just as the establishment of the Commonwealth of Australia through the enactment of the Australian Constitution at the beginning of the twentieth century was the product of peaceful evolution, so the change in legal status of the Commonwealth of Australia from a self-governing British dominion to an independent nation during the twentieth century was the product peaceful evolution. The path to independence has been described as "orderly",[5] "gradual"[6] and "incremental",[7] albeit that the path to independence was accelerated by global crises. Independence from Britain was effectively achieved at the national level upon the enactment by the Commonwealth Parliament of the *Statute of Westminster Adoption Act 1942* (Cth). But remnants of Australia's colonial origins remained in the form of residual connections with the States and in the form of anachronistic provision for appeals from Australian courts to the Judicial Committee of the Privy Council in London.

Those vestigial ties were removed in their entirety exactly forty years ago, on 3 March 1986, upon the commencement of the *Australia Act 1986* (Cth), enacted by the Commonwealth Parliament at the request of each State Parliament. The purpose and effect of the *Australia Act* was described in its long title as being "to bring constitutional arrangements affecting the Commonwealth and the States into conformity

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1 Commonwealth, *Commonwealth of Australia Gazette*, No 1, 1 January 1901 at 1.

2 Section 6 of the *Commonwealth of Australia Constitution Act 1900* (UK).

3 Section 3 of the *Commonwealth of Australia Constitution Act 1900* (UK); Commonwealth, *Commonwealth of Australia Gazette*, No 1, 1 January 1901 at 1.

4 Section 5 of the *Commonwealth of Australia Constitution Act 1900* (UK).

5 *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261.

6 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 183; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 398 [2].

7 Kirby, "Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3 *Deakin Law Review* 129 at 136.

with the status of the Commonwealth of Australia as a sovereign, independent and federal nation". I am proud that today is the fortieth anniversary of the formalisation of the legal status of the Commonwealth of Australia as a sovereign, independent and federal nation and I am honoured to celebrate this important anniversary with you.

One aspect of that final severing of colonial ties forty years ago was the termination of the British Parliament as the ultimate source of the authority of the Australian Constitution. The Australian Constitution has since remained binding on the courts, judges, and people of every State and of every part of the Commonwealth not by reason of some higher source of authority but by reason of its autonomous position within the Australian legal system as superior law which prevails over all legislatively enacted law and judge-made law, subject only to the potential for the Australian Constitution to be amended in accordance with the manner and form of constitutional amendment for which provision is made in the Australian Constitution itself. References within the Australian Constitution to "the Queen" – originally Queen Victoria and her heirs – are now understood to be references to the occupier of the constitutional office of the Monarch of Australia, the role and functions of which are in practice exercised by the Governor-General of Australia who is appointed under the Australian Constitution as the Monarch's representative.

Another aspect of the final severing of colonial ties forty years ago was the removal of provision for any appeal from any Australian court to the Judicial Committee of the Privy Council in London.[8] This has allowed for the recognition of a nationally integrated judicial system in Australia with the High Court at its apex and for the emergence through the operation of that nationally integrated legal system of a distinct and nationally uniform body of judge-made law properly understood to be the common law of Australia.[9] I will speak more about the operation of that nationally integrated legal system later.

The structure of the Australian Constitution

I have already referred to the Australian Constitution providing for the creation of a "Federal Commonwealth". That composite expression captures the unique combination of American-style federalism and British-style parliamentarianism which characterises the constitutional system created and sustained by the Australian Constitution.

Mirroring Articles I, II and III of the Constitution of the United States, Chapters I, II and III of the Australian Constitution provide for the establishment of national organs of government comprising a national legislature, a national executive and a national judiciary. Unlike the position under the Constitution of the United States, however, the relationship between the executive and legislative organs of national government is based not on any notion of checks and balances but on the notion of political responsibility of the national executive to the national legislature. Again unlike the position under the Constitution of the

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8 Section 11 of the *Australia Act 1986* (Cth).

9 See Gageler, "Integrating the Australian Judicial System" (2023) 15 *The Judicial Review* 21.

United States, the national judiciary, although separated from the executive and legislative organs of national government, is structurally integrated with State and Territory judiciaries.

Chapter I of the Australian Constitution provides for the legislative power of the Commonwealth to be vested in the Commonwealth Parliament, which is to consist of "the Queen, a Senate, and a House of Representatives",[10] for the Senate to be "composed of senators for each State, directly chosen by the people of the State",[11] and for the House of Representatives to be "composed of members directly chosen by the people of the Commonwealth" and to number "as nearly as practicable, twice the number of the senators".[12] Legislative power is conferred on the Commonwealth Parliament with respect to specified subject matters. The most practically significant of those subject matters are: "trade and commerce with other countries, and among the States",[13] "taxation",[14] "defence",[15] "naturalization and aliens",[16] "corporations",[17] and "external affairs"[18] (an expression which has been interpreted to include the domestic implementation of treaties).

Chapter II of the Australian Constitution provides for the executive power of the Commonwealth to be vested in the Queen and to be exercisable by the Governor-General as the Queen's Representative.[19] It provides for the Governor-General to appoint Ministers, both to administer departments of the executive government and to advise the Governor-General.[20] Each Minister is required to be a senator or a member of the House of Representatives.[21] By those means, Ch II establishes the framework for the functioning of a form of British-style parliamentarianism – long referred to in Australia as "responsible government" – through which the executive government of the Commonwealth of Australia is in practice reposed in a Prime Minister and other Ministers who remain in office and so continue to exercise executive power only if and for so long as they maintain the confidence of the House of Representatives. The "principal design and effect" of Ch II in combination with Ch I is accordingly to ensure that the "actual government … is conducted by officers who enjoy the confidence of the people".[22]

Passing over Ch III for the moment, I turn to Chs IV and V of the Australian Constitution, which deal respectively with the topics of "Finance and Trade" and "The States". The effect of those Chapters, in broad terms, is to continue the constitutions and legislative powers of the former colonies which became

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10 Section 1 of the Australian Constitution.
11 Section 7 of the Australian Constitution.
12 Section 24 of the Australian Constitution.
13 Section 51(i) of the Australian Constitution.
14 Section 51(ii) of the Australian Constitution.
15 Section 51(vi) of the Australian Constitution.
16 Section 51(xix) of the Australian Constitution.
17 Section 51(xx) of the Australian Constitution.
18 Section 51(xxix) of the Australian Constitution.
19 Section 61 of the Australian Constitution.
20 Sections 62 and 64 of the Australian Constitution.
21 Section 64 of the Australian Constitution.
22 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 110 (Sir Maurice Byers QC), quoted in Gageler, "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2009) 32 *Australian Bar Review* 138 at 139.

States subject to limitations expressed in[23] and implied from[24] the Australian Constitution itself and subject to Commonwealth laws prevailing in the event of inconsistency with State laws to render those State laws invalid.[25] A recent illustration of a constitutional limitation on State legislative power is the case of *Vanderstock v Victoria*[26] in which a tax imposed by the State of Victoria on the use of electric and hybrid vehicles was held by a majority of the High Court to be invalid as a duty of "excise" which can only constitutionally be imposed by the Commonwealth Parliament.[27]

Chapter VI of the Australian Constitution contains provision for the Commonwealth Parliament to make laws for the government of any territory surrendered by any State and accepted by the Commonwealth. Pursuant to that power, the Commonwealth Parliament has established two self-governing territories, the Australian Capital Territory[28] and the Northern Territory,[29] each of which is represented in the Senate and the House of Representatives, each of which has its own legislature and executive and its own system of courts with a territory Supreme Court at its apex, and each of which functions for most practical purposes as if it were a State.

Before turning to Ch III of the Australian Constitution, it is appropriate to mention Ch VIII, which prescribes a mechanism for constitutional amendment. The prescribed mechanism for constitutional amendment is stringent. It requires a proposed amendment first to be passed by an absolute majority of each House of the Commonwealth Parliament. The proposed amendment must then be put to the Australian people in a nationwide referendum. In that referendum, the proposed amendment must attain the support of a majority of electors in a majority of States and must also attain the support of an overall majority of electors voting nationally. Attaining that constitutionally required double-majority support has proven difficult in practice. The difficulty has resulted in the Australian Constitution having only been amended eight times in 125 years, despite there having been 45 attempts. The last referendum to attain the constitutionally required double-majority so as to result in a constitutional amendment was as long ago as 1977. Incidentally, it was the first referendum in which I voted, having then recently attained the voting age of 18. And ironically, it was the referendum which resulted in the insertion into the Australian Constitution of a mandatory retirement age for members of the national judiciary to which I am now subject.

The difficulty of achieving constitutional amendment led one of Australia's leading constitutional scholars long ago to declare that "[c]onstitutionally speaking, Australia is a frozen continent".[30] While that observation may be true from the perspective of the constitutional text, it obscures the existence of the

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23 See, eg, ss 90, 92, 114, 115 and 117 of the Australian Constitution.

24 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

25 Section 109 of the Australian Constitution.

26 (2023) 279 CLR 333.

27 *Vanderstock v Victoria* (2023) 279 CLR 333 at 344 [11], 403 [198]-[199], 649 [835], 692 [949].

28 *Australian Capital Territory (Self-Government) Act 1988* (Cth).

29 *Northern Territory (Self-Government) Act 1978* (Cth).

30 Sawer, *Australian Federalism in the Courts* (1967).

vigorous contestation regarding the interpretation and application of the Australian Constitution that has long occurred, and continues to occur, in the High Court and other Australian courts.

The Australian judiciary

That brings me to Ch III of the Australian Constitution, which is headed "The Judicature" and which provides for the judicial power of the Commonwealth to be vested in: (a) the High Court of Australia; (b) such other federal courts that the Commonwealth Parliament creates; and (c) such other (State and Territory) courts as the Commonwealth Parliament invests with federal jurisdiction.[31]

The judicial power of the Commonwealth includes the judicial power that is unique to the High Court and that is exercised by the High Court in its constitutionally conferred appellate jurisdiction. That constitutionally conferred appellate jurisdiction of the High Court includes jurisdiction to hear and determine appeals from other federal courts created by the Commonwealth Parliament, from other courts exercising federal jurisdiction and from any State Supreme Court exercising State or federal jurisdiction whether in civil or criminal matters.[32]

With the abolition of appeals to the Privy Council now exactly forty years ago, the High Court's constitutionally conferred appellate jurisdiction established it as Australia's final court of appeal having ultimate appellate jurisdiction in all matters before all Australian courts.[33] Combined with the doctrine of precedent to which Australian courts adhere, according to which reasons for decision of higher courts are binding on lower courts when deciding subsequent cases, the breadth of that ultimate appellate jurisdiction of the High Court has resulted in the emergence of the distinct common law of Australia to which I earlier made reference.[34] The law as ultimately declared by the High Court in its reasons for decision is the law that is binding on all other Australian courts subject only to constitutional or valid legislative alteration.

The judicial power of the Commonwealth also includes the judicial power that is exercised in the original federal jurisdiction that is conferred on the High Court directly by the Constitution[35] or that is conferred on the High Court and other federal and State courts by legislation enacted by the Commonwealth Parliament.[36] The most important categories of original federal jurisdiction involve: matters in which the Commonwealth is a party;[37] matters in which certain remedies are sought against an executive or judicial officer of the Commonwealth to restrain them from acting unlawfully, to compel them to perform a statutory or constitutional duty or to restrain them from exceeding a statutory or constitutional

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31 Section 71 of the Australian Constitution.
32 Section 73 of the Australian Constitution.
33 Mason, "Swearing in of Sir Anthony Mason as Chief Justice of the High Court" (1987) 162 CLR ix at x.
34 See, eg, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 562.
35 Section 75 of the Australian Constitution.
36 Sections 76 and 77 of the Australian Constitution.
37 Section 75(iii) of the Australian Constitution.

limitation on their power;[38] matters arising under the Constitution;[39] and matters arising under laws made by the Commonwealth Parliament.[40]

The Commonwealth Parliament has created a number of federal courts. The three that currently exist are the Federal Court of Australia, and Division 1 and Division 2 of the Federal Circuit and Family Court of Australia. The Federal Court was created in 1976.[41] It has since become a court of general federal civil jurisdiction,[42] while also hearing certain federal criminal matters.[43]

The ability of the Commonwealth Parliament to confer federal jurisdiction on State courts and now also on Territory courts has been extensively utilised. Most federal criminal offences in Australia are prosecuted in State and Territory courts vested with federal jurisdiction.[44] State and Territory courts also routinely exercise federal jurisdiction when deciding civil matters including any matter in which a claim is made or a defence is raised based on the application of a Commonwealth law or any matter involving a dispute between residents of different States. This ability of the Commonwealth Parliament to confer federal jurisdiction on State and Territory courts has in turn been understood to imply that State and Territory courts must meet minimum standards of independence and impartiality such as to make them no less fit to be repositories of the judicial power of the Commonwealth than federal courts created by the Commonwealth Parliament.[45] Hence, it has been explained that Ch III "provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth"[46] in which State and Territory courts have a status under the Australian Constitution which surpasses their status merely as State and Territory courts.

Two further aspects of the Australian constitutional system should be highlighted in explaining the position of the integrated judicial system within that constitutional system.

The first is that the Australian Constitution was framed on the assumption of the rule of law, often associated with the great American case of *Marbury v Madison*[47] and often also associated with the writings of the nineteenth century British constitutional scholar Albert Venn Dicey. The rule of law as understood

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38 Section 75(v) of the Australian Constitution.

39 Section 76(i) of the Australian Constitution.

40 Section 76(ii) of the Australian Constitution.

41 *Federal Court of Australia Act 1976* (Cth).

42 Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth). See also Allsop, "The Role and Future of the Federal Court within the Australian Judicial System" in Ridge and Stellios, *The Federal Corut's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 7 at 10.

43 See, eg, s 67G of the *Judiciary Act 1903* (Cth); Weinberg, "Federal Indictable Offences: Has the 'Autochthonous Expedient' Run its Course?" in Ridge and Stellios, *The Federal Corut's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 308 at 317-8, discussing the Federal Court's jurisdiction in relation to cartel offences.

44 Commonwealth Director of Public Prosecutions, "Determining the Appropriate Jurisdiction" (National Legal Direction, May 2024) at 1.

45 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 101-103, 114-116, 127-128, 143; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424-425 [40], [42].

46 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 102.

47 (1803) 1 Cranch 137.

and applied in Australia has two principal elements. The first is the understanding that "all power of government is limited by law": Commonwealth, State and Territory executive power being limited by Commonwealth, State and Territory legislation, and legislative and executive power both being limited by the Australian Constitution. The second is that "[w]ithin the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies".[48]

The second aspect of the Australian constitutional system that should be highlighted is the absence of a Bill of Rights. This was not the result of oversight or neglect but of a deliberate choice by the framers of the Australian Constitution at the end of the nineteenth century to put their faith in the democratic process, according to which any law of the Commonwealth Parliament that might affect the rights of individuals was to be enacted through a parliamentary process which required the majority assent of both the House of Representatives and the Senate, each of which was constitutionally required to be directly chosen by the people. "The great underlying principle" of the Australian Constitution has repeatedly been explained to be "that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[49]

This absence of a Bill of Rights has not prevented the judicial implication of limitations on Commonwealth, State and Territory legislative and executive power by reference to the text and structure of the Australian Constitution. One such limitation of considerable practical importance is the implied freedom of political communication which has been explained to be necessary to ensure free and informed electoral choice.[50] Another such limitation, which has been explained to derive from the separation of judicial power from legislative and executive power and the conferral of judicial power exclusively on courts, is the inability for punishment to be imposed on an individual other than as the result of a sentence imposed by a court in consequence of a finding of criminal guilt.[51]

The High Court in practice

Having spoken about the role of the High Court within the Australian constitutional system, I now speak about how the High Court functions.

I start with personnel: the Justices. When the High Court was established in 1903, there were three. The number of Justices was expanded in 1906 from three to five and in 1912 from five to seven. The number has remained at seven since then (apart from a period from 1933 to 1946 where legislative amendment, as a result of economic downturn following the Great Depression, reduced the number of

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48 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

49 Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) at 329.

50 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

51 *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 16-19 [36]-[39], 17-18 [41], 18-19 [45]; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

Justices to six) and remains at seven today. The population of Australia in 1912 was approximately 4.5 million. The population of Australia is now approximately 27.5 million. The workload of an individual Justice of the High Court, to say the least, has increased.

The career of the modern High Court Justice typically follows a common path. In most instances, a High Court Justice is appointed from the Federal Court of Australia or from the Supreme Court of a State. Before becoming a judge of such a court, the Justice normally would have spent a long period practising as an advocate. Unlike judges in many other countries, it is rare for judges in Australia to be appointed soon after finishing legal studies. The standard formal requirement for a person to be appointed as a judge of an Australian court is that the person has been a legal practitioner for at least five years. In fact, most judges are appointed after having been a legal practitioner for at least 20 years and after having established a substantial practice as an advocate.

I turn now to location. Since its creation in 1947 the modern Supreme Court of Japan has always sat in Tokyo. The High Court of Australia from the time of its establishment in 1903 until the opening of the High Court Building in Canberra in 1980 had no fixed address. The practice of the High Court, instituted by its first Chief Justice, was for the Justices to maintain chambers in their home cities and for the High Court to travel on annual circuits to State capitals where Justices would typically be accommodated in State Supreme Court buildings with the consent of the State Supreme Court judges who were temporarily displaced.[52] Purpose-built buildings were constructed for the High Court in Sydney in 1923 and in Melbourne in 1928. Split in that way, the High Court as a national institution had no single national physical presence. The practice of sitting on circuit in State capitals had the upside of maintaining contact with State judiciaries and State-based legal professions. The absence of a permanent seat of the High Court had the downside of failing to foster a national institutional identity.

The seventh Chief Justice of Australia set out to change all of that. His ambition was to see the High Court housed in a single dedicated building located within the parliamentary triangle at the seat of government of the Commonwealth of Australia in Canberra within the Australian Capital Territory. The project came to be embraced by the executive government of the Commonwealth, and the High Court building was opened in 1980. Following the opening of the High Court building in Canberra, the pattern became for the High Court to sit for two weeks of the month in 10 months of the year. The Full Court would continue to go on circuit most years to State capitals for a few sitting weeks per year. With the exception of the years affected by the outbreak of COVID-19, this practice has endured. In 2024, the High Court spent a week in each of Darwin, Adelaide, Melbourne and Hobart. In 2025, it went on circuit for a week to both Perth and Melbourne. In 2026, it will return to Adelaide and will also visit Sydney. The High Court otherwise continues to sit in Canberra. The Justices reside in their home cities, and fly to Canberra for sitting weeks.

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52 See Gageler, "When the High Court Went on Strike" (2017) 40 *Melbourne University Law* 1098.

I turn now to the work of the High Court. That work is most easily explained by reference to its jurisdiction. I have already mentioned that the High Court has general appellate jurisdiction and also original jurisdiction.

Since 1984, appeals from other Australian courts have been able to be brought in the general appellate jurisdiction of the High Court only if the High Court has first been persuaded on application to exercise its discretion to grant special leave to appeal.[53] The exercise of that discretion has turned on considerations which have included whether the interests of justice require the High Court's consideration of the judgment to which the application relates and whether the proceeding to which the judgment relates raises a question of law of public importance or in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to state of the law.[54]

These considerations bearing on the High Court's discretion to grant special leave to appeal have given "greater emphasis to its public role in the evolution of the law than to the private rights or interests of parties to the litigation".[55] The last of them, in particular, is a reflection of one of the systemic advantages of having a court of final appeal in a judicial system that adheres to precedent. The advantage lies in the ability of the court of final appeal to cut through the muddle that will from time to time come to exist through the accumulation of irreconcilable precedents in one or two or more lower courts of coordinate jurisdiction.[56] An example occurred as recently as last year, when we were asked to determine which of two divergent streams of authority was correct as between the Court of Appeal of the Supreme Court of New South Wales and the Full Federal Court of Australia in relation to notice requirements in class action proceedings.[57]

For matters within its original jurisdiction, the High Court has since 1976 had a broad power to remit those matters to be determined by other Australian courts[58] subject always to the possibility of appeal to the High Court if special leave to appeal is later granted. The power has been routinely exercised. The result is that, with some exceptions,[59] the exercise of the original jurisdiction of the High Court is in practice confined to matters of national significance arising under the Australian Constitution. Matters of that nature typically proceed in the original jurisdiction of the High Court by a procedure known as a "special case" according to which the parties agree the relevant facts and state questions of law for the opinion of the Full Court of the High Court.[60]

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53 See s 35(2) of the *Judiciary Act 1903* (Cth), as amended by the *Judiciary Amendment Act (No 2) 1984* (Cth).

54 See s 35A of the *Judiciary Act 1903* (Cth).

55 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218.

56 Gageler, "Integrating the Australian Judicial System" (2023) 15 *The Judicial Review* 21 at 33.

57 See *Lendlease Corporation Ltd v Pallas* (2025) 99 ALJR 834.

58 Section 44 of the *Judiciary Act 1903* (Cth), as amended by the *Judiciary Amendment Act 1976* (Cth).

59 See, eg, a qualification to the High Court's remitter power in s 476B of the *Migration Act 1958* (Cth); *Plaintiff M27/2025 v Minister for Immigration and Multicultural Affairs* (2025) 99 ALJR 1495 at 1498 [2].

60 See r 27.08 of the *High Court Rules 2004* (Cth).

The High Court is constituted as a Full Court when it hears and determines special cases in its original jurisdiction, when it hears and determines appeals, and when it determines applications for special leave to appeal. Typically, the Full Court of the High Court as constituted for the hearing and determination of an appeal or special case comprises three or five Justices or all seven Justices depending on the importance of the matter. The hearing is always in public and will typically last a day, with judgment typically being reserved and delivered between three and six months later. Special leave applications are now generally determined, usually without an oral hearing, by the Full Court constituted by all seven Justices of the Court.

In 2025, the Full Court of the High Court decided a total of 53 cases: 39 were in appellate jurisdiction and 14 in original jurisdiction. Of those 53 cases, 27 were determined by a Full Court constituted by seven Justices, 22 were determined by a Full Court constituted by five Justices and 4 were determined by a Full Court constituted by three Justices. In 2025, the Full Court handed down 305 "dispositions", largely being the determination of applications for special leave to appeal. The vast majority of those were matters determined by all seven Justices.

The High Court's embrace of technology

Like most courts throughout the world, the High Court adheres strongly to tradition. That does not mean that the High Court has been slow to embrace technological change to improve access to justice.

In 1995, funded by an infrastructure grant from the Australian Government, the Australasian Legal Information Institute (AustLII) was launched as an online platform providing free access to legal information – including legislation, treaties and court decisions. The first significant case law database to become freely available on AustLII comprised past High Court judgments, and since 1995, all new High Court judgments have been freely available on AustLII immediately from the date of their publication. The High Court's special leave dispositions are also published on AustLII, and the transcript of any hearing before the High Court is usually posted the day after that hearing concludes. Since the inception of AustLII, other free legal databases have been established, and the High Court has also adopted the practice of publishing each of its judgments on its website.

Easier reference to these electronically published judgments has been facilitated by the High Court's introduction of medium neutral citations and paragraph numbering in 1998. Medium neutral citations list the case name, the year, an abbreviation of the court name, and the judgment number for that year. To my knowledge, the High Court's first judgment of 1998, *The Queen v Swaffield* [1998] HCA 1, was the first case to be published with a medium neutral citation anywhere in the world. Now, all Australian courts follow this practice, and it has also been adopted in many other jurisdictions.

In 2013, the High Court began publishing full audio-visual recordings for hearings before the Full Court in Canberra. These have usually been uploaded to our website within a week of the hearing and have been available to the public free of charge.

In 2020, the High Court changed its court document filing process to an online electronic system – called the Digital Lodgement System ("DLS"). Through the DLS parties now file documents by simply uploading them via the online portal. The documents are then accepted for filing by the High Court Registry and distributed to each of the Justices' chambers, as either electronic copies or hard copies depending on the Justice's preference. Filed documents are available to the public to inspect, subject to any orders for confidentiality or suppression.

Later in 2020, like many other courts in many other countries, the High Court was prompted to undertake further technological innovation in response to COVID-19. The practical effects of the pandemic and related travel restrictions meant that it became unworkable for the High Court to conduct hearings in-person in Canberra. The Court adapted. It heard cases remotely for a significant period: parties would appear via Audio Visual Link ("AVL"), and each of the Justices would join via AVL too from their respective chambers in their home cities. I do not think I am the only Justice who has expressed the view that court hearings are best conducted in-person. Aspects of effective advocacy are lost through screens, and it becomes more difficult for the Court to have a meaningful dialogue with counsel. As a result of this, the Court returned to in-person hearings for matters before the Full Court when the risks of COVID-19 were at bay. But the lasting impact of that period is that we continue to conduct some hearings via AVL – in particular, this practice is adopted for procedural hearings before single Justices. This saves parties the expense of needing to travel for hearings which may only last for a short duration. The effective and proportionate use of court resources is better served through appreciating the positive impact technology can have on our court proceedings.

One measure which the High Court has not implemented, but which has been implemented at the Federal Court and State Supreme Court level in Australia for some cases of public importance, has been the live streaming of hearings. This is something the High Court is currently contemplating. On the one hand, live streaming further improves access to justice. On the other hand, risks of inadvertent disclosure of confidential information and the impact upon counsel from their being viewed by possibly thousands of people need to be considered. We will think carefully before making a decision.

The latest step in the advancement of technology is, of course, generative artificial intelligence. Since the launch of the first widely popularised and freely accessible generative AI model in 2022, the use of generative AI within the legal profession in Australia has increased significantly. Australian courts have been more cautious, recognising that the potential gains in efficiency from the use of AI need to be weighed against a range of risks to the administration of justice. A report of the Victorian Law Reform Commission published just last month recommended the development of guidelines to support the safe use of AI by judicial officers. The recommendation, in broad terms, was that the guidelines should prohibit the use of

AI for judicial-decision-making but should clarify that the prohibition on AI use for judicial decision-making is not intended to encompass supportive uses of AI.[61]

That timely recommendation accords with internal guidelines adopted also last month by the Justices of the High Court for the purpose of experimental testing to assess the utility of generative AI to the work of the High Court. The High Court's own guidelines restrict the use of generative AI to a single AI tool that has been assessed to meet the High Court's stringent requirements for security and confidentiality. The guidelines prohibit the use of that AI tool for the purpose of drafting the substantive reasoning of judgments and for any task that substitutes for judicial discretion or independent analysis. They permit Justices and staff to use the AI tool for purposes such as summarising lengthy documents and undertaking preliminary research. The experimental testing of the AI tool is expected to commence this month. No doubt, the guidelines will be revisited and refined as the testing proceeds. Where the testing will lead, I cannot predict.

Conclusion

A former Justice of the High Court of Australia once described the Australian Constitution as being "a small brown bird" in comparison to the "soaring eagle" that is the United States Constitution.[62] Perhaps the Australian Constitution is more like a Green Pheasant, nurturing as well as protecting the body politic.

For all its modesty, the Australian Constitution has provided an enduring framework for the national government of one of the world's most stable democracies. By the Australian Constitution, the High Court is entrusted with the guardianship of Australian constitutional values, which centrally include democratic participation, and with ultimate responsibility for the maintenance of the rule of law in Australia. The effective performance of this solemn constitutional duty requires constant reflection and awareness of the impact of technological and social changes. It benefits greatly from engagement with judiciaries in comparable democracies. I have learned much already from the experiences, practices and perspectives of the Japanese judiciary. I look forward to learning more over the course of this week.

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61 Victorian Law Reform Commission, "Artificial Intelligence in Victoria's Courts and Tribunals" (Report, October 2025, tabled in the Parliament of Victoria in February 2026) at xx, 190, 211, 217.

62 Keane, "In Celebration of the Constitution" (Speech delivered to the National Archives Commission, 12 June 2008) at 1. See also Arcioni and Stone, "The Small Brown Bird: Values and Aspirations in the Australian Constitution" (2016) 14 *International Journal of Constitutional Law* 60.

Q&A Session with the Japanese Judiciary

Question from Judge AMANO Kenji of the IP High Court:

In a rapidly changing society driven by new technology and diverse values, balancing competing interests is becoming highly complex. How should the judiciary strike the balance between the stability of legal precedent and the urgent need to adapt to the times? Furthermore, how should the court deliberate and reach a judgement on issues where public values are deeply divided? We would greatly appreciate your perspective on the ultimate role of the judiciary in such an unpredictable era.

Chief Justice Gageler's answer:

You have asked the hardest question first. I believe that the judiciary performs a vital role in society. That is a very narrow role.

I think it is important that the judiciary first recognises the very limited role that it properly performs in a democratic society. It is primarily devoted to the resolution of disputes about legal rights and legal duties between citizen and citizen and between the citizen and the state. It performs that role through traditional methodologies that emphasise fairness and neutrality and that emphasise adherence to legal principle that has its roots in history and tradition and in deeply held democratic values and values of human rights. It is important that the judiciary itself clings to these values, and stays narrowly within its own lane.

Separately and of equal importance is that the public is able to appreciate that the judicial role and the law put into practice by the judiciary is fundamentally different from politics. I think that this is the greatest challenge for our time, being able to explain or demonstrate to the public by what we do and how we do it, that what we do is very different from what politicians do. How that is achieved, I think, has become more and more difficult with changes to technology since the advent of the internet with echo chambers and polarisation and rapid communication and reinforcement of extreme ideas.

I strongly believe that what the judiciary needs to do is to keep behaving in a traditional way. And what it needs to focus on, I believe, is maintaining the respect of the public and the other branches of government that it will always adhere to legal principle, that it will always act fairly, and that it will always act with the utmost integrity. Given that there will always be, in any case, a winner and a loser, the judiciary will be doing its job not when everyone is happy but when everyone is confident that the judiciary will behave in that way and only in that way.

Question from Judge MIZOGUCHI Junya of the Kumamoto District Court:

In Japan, legal apprentices are appointed to judges without prior experience of lawyers, but judges are provided opportunities to gain experience outside the courts as lawyers or administrators. What is the strength of the judiciary predominantly sourced from the bar as in your country?

Chief Justice Gageler's answer:

This question, as I understood it, relates to the strengths, perhaps the strengths and relative weaknesses of having a judiciary that is appointed from the bar as distinct from a judiciary which, like yours, is a career that one engages in having chosen it straight after becoming a qualified lawyer. I think there are some very big differences and some surprising similarities.

The surprising similarity, which I only became aware of in discussions over the last day or so, is that even though as a career judge, you will become a judge as a very young person, very soon after graduating from law school, in practice you will not preside as a judge for maybe 20 years. I understand that's what happens.

20 years is about the period of practice that one would expect of a legal practitioner in my country before becoming a judge. The reality is that when you start to take responsibility for the exercise of judicial power, you are a person of similar maturity and similar experience in Japan to what we expect a person who becomes a judge in Australia will be.

Typically, in Australia, a judge of a superior court, here I'm speaking of the Federal Court of Australia or a State Supreme Court, will be appointed in their early 50s. Some will be older, very few will be younger. They will be appointed with 20 or 25 years of legal practice behind them. That legal practice will almost always be private legal practice as a member of the independent bar.

I was surprised by the difference in statistics in Japan from Australia. You are a country of about 127 million people. I think I was told you have about 47,000 legal practitioners. We are a country of about 27.5 million people. We have 100,000 legal practitioners. Of those, most are solicitors and about 8,000 barristers.

The barristers are the specialist advocates, and typically they are highly qualified as advocates but also deeply learned in the law. They traditionally have been the source to which the executive government has looked in making judicial appointments, so most judges will be drawn from that relatively small pool of highly qualified advocates. That means that when they become judges, they are very familiar with court processes as well as being very knowledgeable about the content of the law. They come having 20 or 25 years in legal practice, which means they come with many scars. They come knowing and having experienced many wins and many losses. They come with a sense of balance. And when they join the bench, because there is this fairly close relationship between the practice of law as a barrister and the judiciary in superior courts who are always seeing barristers appear before them, there is perhaps a greater sense, than

in many countries, of a constructive relationship between the senior members of the bar, the senior advocates and the court. They are all engaged in a single pursuit of the interests of justice.

Of course, the barristers are appearing for their clients. They are seeking to advance their clients' interests always. There is never any doubt about that, but it's always within a framework of great respect for the system and a sense of trust between the judiciary and the members of the bar.

Therefore, if I'm going to talk about the strength of the system, I think it is that connection that exists between the advocates, certainly the senior advocates, and the judiciary. The sense of trust that is engendered is one of the great strengths of our system. The advocates and the judiciary perform different functions, but they are combined together in the pursuit of justice. I'm happy to take any follow up questions on that. But that's what I think is the strength.

Question from Judge UENO Gen of the Osaka Family Court:

About 10 years ago, I studied in Australia for 1 year, and I was very much welcomed by local people. I want to take this opportunity to express my appreciation.

Currently in the world, also in Japan, we are suffering from labour shortage issue. It is getting more serious. In Japan, the society is aging and birth rates are declining. As a result, in attracting young people as workers, there is competition with private companies. We are facing a labour shortage not only of judges but also of court clerks or staffs. I would like to know whether in Australia you have the same labour shortage issue, and if so, what kind of initiatives you are undertaking in order to solve this problem.

Chief Justice Gageler's answer:

The question is about legal shortages or the lack of attraction of a legal career or a judicial career for young judges in an aging society. I think I can honestly say, that is not a problem that I perceive us experiencing in Australia. We have an aging population as well. It is not yet for us as large a problem as it is for Japan.

For the young lawyers, in Australia, who are looking perhaps in the long term to become judges, there are, I perceive, a lot of opportunities. There are many very bright young lawyers who are choosing a career as a barrister, enthusiastically embracing that in their late 20s or early 30s, probably when people would be just joining your judiciary. These young people in Australia are choosing to become barristers, and I think that the competition to join the bar is fiercer now than it was when I joined in the late 1980s. Therefore, I don't think we have that problem. I hope we don't develop that problem. At the moment, I see very bright young people, far brighter than I ever was, becoming barristers and they'll make very fine judges when they have more experience.

Question from Judge YAMADA Yoko of the Yokohama District Court:

In the near future, artificial intelligence might be able to provide logical judgments more cheaply and efficiently than humans. Given that possibility, what do you believe are the irreplaceable values that human judges and human courts can offer to society, and what qualities and capabilities should judges cultivate in order to deliver that value? I would be very interested in your thoughts on the role and significance of judges in the age of AI.

Chief Justice Gageler's answer:

I think this is the second most difficult question to be asked. And my difficulty is that I know a lot about judging but I don't know very much about AI, although I have really sought earnestly to understand it.

I fear that there is very little that the judge does that AI cannot do better. There is a famous description of law by Sir Edward Coke, the great Lord Chief Justice of England who had to confront James the First of England, who, as King, decided that he could judge disputes between his subjects as well as could his judges. The King's argument was that law was just reason, and that he, as King, had reason as much as any judge, and that he could do the job just as well. Lord Coke had to explain "No, Your Majesty. Law is artificial reason, and only with deep learning and long experience can the artificial reason of the law be brought to bear on disputes." And His Majesty, said Lord Coke, "although very wise in human affairs, did not appreciate this artificial reason."

Now that always struck me as a very stylized but adequate explanation of the nature of legal reasoning as distinct from ordinary human reasoning. I think artificial intelligence is artificial reasoning on stilts. I think that it is likely to produce more predictable, equally learned, if not more learned, and fair outcomes than human judges. This is my true fear.

What is it that a human can bring to the process that artificial intelligence will not be able to bring to the process either now or in two years? I don't think there's very much, but I think there is something that is really more important in criminal law than in civil law. My prediction is that civil law practice will probably be overtaken by artificial intelligence very soon. But I think in criminal law there is something about the vulnerability, the identification, the humanness of the subject matter, or the object or the person who is to be subjected to criminal liability. I can't articulate it particularly well but there's something fundamentally important about the person who is making the decision that somebody else is to be deprived of their liberty for what they have done being a person who could equally be deprived of their liberty if they did the same thing. I think there's something fundamentally important about a human subjecting another human to punishment.

Question from Judge WATANUKI Shota of the Sapporo District Court:

About ten years ago, I also had a chance to study at the University of Sydney. I learned that, both in federal jurisdiction and state jurisdiction of Australia, ADR is much used including in private sectors. If you have noticed any recent change with the use or operation of ADR, would you please share it with us?

Chief Justice Gageler's answer:

Of course, in my jurisdiction, alternative dispute resolution does not exist. We only exercise judicial power. I sometimes wish it would be an option to send to a mediator or an arbitrator an issue coming before the High Court, but it is not possible.

In commercial courts in Australia now, alternative dispute resolution is always considered as an option. Most commercial courts, in here I include the Federal Court of Australia and in particular the Supreme Courts of NSW, Victoria and Queensland, have dedicated commercial lists where matters coming before the court will be assessed at an early stage by a judge to determine their suitability for possible mediation or arbitration. I do not follow the practices very carefully but I think the point has been reached where mediation and arbitration are not always considered appropriate for the resolution of commercial disputes, but they are always considered at the pre-trial stage by the managing judge and in appropriate cases, the matter will be dealt with by a referral to arbitration and sometimes mediation. Of course, quite separately from the court system, there is a thriving private market for mediation and arbitration in Australia.