

THE OXFORD
COMPANION
— • TO THE • —

HIGH COURT OF AUSTRALIA

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In any event, while *Rowell & Muston* established that the seat of government must be a 'place', the Court has remained unable to determine its precise location, and has usually sidestepped the issue. Though Windeyer agreed in *Rowell & Muston* that the seat of government is a 'place, a locality', he also recalled his earlier view in *Spratt v Hermes* that it means 'a capital city'. As such, he said, it 'has never been taken to mean a precise area of the earth's surface delineated by metes and bounds, any more than has a seat of learning, meaning a university town, or a place described as the seat of a bishop'. He conceded that 'a power to make laws with respect to a place, if it be understood as a power to make laws for the conduct of people in that place, does postulate that the place can be precisely defined', but did not see this as a problem—since 'the seat of government, however it be spatially measured', would in any event be covered by legislation under section 122. The majority in *Svikart* noted again that the limits of the seat of government 'have not been precisely determined by the Parliament'; and that it is neither 'co-extensive with the Territory in which it is located nor, under s 125, is it intended to be'. In *Eastman*, this prompted Solicitor-General David Bennett to argue that the phrase 'seat of government' is after all 'non-geographical', referring only 'to the national capital, *qua* capital'.

In *Spratt v Hermes*, Menzies concluded 'that if there can be no seat of government of the Commonwealth unless and until some portion of the Australian Capital Territory has been specified as such by the Parliament, then there is at present no seat of government of the Commonwealth'. Given the apparent equanimity with which the Justices have accepted the indeterminate boundaries of the seat of government, and even its uncertain metaphysical status, one might wonder whether this matters. Yet the Court has insisted that the seat of government is important to the federal system. In *Spratt v Hermes*, after holding that section 52(i) did not extend to 'laws for the government of the Capital Territory', Windeyer added: 'That does not mean that the Capital Territory has not a special position in the polity of Australia. It has, for within it lies the seat of government.' In *R v Smithers; Ex parte Benson* (1912), Griffith and Barton saw freedom of movement as an inherent right of citizenship in a federation—in part because, as the United States Supreme Court held in *Crandall v Nevada* (1868), it includes 'the right to come to the seat of government'. In *Pioneer Express v Hotchkiss* (1958), where the Court upheld legislation preventing an interstate bus service from setting down passengers at Canberra, the judgments nevertheless acknowledged the special status of the ACT, and the need for unrestricted access to the federal capital. No one, said Dixon,

would wish to deny that the constitutional place of the Capital Territory in the federal system of government and the provision in the Constitution relating to it necessarily imply the most complete immunity from State interference with all that is involved in its existence as the centre of national government.

Yet the Court agreed that this was not the occasion to explore such a doctrine; judicial acknowledgment of the special position of the seat of government has not in fact had any special effect.

Barwick's reasoning in *Spratt v Hermes*—using the application of section 75(v) of the Constitution to decisions taken in the seat of government to exclude the conclusion that Chapter III does not apply in the territories—is perhaps an exception. In August 1999, when motorists passing the Indonesian Embassy repeatedly honked their horns in protest at violence in East Timor, it was suggested that, if prosecuted, they might invoke the constitutional freedom of political communication as a defence; and that idea, too, might gain weight from the fact that such protests are commonly directed to national embassies at the seat of government.

If the seat of government—whether as 'place' or as 'metaphor'—is of special constitutional significance, what is the significance of the directive that the High Court be 'at' the seat of government? Advocates of its location there, from Patrick Glynn to Barwick, have stressed its symbolic significance (see *Circuit System; Canberra, Court's move to*). The strong insistence on open court, and perhaps the Justices' general tolerance of litigants in person, might reflect the theme of citizen access to federal institutions sounded in *Re Smithers; Ex parte Benson* and *Pioneer Express v Hotchkiss*. Yet the Court's endorsement of a requirement of special leave to appeal as a restriction on access (see *Smith Kline & French Laboratories v Commonwealth* (1991)) may point in a different direction.

In any event, the Court's inability to define 'the seat of government' leaves it unclear whether the directive for its own location has been fulfilled. Perhaps the ambiguity reflects the confusion, in a system of responsible government, between 'parliament' and 'government'. The arguments in *Eastman* assumed that the 'seat of government' must at least include the precincts of Parliament House. Yet perhaps, if 'government' means 'executive government', the focus should be on Government House—the place where the Governor-General, as the Queen's representative, 'sits'. In that event, the High Court building may simply be in the wrong place.

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Further Reading

JQ Ewens, 'Where is the Seat of Government?' (1951) 25 *ALJ* 532
Bernard Sugerman, Letter to the Editor (1973) 47 *ALJ* 344

Seniority. The Chief Justice is the most senior Justice. The *High Court of Australia Act* 1979 (Cth) provides that the other Justices—the *puisne Justices*—have seniority according to the dates of their commissions. Where two or more Justices have commissions with the same date, their relative seniorities are set out in their commissions. This was the case when Toohey and Gaudron were appointed on the same day in 1987 (Toohey was senior).

On only one other occasion has more than one *puisne Justice* been appointed on the same day: when the first appointments were made, in 1903. At that time, the relevant provision (in the *Judiciary Act* 1903 (Cth)) provided that, where the commissions did not make it clear, the relative seniorities were determined by the order in which the Justices took their judicial oaths. The commissions of the first two *puisne Justices* (Barton and O'Connor) did not set out their relative seniorities. No doubt it was understood that Barton would be the senior *puisne Justice*, and he took his oath before O'Connor.

The most senior available Justice acts as Chief Justice during the Chief Justice's absence from Australia, or if the Chief Justice is unable or unavailable to perform the duties of the office, or when a vacancy in the office occurs.

The Justices' seniority has its only substantive application when a **Full Court** is evenly divided in its opinion (see **Tied vote**). Normally, the Court's decision is that of the majority of Justices. However, if the Court is equally divided when exercising its original **jurisdiction**, the Judiciary Act provides that the Court's decision is that of the Chief Justice or, in his or her absence, that of the senior Justice present. (If the Court is equally divided when exercising its appellate jurisdiction, the general rule is that the decision appealed from is affirmed.)

The Chief Justice, or the most senior puisne Justice, presides over hearings and sits at the centre of the Bench. The seating of the other Justices is determined by their seniority (see also **Etiquette**). The most senior Justice after the presiding Justice sits on his or her right; the next most senior sits on the presiding Justice's left; the next sits two places to the presiding Justice's right; and so on. The recognition of this order of seniority was taken to extreme lengths by the practice of court officers in handing documents up to the bench in a zig-zag fashion, sequentially from the most senior to the most junior. Documents are now distributed in a slightly less complicated way, though it still takes account of seniority: documents are handed first to the Chief Justice (or presiding Justice), then to the next most senior Justice and all Justices on that side of the presiding Justice, and then to the next most senior Justice and all Justices on the other side. When judgments are handed down, the court officer still collects the judgments in the zig-zag way.

If separate reasons for judgment are given, they are published and reported in order of the seniority of the most senior Justice who joined in those reasons. When joint reasons for judgment are given or later referred to, the names of the Justices who joined in those reasons are listed in order of seniority.

Six of the eleven Chief Justices have been appointed from the High Court Bench. Each was the senior puisne Justice at the time of his appointment, though there is no statutory impediment to the appointment of any puisne Justice as Chief Justice, regardless of seniority.

JAMES POPPLE

Separation of powers. The Australian Constitution incorporates, as one of its basic elements, a separation of federal legislative, executive, and judicial powers. The High Court has held that this doctrine is implied from the text and structure of the Constitution, in particular from the words of sections 1, 61, and 71 and the nature of Chapters I, II, and III. The Court has also elaborated the constitutional constraints that flow from the separation of powers. As a result, the Court has had a profound impact on the functions, and general design, of a number of institutions of federal government. In turn, the separation of powers has played a major role in shaping the functions of the High Court and its Justices.

Despite some earlier references to the separation of powers, the Court, led in this respect by Isaacs, first clearly recognised and applied the doctrine in the *Wheat Case* (1915). There, it was found that only Chapter III courts (the

High Court, federal courts created by Parliament, and courts invested with federal jurisdiction) could validly exercise the **judicial power** of the Commonwealth. On the facts of the case, this meant that the **Inter-State Commission**—dealt with in sections 101–104 of the Constitution—could not be empowered to issue an injunction, or other judicial remedy, in aid of its determination that a law of **trade or commerce** had been breached. Predictably, the *Wheat Case* hindered the activities of the Commission, contributing to its effective abolition in 1920 after a mere seven years of existence. Three years after the *Wheat Case*, in *Alexander's Case* (1918), the Court found that the other major federal tribunal envisaged by the **framers**—the Commonwealth Court of **Conciliation and Arbitration**—had not been validly established as a federal court because its President did not have **life tenure** in accordance with section 72 of the Constitution, as that section (as it then stood prior to its amendment in 1977) was interpreted by a majority. Thus, under the separation doctrine it could not validly discharge the judicial function of enforcing industrial awards.

The effect of these two cases was to ensure that courts, including the High Court, retained control over the exercise of federal judicial power. The proposition that only Chapter III courts can exercise federal judicial power is commonly described as the 'first limb' of the separation of federal judicial power. The 'second limb'—that the Commonwealth Parliament cannot ordinarily invest Chapter III courts with legislative or executive functions—was recognised by the High Court in the *Boilermakers Case* (1956) in a judgment generally attributed to **Dixon**. Once again, the institution immediately affected was the Court of Conciliation and Arbitration. In 1926, the Commonwealth had purportedly restructured the Arbitration Court as a federal court with judges appointed for life. It was empowered to exercise judicial and non-judicial functions, and in fact did so for the next 30 years. However, the holding in the *Boilermakers Case* that these functions had been invalidly combined meant that the Commonwealth was thenceforth required to maintain two separate institutions to administer its system of industrial arbitration: a non-court tribunal to participate in the quasi-legislative function of making industrial awards, and a Chapter III court to enforce those awards. This divided system, which at times has been strongly criticised, remains in place today.

The *Wheat Case*, *Alexander's Case*, and the *Boilermakers Case* indicate that, from its earliest days, the High Court was concerned to ensure that the judicial power of the Commonwealth was exercised independently and impartially by bodies meeting the traditional description of a court. The fact that enforcement of this principle disturbed settled institutional arrangements—or, in the case of the Inter-State Commission, undermined the viability of a body expressly contemplated by the Constitution—was no impediment. Admittedly, the *Wheat Case* and *Alexander's Case* also had the effect of protecting the High Court, and Chapter III courts generally, from challenges to their authority posed by rival institutions such as the Inter-State Commission at a time when governments were actively experimenting with quasi-judicial tribunals. However, whether the Court was influenced by these considerations is entirely speculative; there is no reason to suppose that the Court, in recognising