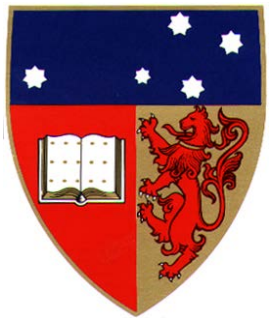

Emmanuel College

THE UNIVERSITY OF QUEENSLAND

Jurisdiction and Power: The Language of the Law

By

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David Jackson QC was educated at the Marist College, Ipswich and the University of Queensland (BA, 1963; LLB, 1964). After serving (1963-64) as Associate to Justice Harry Gibbs in the Supreme Court of Queensland, he was called to the Queensland Bar in 1964 and practised there (QC, 1976) until 1985 before becoming a Judge of the Federal Court (1985-87). Following his resignation from that office he moved to the Sydney Bar in 1987, where he has since practised as the leading silk on constitutional issues. In 1985-87 he was Chairman of the federal Constitutional Commission's Advisory Committee on the Australian Judicial System, and in 1995-98 a member of the Judicial Commission of NSW. A Major in the CMF Australian Intelligence Corps (1959-71), he was also created (1979) Knight of the Sovereign Military Order of Malta. He has published numerous articles on constitutional and other legal topics.

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JURISDICTION AND POWER: The Language of the Law

A. INTRODUCTION

It is a privilege to be invited to deliver this lecture tonight. I was Sir Harry's Associate for two years in 1963 and 1964. As a young barrister I appeared before him in the Supreme Court of Queensland. Later I appeared before him many times in the High Court and I saw him regularly in the seventeen years after he retired. He was a great man. I learnt much from him.

There are many differing meanings of the terms "jurisdiction" and "power", but the words, in a variety of contexts, convey concepts that are at the heart of our legal system, both nationally – the topic with which I shall deal principally – and internationally. Let me give two examples.

Australians are great international travellers. However, as we leave the aircraft and move towards the customs and immigration officers of another country – persons armed with coercive powers (and sometimes actually armed) – we can no longer rely on the familiarity and relative safety of our own country. We are out of the jurisdiction; we are in another jurisdiction, and are subject to its laws.

When we have arranged to leave for a Mediterranean idyll in early July and are served with a notice for jury service for the month starting 15 July, we ask "Does the court have *power* to require us to be there?"

It is a topic which I have selected because questions of jurisdictions and power arise acutely in relation to the work of the High Court, of which Sir Harry was for so many years a member. They arose particularly during that period of office, in relation to matters such as:

(a) whether the High Court could entertain challenges to the legislation enacted after double dissolution of the Parliament in the Whitlam years, on the basis that the requirements of s.57 of the *Constitution* had not been complied with;
(b) the problems caused by giving *exclusive* jurisdiction to the new federal courts – the Federal Court of Australia and the Family Court of Australia – in particular matters; and
(c) the relationship between the remnant Privy Council jurisdiction and that of the High Court of Australia.

But, of course, questions of jurisdiction and power arise in courts and tribunals at every level, and arise every day.

I shall first, and briefly, say something about jurisdiction in international law. After that I shall go in more detail to the position in our domestic law.

B. INTERNATIONAL LAW

Jurisdiction in this context is the power of a sovereign nation to affect the rights of those within it by legislation, or by action of its executive government or by judgments of its courts. The concept is connected with notions of territory and independence. It is why we are warned not to take drugs into countries which may have severe penalties for doing so. It is why the Australian government can only make representations to Indonesia in respect of the fate of persons like Shapelle Corby and the young man Rush. Or to China in the case of those caught up in economic offences.

The concept of "jurisdiction" lies at the heart of any discourse of international law. Involved in it, as I have mentioned, is a concept of territory, a concept of an area the subject of dominion by that nation, or group of nations, as in the case of the European Union.

There is a further spatial element. The jurisdiction of a nation in this sense, as one might expect, extends to its internal waters and to its lakes and rivers, and also bays and gulfs. Sometimes, however, bays and gulfs can be very wide and questions can arise whether the whole of the gulf is part of the territory of the adjacent country. Questions can arise also in relation to the waters in the vicinity of archipelagos as in Indonesia or the Philippines, or island chains, as in the Solomons.

Maritime nations also have seas adjoining them – I recognise the tautology – and their own warships, or vessels engaged in trade or fishing or recreation pass through them, as do such ships of other countries. It is necessary to have laws to regulate matters such as navigation, pilotage, pollution and public health. And also to deal with crimes committed on those vessels, or in relation to them, such as piracy.

One feature which gained acceptance in the 19th century was that each nation had jurisdiction over its adjacent territorial sea, an area of three nautical miles from shore. Later agreements have extended the maritime nation's jurisdiction to various further distances for a variety of purposes, such as oil drilling, fisheries, and for determining when immigrants fall within Australian jurisdiction.

In the event the resolution to these issues tends to be dependent on the extent of agreement or acceptance by other nations. Sometimes that involves force. One may think we are beyond the days of "send a gunboat up the Irriwaddy" but the current North Korean provocations demonstrate the extent to which territory is dependent on the ability to protect it and the lack of desire of others to challenge it. Another instance is Kashmir, a dispute which has gone on for 60 years. Soon it will be challenging the duration of the Schleswig-Holstein Question, which went on for so long that people forgot what the question was, or at least what it had originally been. And, as Oliver Wendell Holmes said in 1917: "The foundation of jurisdiction is physical power."

I have spoken so far of jurisdiction in the international sense without distinguishing between legislative, executive and judicial powers. One does need to bear in mind that not every other nation has the division of these powers as we have. In some there may be arrest and detention for long periods without bail. And there may be detention for civil matters. We should, however, not always assume that our system is better. A prominent Brisbane barrister had a friend who was a Swiss lawyer. The Swiss lawyer was told about a three car collision case which had taken a week to try in the Queensland Supreme Court. "Why didn't the policeman on the scene work out who was at fault?"

One area where there has been significant development is in the establishment of international *courts*, having jurisdiction over disputes between nations, such as the International Court of Justice, and also the establishment of courts which can deal with crimes against humanity of various kinds such as the International Criminal Court, or enforce international laws, such as the courts of the European Union.

C. OVERLAP

An area where there is an overlap between jurisdiction in the international law sense, and jurisdiction in the domestic law sense is that a nation has power to make laws regulating the conduct of all persons within Australia, but also the conduct of Australians outside Australia.

Thus Australia can legislate to make it an offence for Australians to engage in sexual acts with children in Thailand, but there may be difficulties in enforcement. Unless the offender comes back to Australia or Australia has an extradition treaty allowing compulsory extradition to Australia, the law cannot be enforced.

Jurisdiction in Australian courts is also capable of being conferred by international agreement, or treaty. Judgments of foreign courts may be enforced against Australia if there is an agreement between Australia and those countries or, if there is no agreement, upon a common law doctrine of recognition.

D. DOMESTIC LAW

We can speak of jurisdiction in the sense of legislative power, as divided between the Federal and State legislatures. Or as relating to the division of powers between the Houses of the bicameral Parliaments. But I want to speak of jurisdiction in relation to *courts* in Australia. It is in this context that one sees, and sees consistently, the use of the terms "jurisdiction" and 'power".

Sometimes they are treated as synonymous. More accurately, however, "jurisdiction" refers to the capacity of a court to entertain and decide upon, a matter. "Power" refers to the things which a court may do in the exercise of that jurisdiction. For example a court may only be able to award damages for breach of contract but lack power to grant an injunction to restrain further breaches or to grant specific performance.

E. HIERARCHY

We live in a federation: there is jurisdiction which is federal and jurisdiction which is State.

Also, courts operate in a hierarchy, and the ambit of the jurisdiction of those courts depends on their place in the hierarchy. Take the State courts. There is a Supreme Court. The *Constitution,* the High Court held, requires it. It will have jurisdiction in civil matters and in criminal matters. There are likely to be two State courts directly below the Supreme Court, the District (or County) Court, and the Magistrates Court. Each will have a jurisdiction in civil matters and in criminal. There are likely to be money limitations on the cases in which each has civil jurisdiction. There will be limitations on the criminal offences which can be dealt with, and sometimes limitations on the types of relief which can be granted. Sometimes there will also be limits on the types of claims which may be brought. Sometimes there will be specialist courts dealing with particular matters, and having jurisdiction limited to those matters, such as the Planning and Environment Court.

Sometimes a court's power to do things may arise from a statute; sometimes under the general law. Much more of our substantive law is statutorily based than was the case 50 years ago. But the question of jurisdiction (or power) is always lying in the background. "How do I, or how does the Court, get jurisdiction (or power), to entertain this case or make this order?"

It was a question which fell frequently from Sir William Mack, a Judge of the Supreme Court (and later Chief Justice) in the 50s and 60s. He was a very intelligent man but did not have quite the same enthusiasm for work, particularly if it coincided with the affairs of the Queensland Turf Club. He was a very hard man, in a style which one does not much encounter today. When I was an Associate I once saw him make a barrister of more than 20 years experience cry in the Court of Criminal Appeal. (Perhaps "Mack" was abbreviated from Machiavelli. Or perhaps his ancestor had been washed up from the Armada, having previously been with the Inquisition.)

One of his amusements was to ask young barristers how he had jurisdiction to do X or Y. If they had trouble responding, the case could be adjourned until they returned with the right answer. A favourite question was in relation to motions for probate when the executor was "outside the jurisdiction", say in Tweed Heads. We all knew the answer, "Section 32 of *The Probate Act of 1867*". But one young barrister did not. He said, taking a punt – not a bad one but wrong – "It's in the Supreme Court Rules, your Honour", which it wasn't. "Which rule" – "I just don't have it with me, your Honour." "Use my copy", handing it to him. And so the torture went on. The young barrister moved to interstate.

I have digressed. One then has the question of appeals. Rights to appeal are creations of statute. There is no jurisdiction to hear an appeal unless the jurisdiction

is conferred by statute. And the ambit of the right to appeal is only that conferred by statute. Thus an appeal may be restricted to appeal on the ground of error or mistake in law, or want of jurisdiction or failure to exercise jurisdiction on the part of the court appealed from, but not to appeals or errors of fact.

Leave to appeal may be required to be obtained in particular cases, for example where the amount involved does not exceed a certain amount, or where the appeal is not from a judgment finally disposing of the matter, but from an interlocutory decision, ie. a decision in the course of the matter.

The three eastern States, and Western Australia, have now permanent Courts of Appeal. Present and former members of the Queensland Court of Appeal are here tonight. Constantly the cases before them involve questions such as:

> "Where did the judge below get power to make this order, or that?"
> "Where does the right to appeal come from in this case?"
> "What order should we make if we allow the appeal? Can we simply reverse the judgment, or should we order a new trial."

There is an appeal to the High Court of Australia by special leave of that Court. I shall come to it.

F. FEDERAL JURISDICTION

Until federation, Australia consisted of six self-governing colonies of the United Kingdom. What is now the Northern Territory was a Territory of the Colony of South Australia.

Each colony had its legislature and its judicial system. The judicial systems were most often at three local levels – a Supreme Court the numbers of which sat either as trial Judges or as members of a Full Court hearing appeals, a District or County Court, and Magistrates or Justices of the Peace. In some Colonies there was no District/County Court. There was also an appeal to the Privy Council.

Federation brought with it a need for re-adjustment of jurisdictions. Now there were to be legislatures having legislative power over the same areas of Australia - the new Commonwealth Parliament and the Parliament of the former Colony, now a State.
Some legislative powers were vested exclusively in the Commonwealth – the seat of government, the territories, Commonwealth places, transferred public service departments. And importantly, the power to impose duties of excise. Some were withdrawn from the States, eg. s.92 prevented the States from interfering with freedom of trade, commerce and intercourse among the States.

Apart from that, s.51 gave the Parliament of the Commonwealth legislative powers on specific topics concurrent with those of the States but if there was inconsistency

between a law of the Commonwealth and a law of the State, the law of the State became invalid (ie. inoperative) to the extent of the inconsistency.

Federation, however, did not only affect the legislatures. There was also the question of federal judicial jurisdiction, because Federation threw up new jurisdictional issues, such as:

(a) Would there be federal courts?
(b) Would State courts be able to decide questions in which the new Commonwealth was suing or being sued.
(c) Should provision be made for cases where the parties were residents of different States?
(d) What courts would decide cases involving federal laws, or involving issues arising under the new *Constitution*.

The solutions adopted owed much to the United States Constitution.

There was established a concept - the "judicial power of the Commonwealth". It was to be vested in a new court, the High Court of Australia, and in other federal courts which the federal Parliament might create and in such other courts as it might invest with, as it put it, "federal jurisdiction".

As time has passed the courses set out in the *Constitution* have been followed. The High Court of Australia was established in 1903. The courts of the States have been invested with federal jurisdiction. This has been called the "autochthonous expedient". Federal courts, large in numbers, have been established – the Federal Court of Australia, the Family Court and the Federal Magistrates Court. Their roles, and jurisdiction, are provided for by statute. There is, of course, an issue as to the future position of the Federal Magistrates Court.

I will not attempt to set out in detail the subject matter of federal jurisdiction, but may I mention one important constitutional provision which deals directly with issues of jurisdiction. It is s.75(v), ie. matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Mandamus is a remedy designed to compel exercise of a power where there has been a failure to do so when called upon. Prohibition is a remedy designed to restrain an exercise beyond power. The Federal Court has also been given power to issue these writs.

Writ of mandamus and prohibition were at federation and for years thereafter described as "prerogative writs". But time changes usages as well as meaning. "Prerogative writs" came to be disused in favour of "s.75(v) relief" and now the usage has become "the constitutional writs". The "language of the law" is capable of change.

G. HIGH COURT OF AUSTRALIA

As I have mentioned, one of the features of the *Constitution* was the provision for the High Court of Australia.

With the passage of time and various legislation including the *Australia Acts* of the 1980s, the position of the High Court has become established. It is the final appeal court for all cases, constitutional or otherwise, in Australia. It also has an original, ie. non-appellate, jurisdiction in constitutional and other federal matters. In fact that is exercised only in relation to constitutional issues, such as the electoral decision of a week ago.

Many of the cases instituted in the High Court's original jurisdiction are inappropriate for the nation's highest court, for a variety of reasons. The High Court has power to remit those matters to other courts in the judicial hierarchy.
It can do so with some enthusiasm. Quite some years ago now when Sir William Deane was a member of the High Court, there was a directions hearing in a matter in the High Court in which I was engaged. Leading counsel for the other side was my namesake David Jackson QC. (I call him "the imposter", because he is younger. What he calls me I would prefer not to know.)

In the minutes before the Judge came in, we mused about how he would distinguish between us – "Mr Jackson on the left", "Mr Jackson on the right" – and other more amusing possibilities or would he just say "counsel for the plaintiff" or "counsel for the defendant". In fact he scurried in, said "The appearances of counsel are noted. This matter will be remitted to the Federal Court of Australia. The Registrar will draw up the usual order. Costs will be costs in the cause." And scurried out. You will all have heard of the *audi alteram partem* rule – "you must hear the other side" – but he heard neither.

The High Court is the final court for Australia. There is no appeal from it. But also there is no appeal *to* it, unless it grants special leave to appeal. That means that whilst ordinarily speaking a jurisdiction is to be exercised, the High Court can choose whether to entertain a matter and thus exercise jurisdiction. That is a characteristic of final courts of appeal, such as the Supreme Court of the United Kingdom and the Supreme Court of the United States. It means that those courts can decide on the pace of change, and the legal areas in which change may occur. It is an important power.

If the High Court decides to grant special leave to appeal it does not give reasons. But if it refuses special leave it gives short reasons. They usually include phrases like:

(a) An appeal would not enjoy sufficient prospects of success to merit the grant of special leave – (Roughly translated: "The court below was right".)

(b) Without endorsing the reasoning of the courts below, the actual result arrived at is not sufficiently attended by doubt – ("The court below got it right, but probably for the wrong reasons".)
(c) The case is not a suitable vehicle for the determination of the issue which the applicant seeks to raise – ("Good point, wrong case.")
(d) The case does raise an issue of sufficient public importance to merit the grant of special leave – ("Not worthy of us.")

H. SOME ASPECTS OF JURISDICTION

I turn to a number of aspects of jurisdiction and power in courts.

First, what are the *types* of dispute which courts are to have jurisdiction to decide? Are they empowered to entertain and decide every difference of view which occurs in society? Are they to resolve whose turn is it to walk the dog on a cold morning, or to decide whether someone was served out of order at dinner tonight?

As one might expect the answer is "no". There are categories of cases which are treated as "non-justiciable". They include decisions as to the internal workings of Parliament, intergovernmental agreements and many forms of family or interpersonal disputes.

Secondly, parties cannot by their agreement confer on courts a jurisdiction to hear and determine matters which they would otherwise not have. They can confer on arbitrators power to decide disputes, or give a person the power to determine which of two views is correct, but they cannot confer jurisdiction *on courts* by consent.

Thirdly, there are restraints on attempts to relitigate issues already decided by courts in litigation between the same parties or their privies. There are principles of *res judicata* and issue estoppel and what which is called *Anshun* estopplel which prevent:

(a) relitigation of a matter already decided by a judgment – *res judicata*
(b) attempting to obtain a different decision on an issue (of factor or law) essential to an earlier decision – issue estoppel
(c) raising in new litigation an issue which was not but could, and should, have been raised in that litigation – *Anshun* estoppel.

In criminal proceedings there are pleas of previous acquittal or conviction, or double jeopardy.

Again not every matter which a court has jurisdiction to entertain will be heard fully by that court. Where there are similar proceedings between the same parties in other courts, the action may be stayed.

The *third* feature is that conferral of jurisdiction by statute is both a grant of power to act and a limitation on the ambit of that power. Judicial acts outside the power so conferred will be either a nullity or can be set aside on appeal. Refusal to exercise a jurisdiction can also be set aside and performance compelled.

The body on which jurisdiction is conferred is, in the absence of statutory power to do otherwise, required to exercise the power itself – *delegatus non potest delegare.* The person to whom any office or duty is delegated cannot devolve the duty on another, unless lawfully authorised to do so.

Sometimes a jurisdiction is conferred in relatively general terms, but little guidance given as to the manner of its exercise. The principle then applicable is that when anything is authorised to be done by law, or especially if it is required by law to be done, and it would not be possible to do it without doing something not expressly authorised, the power to do that something else will be supplied by necessary intendment.

Let me say something more about criminal cases.

At say the time of Federation, many civil cases were heard by judge and jury. So too were the more serious criminal cases, ie. trials on indictment. There are now very few civil cases tried by jury, generally speaking. They remain more popular in Victoria. But in criminal cases juries remain, in the case of offences which are serious. They are prosecuted on indictment.

If an offence being prosecuted on indictment is an offence against a law of the Commonwealth, the trial *must be* by jury: s.80 of the Constitution. Some of the States allow an election to dispense with a jury, and have a Judge alone try it. That cannot be done in federal jurisdiction.

The requirement of s.80 that there be trial by jury also gives rise to questions about the composition of a jury in federal matters. Is it the same as in 1901 – a jury of 12, no majority verdicts, no reserve jurors and – as once was faintly suggested – no women?

The conduct of criminal cases is, of course, quite different from that of civil litigation. The burden of proof lies in the prosecution in criminal cases, the standard of proof is beyond reasonable doubt and the accused is under no obligation to give evidence.

The meaning of the term “beyond reasonable doubt”, and the directions to be given occasioned much debate in years gone by. Many supposed synonyms existed.

Judge RF Carter of the Queensland District Court used to tell juries "A reasonable doubt means a doubt founded on reason. Not wild speculation or a desire to avoid an unpleasant duty". (He had been Chief Crown Prosecutor.)

After some time the High Court said that the best thing was not to try to define it at all. Those were ordinary English words. They needed no explanation to the jury. But as Justice Helman would tell you, this created its own difficulties.

A young and enthusiastic defence counsel in a case before him addressed the jury saying: "As his Honour will tell you, the Crown must prove its case beyond a reasonable doubt. Not just up to. Not even equal to. But BEYOND". It was a little difficult to sum up to the jury in relation to that, without falling foul of the High Court's views.

One feature which is now emerging is an increasing reliance on civil penalty provisions. They are commonly seen in the corporations and trade practices legislation, and in relation to enforcement proceedings by ASIC and ACCC. They may result in the imposition of a penalty, but the procedure is civil in nature. They have historical antecedents but the dual nature creates its own difficulties.

I. CONCLUSION

This has been a rambling disquisition, but the point I wish to make is that the concepts of "jurisdiction" and "power" permeate the legal system. They are products of the hierarchical nature of it, and of the different sources of legal power. They are the way in which the legal system speaks.

Could I conclude by giving an example of the difference between jurisdiction and power. Sir Charles Powers, an early Justice of the High Court of Australia, was not highly regarded for his legal talents. During his term of office other members of the Court were said to complain that a relatively high proportion of the Court's work was within jurisdiction but *ultra vires* – "beyond Powers".

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