

## **2016 PPL Notes<sup>i</sup>**

Includes:

1. Manner and form
2. Extra-territoriality
3. *Boilermakers* and the Separation of Powers
  - a. Note that exceptions to the first limb (detention) is not thoroughly explored
4. *Brandy* and the Indicia of Judicial Power
5. *Persona designata* and the second limb
6. *Kable* and State Courts
7. Avenues of Review
8. Freedom of Information
9. Cases (NOT exhaustive)

Manner and Form	
Provision must refer to the 'Constitution, powers, or procedure of the Parliament of the State' s 6 <i>Australia Act 1986</i> ; <i>West Lakes Ltd v SA</i>	
Double-entrenched	

Types: Special majority of Houses of Parliament, or a referendum (majority of electors)

'Manner and form requirements exist to entrench legislative provisions so that if a future Parliament wishes to change the law, it must do so in the relevant manner and form set down. For a provision or legislation to be effectively protected, it must refer to the 'Constitution, powers, or procedure of the Parliament of the State' (s 6 *Australia Act 1986*; *West Lakes Ltd v SA*), and it must be double-entrenched to prevent Parliament from repealing or amending the entrenching section and thus avoid its requirements.

Here, the provision/legislation does/does not concern the Constitution, State powers, or the Parliament. Furthermore, it is/is not double-entrenched. Thus, it is/is not effectively entrenched according to manner and form requirements.'

### Extra-territoriality

'When interpreting legislation, it is presumed that the statute does not intend to legislate extra-territorially (*Jumbunna Coal Mine NL v Victorian Coal Miners' Association*). This is displaced by... . *Australia Acts 1986* (Cth) provides authority for States to legislate extra-territorially in s 2(1). This permits Parliament to enact... . However, there must be a 'sufficient nexus' between the subject matter of the legislation and the State (*Pearce v Florenca*; *Union Steamship*). [Residence and domicile is a sufficient nexus. (*Broken Hill South Ltd v Commissioner of Taxation (NSW)*).]

Therefore, the [application of the law] in this situation is valid/invalid, because there is/is not an intention to legislate extra-territorially, and there is/is not a sufficient nexus between the subject matter of the legislation and the State.

## **Boilermakers and the Separation of Powers**

<b>Boilermakers Limbs</b>	
1 – ‘The Federal judicial power of the Commonwealth can only be exercised by a Chapter III court.’	2 – ‘Chapter III courts can only exercise Federal judicial power.’

‘The separation of powers, while drawn from the Constitution, is not expressly mentioned within it. It was invented by the courts, and articulated in *Boilermakers*. Its primary purpose is to prevent any one person or body from wielding all power, and thus to avoid potential abuses of power.

The reasoning employed by the majority in *Boilermakers* to justify the separation of powers is, firstly, that the text and structure of the Constitution makes it clear that judicial power cannot be exercised except under conformity with ss 71-80. Secondly, since the judiciary’s role in Federal government includes the ultimate responsibility to keep the government accountable and controlled, no other body can exercise Federal judicial power. This reasoning led to the rise of the two limbs of *Boilermakers*:

- (1) Federal judicial power of the Commonwealth can only be vested in a Chapter III court.
- (2) A Federal Chapter III court cannot be vested with anything other than Federal judicial power, or powers incidental to the exercise of Federal judicial power.’

### **Relevant cases**

<i>Luton v Lessels</i>	Child support case. Valid: Not judicial power – regards <i>future</i> rights and obligations; not binding and authoritative, appeal <i>de novo</i> permitted.
<i>TLC Airconditioner (Zhongshan) v Judges of the Federal Court</i>	Not judicial power. <ul style="list-style-type: none"> <li>- No sovereign authority</li> <li>- Not binding and authoritative</li> </ul>
<i>Thomas v Mowbray</i>	Control order valid: <ul style="list-style-type: none"> <li>- Room for discretion and reasonableness ‘great test of the common law’</li> <li>- May be in line with defence power</li> <li>- (Despite balance of probabilities rather than beyond reasonable doubt)</li> </ul>
<i>Liyanage v The Queen</i>	Not permitted <ul style="list-style-type: none"> <li>- Retrospectively creating crimes, redefining them and removing a right to trial by jury</li> <li>- This would create a precedent</li> <li>- Legislature cannot amend the laws to obtain a prosecution in Sri Lanka</li> </ul>
<i>Polyukhovich v The Queen</i>	Retrospective legislation is permissible <ul style="list-style-type: none"> <li>- Still allows courts to exercise discretion and judicial process</li> </ul>
<i>Lim v Minister for Immigration, Local Government and Ethnic Affairs</i>	Detention permissible as there are limited exceptions (non-punitive) <ul style="list-style-type: none"> <li>- Remand in custody pending judicial hearing</li> <li>- People suffering from mental illness or seriously infectious diseases</li> <li>- Contempt of Parliament</li> </ul> <i>Not closed.</i>
<i>Kruger v Commonwealth (Stolen Generations Case)</i>	Detention valid. <ul style="list-style-type: none"> <li>- Non punitive</li> <li>- Consequence not to be considered: only intention</li> <li>- Detention may be authorised by legislation and not the Court (if non-punitive)</li> </ul>
<i>Behrooz v Department of Immigration</i>	Detention valid <ul style="list-style-type: none"> <li>- Conditions are not a factor in determining whether detention is punitive</li> </ul>
<i>Al Kateb v Godwin</i>	Detention of a stateless asylum seeker – valid – Non-punitive purpose