

SEPARATION OF JUDICIAL POWER: DEFINING JUDICIAL POWER

Boilermakers

Limb One

The **judicial power** of the Commonwealth can **only be vested in a Ch III Court** (including State courts vested with federal judicial power under s 77(iii))

- Only a Chapter III court can exercise judicial power
- Includes Federal Court of Australia
- Not a Ch III court if no mention of **s 72** appointment, not called a court etc

Limb Two

A federal Ch III court cannot be vested with anything other than federal judicial power

Is the Power Validly Conferred on that Body?

1. What is the nature of the power?
2. To which body is the power given?
3. Apply the Boilermaker limbs to determine if it is valid

1. What is the nature of the power – judicial or executive?

In accordance with the first limb of **Boilermakers**, only a Ch III court can exercise judicial power.

Difficulty arises in attempting to formulate a comprehensive definition of judicial power' (**Brandy**)

Accordingly, the court identified indicia of judicial power.

Indicia (Indicators) of Judicial Power

<p>Power Derived from a Sovereign Authority (Huddart Parker)</p>	<p>Means the body making the decision must have the power to make the decision by the actual law of the Parliament. → Not binding and authoritative as it was not 'binding of its own force' but required exercise of judicial power to enforce (TLC Air Conditioner)</p>	
<p>A Controversy About Existing Legal Rights and Duties 'A Matter' *ESSENTIAL*</p>	<p>The creation of new rights will not satisfy this element (Luton v Lessels) → s 75 and s 76 deal with the jurisdiction of the federal courts in respect of matters. Must be resolving a matter. Note: the court is a passive institution. They will not actively seek out disputes (Alexander Hamilton). The matter must call upon them to take action. (Huddart v Parker) → Requirement of a matter is reinforced In Re Judiciary and Navigation Acts IF THERE IS NO MATTER THERE IS NO JUDICIAL POWER</p>	
<p>Inter Partes</p>	<p>The decision of the court will be reached with the parties present. They will be represented before the court and their submissions to the Court will be heard.</p>	
<p>Binding and Authoritative Decision *ESSENTIAL* (Huddart v Parker)</p>	<p>Essential element of the judicial process is to resolve a matter → so need a binding and authoritative effect to actually enforce. Note the decision may be subject to appeal. → The right to an appeal de novo will make a decision not binding and authoritative as it is essentially a new hearing (Luton v Lessels). A strict appeal is more limited – you cannot submit new evidence, you can only attempt to find a legal error made by the previous decision maker.</p>	
<p>Performed in a Judicial Manner</p>	<p>Appropriate Level of Judicial Discretion → Discretion must be exercised according to legal principle, not by reference to matters not specified by the legislature (R v Commonwealth Court of Conciliation and Arbitration) → Note discretion need not be removed from</p>	<p>In Accordance with Judicial Process R v Trade Practices Tribunal: Ascertainment of the law as it is, determination of the facts as they truly are, application of the law as determined to the facts as determined.</p>

the judicial process (*R v Commonwealth Industrial Court*), but it **must not be of an arbitrary kind** and must be **governed by some ascertainable tests or standards** (*R v Spicer*)
 Test with an objective standard = discretionary as it is bounded by the common law (*Thomas v Mowbray*)

-Result: Binding and authoritative decision (Not exclusively judicial attributes)
 Further: *Nicholas v The Queen*
 -Ensure equality before the law
 -Impartial and Independent ascertainment of the law

Chameleon Powers

Some powers may be **judicial or executive**. Their nature **depends on the body** in which it is reposed (*Re Dingjan*)

Common Elements

A Controversy About Existing Legal Rights and Duties 'A Matter'
 Ascertaining the law, determining the facts and applying the law to the facts
 Reaching a Decision

Beyond these common elements, the chameleon power will **take on the character of the body that it is reposed.**

Given to a Court

- Judicial process
- Rules of evidence
- Binding and enforceable decision (subject to appeal)

Given to a Tribunal

- Flexible procedure
- Not bound by rules of evidence (often)
- Not binding**, must be enforced by Court Action
- Subject to judicial review

Advantages of a Tribunal

- Flexible, as more adapting to changing circumstances than the court.
- Speedy and efficient
- **Avoids onerous nature of s 72 tenure.** A judge will have tenure until they are 70, so if you need a number of determinations to be made **in a short time** there is an advantage in choosing a tribunal. Appointing judges for a shorter period also indicates flexibility.

Disadvantages

- **No guarantee of independence and impartiality** in decision making, as judges do not enjoy the security of tenure guaranteed under **s 72** of the Constitution. So members may be less independent.
- Deviating from the strict nature of judicial process means the **same degree of fairness may not be evident.**

Brandy

Indicia of Judicial Power: It is **difficult to frame an exhaustive definition of judicial power** and almost impossible to point to any essential or constant characteristic. *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 373; *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245, 267

Brandy considered first limb of *Boilermakers* – issue whether binding and authoritative?

Held - that ss of 25 of the Racial Discrimination Act 1975 purported to vest judicial power in the Commission contrary to Ch III of the Commonwealth Constitution and hence were invalid.

Authority – binding and authoritative unless subject to appeal de novo. Indicates **if a power is binding and authoritative it must be judicial. Repugnant to first limb of Boilermakers and therefore invalid by attempting to vest judicial power in a body that is not a Ch III court.**

Brandy considered bodies which are not courts (i.e. executive) vested with judicial power

found INVALID

The facts are found on 252-253 (also bottom of 265)

pages 267-269 of majority judgement are the most important bits

THE SEPARATION OF JUDICIAL POWER: APPLICATION AND EXCEPTIONS

Application of:

Boilermakers First Limb: 'The **judicial power** of the Cth can **only be vested in a Ch III court** (including state courts vested with federal judicial power under s 77(ii))'

Consequences

Legislative Usurpation – Parliament attempting to exercise judicial power

- Unusual in practice
- Must **protect even small encroachments** of the parliament attempting to exercise judicial power as smaller encroachments can lead to larger ones (*Liyanage v The Queen*)

WILL AMOUNT TO LEGISLATIVE USURPATION:

- **A bill of attainder** (punishment by death) or **bills of pains and penalties** (punishment by lesser means) **infringe** the separation of judicial and legislative power as substitutes a legislative judgment of guilt for the judgments of the court exercising federal judicial power (*Lim v Minister for Immigration*)
- Parliament attempting to **interfere with the process of the judiciary by retrospectively amending laws to achieve a desired outcome** will amount to legislative usurpation (*Liyanage v The Queen*)

WILL NOT AMOUNT TO LEGISLATIVE USURPATION:

- Parliament can **apply criminal laws retrospectively** without an infringement of judicial power as they are prescribing the law and changing the standard that is applicable to an individual's conduct, but it is still the Court who will determine if there has been a breach of the law (*Polyukhovich*)

Detention

GENERAL PRINCIPLE: the **involuntary detention** of a citizen in custody by the state is penal or punitive in character and, under our system of government, **exists only as an incident of the exclusively judicial function** of adjudging and punishing criminal guilt (*Lim v Minister for Immigration*)

→ *The Migration Act* now requires an **unlawful non-citizen** who is present in the migration zone without a valid visa **must be detained**. There is **no discretion** exercised in this choice, it is determined by the parliament.

→ It is therefore **inconsistent with the principle that detention is exclusively judicial**.

EXCEPTIONS:

- If detention is to ensure that a **person accused of a crime is available** to be dealt with by the courts (*Lim*)
 - Essentially, to ensure the smooth function of the judicial process
- Involuntary detention in cases of **mental illness** or **infectious disease** as it is imposed by the legislature to protect the community, not as punishment of the courts (*Lim*)
- Parliament can punish for **contempt of Parliament** (*Lim*)
- Military tribunals may punish for **breach of military discipline** (*Lim*)
- Detention for a **legitimate, non-punitive purpose** can be authorised by legislation (*Kruger v Commonwealth*)
 - **Negative consequences** of detention will not make it punitive, it is the intention that is important
 - **Harsh conditions** will not make a non-punitive detention punitive (*Behrooz*)
 - Detention will not be punitive just because it **violates an international obligation** (*Woolley*)
 - Detention will not be punitive even if it were **indefinite** (*Al-Kateb v Godwin*)
- As long as the purpose of the detention is not to punish detention can be authorised via legislation

Exceptions to the First Limb of Boilermakers

- The delegation of **judicial functions to administrative officers** of the courts is permissible, providing it is limited and subject to the review of the courts (*Harris v Caladine*)
- Parliament may punish for **contempt of Parliament** (*Australian Constitution s 49*)
- Military Tribunals can punish for breaches of military discipline per the defence power in s 51(6) (*Re Tracy*)

Application of *Boilermaker's* Second Limb

A federal Ch III court cannot be invested with anything other than federal judicial power

Exceptions: Non-judicial functions may be conferred on judges in their personal capacity (*persona designata*)

Drake v Minister for Immigration and Ethnic Affairs: **Nothing in the Constitution precludes** a Chapter III judge from being appointed administrative or executive functions **in their personal capacity**.

What are the limits of executive and legislative powers on federal judges in their personal capacity?

PERSONA DESIGNATA

Function must be conferred on the judge in their personal capacity , opposed to upon the Court they are a member <i>(Hilton v Wells)</i>	Can assume a mixed commission is not aiming to involve a court.			
Judge must consent to this conferral of functions <i>(Hilton, Grollo)</i>	Yes – assumed, because it’s likely the appointment could be refused.			
The non-judicial function must not be incompatible with the judge’s exercise of judicial functions. It will be incompatible if: <i>(Grollo)</i>	Breadth of Commitment must not be so great as to prevent the Judge from undertaking their judicial functions.	One judge, for short period of time: no one is likely to care		
	Integrity Compromised: the non-judicial functions should not be of a nature which compromise or impair the integrity of the judge	Not likely if the judge is unlikely to learn confidential information about parties to future cases, and if so judge can recuse. (Majority in <i>Grollo</i> , but McHugh J dissented on the notion conflict may arise between the judges obligation to not divulge information learnt and the obligation to discharge information as part of their judicial function)		
	Public Confidence Diminished: the non-judicial functions cannot be of a nature that diminishes public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his judicial functions. <i>(Wilson)</i>	Is there a close connection between the function being performed by the judge and the function of the legislature or executive government? Yes – continue No – not incompatible, valid persona designata	Distinguish <i>Wilson</i> – there, the report enlivened the Minister’s power, here, it simply informs the minister.	
	Is there a requirement to perform the function independently of any instruction, advice or wish of the legislature or executive government? Yes – continue No – incompatible, invalid persona designata			
Is the function guided by legal criteria and free from political discretion? Yes – Not incompatible, person designata valid No – Incompatible, invalid persona designata				