

### **Commonwealth law that confers compatible Non-Judicial Functions as Persona Designata**

1. **Boilermakers** held that C3 courts cannot be invested with non-JP, however a federal judge may be appointed to carry out non-Judicial functions so long as the appointment is in his/her personal capacity. Such functions may be conferred even if federal judicial tenure is the criterion by which the person was selected.
2. *The issue here is whether the performance of the function of [under section] is a function which is constitutionally compatible with the holding of office as a J appointed under C3 of the Constitution.*
3. *If the nature of extent of functions cast upon J to the prejudice of their independence or to conflict with the proper performance of their judicial functions, Boilermaker's principle would no doubt render the law invalid. However, if it confers on them a function what is not incompatible with their status and independence or inconsistent with the exercise of their judicial powers, then they are well qualified to fulfil the role the provision envisages.*
4. Examples:
  - Federal judges serving on executive branch tribunals eg. Administrative Appeals Tribunal, Australian Competition Tribunal, Copyright Tribunal Defence Force Discipline Appeal Tribunal, National Native Title Tribunal.
  - Federal judges appointed as issuing authorities for warrants eg. Telecommunications (Interception and Access) Act Cth
5. Case Law
  - **Drake v Minister for Immigration & Ethnic Affairs**
  - Federal Court Judge appointed as deputy president of Administration Appeals Tribunal
  - Cst C3 does not prohibit C3 J from being appointed in a personal capacity to an office with administrative/executive functions, even if quasi-judicial in nature. J was sitting in the AAT in his personal capacity, nothing to do with being a judge even though that was one of the criteria he satisfied for his appointment.
6. **TEST: Grollo v Palmer** sets out the criteria that must be fulfilled. State whether this test can be passed, which would render the PD scheme valid or not. [oversee warrant scheme]
  - (1) Firstly, the J must consent to the conferral on them of any non-judicial function (other than a function incidental to a judicial function) and
  - (2) Secondly, no function can be conferred that is incompatible with either the J's performance of his/her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising JP
7. **Political Nature**
  - **Wilson v Minister for Aboriginal and TSL Affairs** [invalid]
  - *J from Fed Court nominated by Minister to prepare a report under a Cth Act under PD.*
  - *It appears that the J was required to make decisions of a political nature. Furthermore, the [section] confers power on a Minister to make a declaration and the report by the J is merely a condition precedent of the exercise of the Minister's power to make the declaration. Although the reporter can choose to act independently of the Minister in determining the interests, the Act did not require the reporter to disregard ministerial instruction, advice/wish when preparing the report.*
  - *"The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action"*
  - *Thus the appointment is likely invalid on the grounds that it is inconsistent with their judicial role for [FC J to prepare report for the Minister] J was in a position to advise the Minister and there was also the concern that J would have to follow ministerial policy. HC concerned proximity of the reporter role with executive and possibility of political influence in the report.*
8. Nature of the function is such that its performance by a J diminishes confidence in the integrity of the J or the judiciary
  - Refer to Institutional Integrity
  - Impartiality/Independence
    - Impairment of J's individual integrity/compromise J's capacity to perform judicial function
    - Lowers public confidence in integrity of the judiciary: impartiality/independence from Ex
    - Permanent/complete commitment: J cannot practically perform substantial judicial functions
    - In this case, having Js as PD oversee this sensitive/secret warrant scheme increase public confidence in the judiciary; function of participating in criminal investigation could not be given to a J as PD because its inherently incompatible. The test passed rendering the PD scheme valid.
9. 3 step test for determining the validity of PD appointment set out in **Wilson**
  - (1) Examine the statute/measures taken pursuant to the statute. Is the function an integral part of/closely connected to the functions of the legislative or executive?
  - (2) Is the function required to be performed independently of any instruction/advice/wish of the legislature/executive
  - (3) Is any discretion purportedly possessed by the C3 J exercised on political grounds? \*Refer diagram in notes
10. Draw Conclusion: *J's performance of a non-judicial function in their personal capacity is invalid if function is incompatible with institutional integrity of courts. (Grollo; Wilson) Thus it seems unlikely that this will be protected by the persona designata rule.*

## Administrative Detention for Non-Punitive Purposes

1. Authorising detention for a punitive purpose is an exclusively judicial function that rests exclusively with C3 courts (*Polyukhovich; Brandy*). Cth Pt cannot authorise punitive detention other than by order of a court exercising the exclusively JP to adjudge and punish criminal guilt. However, the Cth Pt can authorise non-punitive detention without usurping JP. *The issue here is whether there is a non-statutory executive power to authorise detention.*
2. On basis of HC authority, there are two requirements.
  - (1) Firstly, **a detention must be reasonably capable of being seen as necessary for a lawful non-punitive purpose in order not to be characterised as an exercise of JP and thus in order not offend constitutional rule about the separation of JP** (*Lim; affirmed in M76/2013*)
    - Necessary means whether detention is effecting or facilitating a non punitive purpose (eg removing unlawful migrant *Re Woolley; Falzon*)
    - Not a proportionality test (*Al-Kateb*)
  - (2) **Secondly, there must be objectively determinable criteria for detention at any time and from time to time so that the court at any time can scrutinise the duration of detention, otherwise detention must be characterised as punitive and therefore only done by with the order of a court** (*Plaintiff M96A/2016*)
    - Does not depend on **opinion, satisfaction or belief** of an executive officer.
3. Below factors are not determinative of whether detention is punitive
  - Indefinite duration does not make it punitive (*Al-Kateb; M96A/2016*) although Gageler J has suggested that detention will lose non-punitive character if purpose incapable of fulfilment (*AAJA v NT; M68/2015(2016)*)
  - harsh conditions of detention violate civil rights of the detainees
4. Case Law
5. *Lim's case* [Detainment of non-citizens; Executive detention]
  - Cth Pt can authorise detention otherwise than by court order if detention reasonably capable being seen as necessary for permissible non-punitive purpose; non punitive purposes are exceptional.
    - Note: **Orbita by Gummow in *Kruger* still suggests that the categories of non-punitive detention are “not closed”; it’s not only those noted in Lims, but can be others eg. detention of citizens “for their welfare” in *Kruger (Lim; Kruger)*** However, an inference can be drawn that detention is for punitive purposes in absence of legislation of a non-punitive purpose (*see Woolley and Falzon*)
  - Principle: Detention permissible for purposes of expulsion/deportation or until a decision is made to admit/exclude them (executive power in this limited extent). If not limited, it is not incidental to executive power, to exclude/deport is punitive in nature and exclusively a JP.
  - HC has identified number of permissible non-punitive purposes for detention:
    - detention after arrest/pending trial, mental illness/infectious disease, enemy of aliens during war time, preventative detention to protect public from criminal harm, non-citizen while awaiting application (*Lim*)
  - *It bears no analogy to established legitimate non-punitive purposes. Although the class of legitimate no-punitive exceptions are not closed, there is no migration purpose (fact that X is non-citizen does not establish a migration purpose for detention) and there is no analogy with police powers to hold individuals suspected of committing a crime, pending criminal process.*
6. *Al-Kateb* [no likelihood/prospect of removal in reasonable future]
  - HCA: Although ‘no real likelihood or prospect of removal [to receiving control] in the reasonably foreseeable future, *Al-Kateb*’s deportation may yet be fulfilled by the Executive one day.
  - **Incapable of fulfilment:** Just because purpose of deportation becomes incapable of fulfilment, the executive detention does not stop being unlawful. Detention makes him available for deportation (purpose), even if not achievable it prevents him entering Aus (purpose). The detention was not and has not become punitive, it is not consequent upon any offence; it is to prevent an unlawful non-citizen entering Aus.
  - Law requiring detention takes character from purpose of detention
7. *P M76/2016*: Duration of the detention must be necessary; Executive detention becomes not necessary if it becomes open-ended detention, that is punitive and thus unconstitutional.
8. *P M276/2003*: Rejected Proportionality test-> the focus is on the purpose of detention
  - Where law authorises imprisonment of asylum also has the purpose of keeping detainee in confinement w/o justification or otherwise has a purpose of subjecting detainee to cruel/unusual punishment, it would go beyond what was necessary to achieve its non-punitive objective. Qs of proportionality do not arise in C3.
9. *P M96A/2016*: [objective criteria]
  - Affirmed *Lim* that duration of detention for non-punitive purpose must be capable of being objectively determined from time to time. Executive detention limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for the entry permit to be made and considered. Purpose of detention is for their removal from Australia
  - **Clear/objectively determinable:** Criterion determination duration is ‘objective’ ; did not depend on **opinion, satisfaction or belief** of an executive officer.
10. *Falzon* [Removing an alien from Australia is a permissible non-punitive purpose]
  - *Falzon* was never citizen, went to prison, visa was cancelled and taken to immigration detention
  - The limited power under the Migration Act to detain an alien in custody can be conferred upon the Executive without infringing C3 because the authority to detain is neither punitive in nature nor part of the JP of Cth.
  - **Chameleon principle:** When authority to detain conferred on the Executive it takes its character from the executive power to exclude or deport.
11. *NAAJA v NT*
  - Purpose was to preserve public order and preventing offences rather than penal/punishment purposes
  - Women into custody
12. Draw Conclusion; State that the onus is on the Pt to provide evidence that it is for non-punitive purposes.

