

# **PART 1**

## **Course breakdown**

### **Judicial**

- 1) Separation of powers – introduction
- 2) Separation of judicial power
- 3) Application and exceptions
- 4) Separation for State courts

### **Executive**

- 5) Executive accountability
- 6) Judicial + Public accountability + FOI

### **Other**

- 7) The State constitution
- 8) Human rights

## **The potential questions**

- *Boilermakers* application
  - o X seeks your advice as to whether Y can be enforced as a judgment of the Federal Court of Australia
- *Persona designata*
  - o Is the appointment of Justice P valid?
  - o How can the appointment of Justice P be invalidated?
- *Kable (when there is a State court)*
  - o Advise T as to the legality of the confiscation/declaration of S
- Avenues of review
  - o Advise G on what avenues of review he can pursue
  - o Advise H and J on whether each of them have a right to reasons, and their options to challenge the decision
- Freedom of information (\* **look at jurisdiction!**)
  - o Advise F about his legal options to obtain a copy of the report
  - o Advise L about his options to obtain access to the report
- Extra-territoriality (\* **note where there is an interstate matter**)
  - o Advise M whether section X of legislation Y can validly apply to his conduct in Queensland
- Manner and form
  - o Advise U whether X Act could be repealed by an ordinary bill passed by Parliament

## CONFERRAL OF POWER ON A BODY

- 1) **Issue:** Whether the power has been validly conferred on the body
- 2) **State:** In Boilermakers two limbs were established: federal judicial power could only be vested in a chapter III court, and a chapter III court could exercise nothing but federal judicial power
- 3) **Determine:** What is the body?
  - a. Executive
    - i. If so, the 1<sup>st</sup> limb applies
  - b. Judicial
    - i. If so, 2<sup>nd</sup> limb applies
- 4) **State:** In Ex parte Tasmanian Breweries, Kitto J stated that an exhaustive definition of judicial power has not been possible to frame
- 5) **State:** In order to first determine whether the power is judicial, the indicia of judicial power identified in Huddart Parker and Co v Moorehead need to be analysed
- 6) **Determine:** What is the nature of the power?
  - a. **Power derived from a sovereign authority?**
    - i. Does the body get their power from legislation?
    - ii. **Analyse** on facts – cite specific section!
  - b. **Binding and authoritative decision?**
    - i. **If** something can be registered as a Federal Court judgment: Brandy v Human Rights Commission, which tells us that a binding and authoritative makes the power judicial
      1. **Consider:** Is there a strict appeal, or an appeal *de novo*?
        - a. *De novo* appeal allows new facts or evidence
  - c. A controversy about existing legal duties and rights: a ‘matter’?
  - d. *Inter partes*?
    - i. Are both parties present?
    - ii. A party has a right to know a case against them
  - e. Ascertainment of the law as it is?
  - f. Determination of the facts as they truly are?
  - g. Performed in a judicial manner?
    - i. Appropriate judicial discretion?
    - ii. In accordance with judicial process?
- 7) **Consider:** Chameleon powers doctrine
  - a. **State:** As discussed in Re Dignan, there are certain powers that may be either judicial or executive depending on the body in which they are reposed
    - i. Dispute about existing rights and obligations / ‘matter’ (often)
    - ii. Finding of fact
    - iii. Interpretation of law
    - iv. Application of law to fact
    - v. Decision
    - vi. **If** an executive body has several of these characteristics, yet lacks important judicial indicia, it can still be valid conferred: Ex Parte Tasmanian Brewers
- 8) **Conclude**
  - a. If valid: Sections X and Y of Act Z must be valid as they do not breach the 1<sup>st</sup>/2<sup>nd</sup> limb of *Boilermakers*
  - b. If invalid: Sections X and Y of Act Z must be invalid as they breach the 1<sup>st</sup>/2<sup>nd</sup> limb of *Boilermakers*

## **CASE AUTHORITY**

### **If enforced as a judgment (binding and authoritative)**

Brandy: Unless there is a *de novo* appeal, a binding and authoritative decision makes the power judicial

### **If there is an appeal *de novo* (binding and authoritative)**

Brandy and Luton v Lessels: No binding and authoritative decision;  
Court does not need to rely on previous conclusion – new hearing

### **If there is an agreement OR the decision requires enforcement by a court (Sovereign authority and binding and authoritative)**

TCL Air Conditioner: No sovereign authority where authority is not given from the state, but rather generated through an agreement;  
Not binding and authoritative through its own force

### **If there is a lower standard of proof e.g. balance of probabilities (Performed in a judicial manner)**

Thomas v Mowbray: There was room for judicial discretion – reasonableness the ‘great test of the common law’;  
May be in line with defence power;  
Balance of probabilities acceptable standard

### **If there is a decision of future obligation (existing rights and obligations)**

Luton v Lessels: Not judicial power – not a ‘matter’

### **If there are chameleon aspects, yet no strong judicial aspects (binding and authoritative, sovereign authority, *inter partes*)**

Ex Parte Tasmanian Brewers: some powers that may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred on a federal court

## DETENTION

- 1) **Issue:** Can body X lawfully detain Y?
- 2) **State:** In Boilermakers it was stated that federal judicial power could only be vested in a chapter III court
- 3) **State:** As was decided in Lim: involuntary detention by the State is an exclusively judicial function of the judging and punishing of criminal guilty. However, detention may be permissible where it is for a non-punitive purpose: Lim. The decision in Lim suggests that non-punitive detention is not exclusively judicial
- 4) **Apply:** There is an executive body here trying to exercise judicial power, and so it will be necessary to determine whether it fits an exception
- 5) **Consider:** Exceptions where the detention is *non-punitive* in character. These categories are not closed: Kruger
  - a. Remand in police custody pending trial
    - i. Must be the ability to grant bail
  - b. Involuntary detention for mental illness
  - c. Infectious disease
  - d. Aliens detention and processing
    - i. Harsh conditions of detention not relevant to purpose: Behrooz
    - ii. Indefinite nature not a bar: Al-Kateb
    - iii. Children may also be detained: Re Woolley
  - e. Protecting children: Kruger
  - f. **Analogise**
- 6) **[Alternatively]:** There are exceptions where detention may be *punitive* in character. This is permitted through the Constitution, and depends upon the existence of a constitutional provision outside Chapter III which itself confers or authorises the Parliament to confer that power on the instrumentality: Re Tracey
  - a. Contempt of Parliament: s 49; R v Richards
  - b. Military Tribunals: s 51(v) (defence power); Re Tracey
- 7) **[Alternatively]:** There is an exception to this rule where judicial power is conferred on administrative officers of the court: Harris v Caladine
- 8) **Conclude**
  - a. Is it lawful for person Y to be detained?

## CASE AUTHORITY

### **If there is retrospective criminal law**

Polyukovich v The Queen: Retrospective criminal law is a valid exercise of legislative or executive power;

But, Parliament cannot determine whether that law is breached

### **If in immigration detention whilst considering a visa application**

Lim: This is permissible, so long as the purpose is for considering a visa application, and will result in removal if denied

### **If people have been removed from their home/families**

Kruger: So long as the intention behind the legislation is non-punitive, this will be acceptable

### **If there are poor conditions in detention**

Behrooz: Harsh conditions are irrelevant to determine whether the detention was punitive

### **If detention is potentially indefinite**

Al-Kateb: Even where there may be no prospect for removal in the reasonably foreseeable future, detention will not be punitive

### **If children have been detained**

Re Woolley: Even a breach of international obligations will not make detention punitive

## PERSONA DESIGNATA

- 1) **Issue:** Whether the appointment is a valid *persona designate* appointment
- 2) **State:** The second limb of *Boilermakers* states that a federal Chapter III court can only exercise federal judicial power
- 3) **State:** There is an exception, however, where the judge is acting in their personal capacity: Drake creates, Hilton confirms, Wilson applies
- 4) **Determine:** Is the function conferred on a judge in their personal capacity?
- 5) **Determine:** Is there consent of the judge? Grollo v Palmer, which was originally the dissent in Hilton v Wells
- 6) **Determine:** The task must not be incompatible with the judicial function: Grollo v Palmer: (Any one of these invalidates appointment)
  - a. **Breadth of commitment**

Consider: time taken, judge's involved; location; think about court *as a whole*  
– ok if there are still many other judges to do work

    - i. If possible, mention that the President of the AAT does not sit on the Federal Court at all
  - b. **Integrity compromised**

Consider: In performing the function is the judge going to come across information that could preclude a judge from impartially determining a criminal case in the future?

    - i. **If relevant**, discuss McHugh Grollo dissent: conflict between an obligation not to divulge information learnt in a wire tap and an obligation to reveal to parties in a case before them that they knew something about the case
    - ii. **However**, per the majority in Grollo, a judge could simply recuse themselves
  - c. **Public confidence diminished**
    - i. **Close connection** to the executive or legislative?
      1. Is advice given directly to government minister?
      2. **Does the report give the minister power or is it just advice?**  
Wilson
        - a. *If no = valid; If yes = continue*
    - ii. Is the function to be performed **independently** of any instruction wish?
      1. Consider: There is no reason to think that judges will not be independent
      2. Wilson states that independence must be expressly stated
        - a. *If no = invalid; If yes = continue*
    - iii. Is the function **legal** or **political**?
      1. Consider: Is there a consideration of public funding? Will be political
        - a. *If political = invalid*
- 7) **Conclude**
  - a. The most likely option

# ***PART 2***

## **1) SEPARATION OF POWERS - GENERAL**

### **General**

- Separation of powers was adopted from the American federation; however, we retained the UK's responsible government

### **Limits on separation**

- Responsible government - merging of the Executive and Legislative
- Delegated legislation/regulation – rules made by the Governor General, who is a member of the executive

### **The 'Washminster' model**

<b>British model</b>	<b>American Model</b>
Representative government	Federalism
Responsible government	Separation of powers
Bicameral parliaments	Judicial review of legislation
Rule of law	The senate
Common law	
Judicial review of administrative action	
Faith in parliaments	
Parliamentary supremacy in the states	
The Crown	

## **Legislature (Ch 1 & s 1)**

### **1 Legislative power**

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called The Parliament, or The Parliament of the Commonwealth.

- **General**
  - The parliament may only pass laws on specific topics
    - **S 51** lists the areas that the parliament may pass laws on – 39 in total
      - **S 52** lists a further 3 areas
  - Legislative power should be general
    - Laws should not be passed to deal with a particular individual
- **Inconsistency**
  - **S 109** – where there is inconsistency, Commonwealth laws will prevail
- **Exercise**
  - House of representatives (controlled by Government) and the senate (reviews HoR)

## **Executive (Ch 2 & s 61)**

## The executive

- Ministers
- Departments; public servants
- Agencies (e.g. ASIC, ACCC)
- Tribunals (e.g. AAT, MRT, RRT, SSAT)

## 61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

### • Exercise

- Executive power is exercised by the GG as the Queen's representative
- In effect, however, the GG is just a rubber stamp on the decisions of the cabinet
  - Three cabinet rules:
    1. Confidentiality – processes are confidential in theory, as this allows a robust discussion
    2. Solidarity – ministers must support the decision of cabinet; gives a sense of finality to the decision
    3. Filter up, filter down – cabinet operates by having decisions filter up to them, and then having its decisions filter back down afterwards
- Federal Executive Council - the cabinet + the GG
  - **62 Federal Executive Council**  
There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.
  - **63 Provisions referring to Governor-General**  
The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

### • Relationship between Executive and Legislative

- Legislative power is the development of general rules, whereas executive power is the application of general rules to specific circumstances
- Two incursions on separation of powers:
  1. **Responsible government**
    - Executive ministers come from, and are accountable to parliament – s 64 – no minister shall hold an office for more than 3 months unless they become a senator or member of the HoR
    - Government is controlled through this accountability – *Egan v Willis* (1998)
  2. **Delegated legislation/regulations**
    - Parliament can refer law-making power to the GG/executive through statute – *Victoria Stevedoring and General Contracting v Dignan*
    - If regulation change – cabinet conveys decision to GG

## Judiciary (Ch 3 & s 71)



## 71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

- **General**

- Parliament and the executive cannot amend or vary constitutional law determined by the HC without seeking formal constitutional amendment
- Federal courts may only exercise federal, and not state power – *Re Wakim; Ex parte McNally* (1999)
  - States may exercise federal power
- The HC may not give a formal declaration of law unconnected to any dispute – *Re Judiciary and Navigation Acts* (1921)

- **Boilermakers**

- Two limbed test for determining when the separation of powers will be breached:
  1. The 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

- **Other sections**

- S 72 – appointment made by GG; mandatory retirement age; reasons for removal; remuneration
- S 73 – powers of appeal: first instance of the HC, state supreme court, federal court, inter state commission; judgment of HC is final, and parliament cannot restrict this
- S 74 – appeal to Queen in council is determined by HC; Queen may request appeal
- S 75 – circumstances in which HC has original jurisdiction
- S 76 – Parliament may make laws conferring original jurisdiction on HC with respect to *inter alia*, the constitution and any laws made by parliament
- S 77 – HC may define jurisdiction of lower courts
- S 78 – Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power
- S 79 – Parliament may prescribe number of judges
- S 80 – Trial by jury; held in the state committed

## 2) SEPARATION OF JUDICIAL POWER – DEFINING JUDICIAL POWER

### Boilermakers

- |   |
|---|
| 1. The judicial power of the Commonwealth can only be vested in a Chapter III court – this includes State courts vested with federal judicial power under <u>s 77(3) Constitution</u><br>- <b>This limb will most likely be breached if there is an <u>executive</u> body</b> |
| 2. A federal Chapter III court cannot be vested with anything other than federal judicial power<br>- <b>This limb will most likely be breached if there is a <u>judicial</u> body</b>   |

### The problem

- The “judicial power” spoken about in *Boilermakers* has been difficult to define
- As a result, the court has attempted to define indicia

### Definition

- ‘The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.’ *Huddart Parker & Co v Moorehead* (1909)

### The appeals

De novo – “from the beginning” – an appeal where there is an entirely new trial conducted; new facts/evidence – it means there is not a binding and authoritative decision  
Strict appeal – an appeal on existing evidence and established facts, which is based on a legal error – implies judicial power

### The process

- 1) What is the nature of the power? **Look to indicia**
  - a. Power derived from sovereign authority (**essential**)
  - b. Binding and authoritative decision (**essential**)
  - c. Controversy about existing legal rights and duties (a ‘matter’) – s 75/76
  - d. *Inter partes* – parties will be represented
  - e. Ascertainment of law as it is
  - f. Determination of facts as they truly are
  - g. Performed in a judicial manner
    - i. Appropriate level of judicial discretion
    - ii. In accordance with judicial process
- 2) What is the nature of the body on which the power is conferred? **Will be on facts**
- 3) Applying the Boilermakers rules, will that conferral of power be valid, or invalid?
  - a. 1<sup>st</sup> limb: judicial power can only be given to a Ch III court
  - b. A Ch III court can only exercise judicial power

### Indicia

- 1) **Sovereign authority**
  - Body making decision is given that power by law
  - Arbiters who derive their powers from contract lack sovereign authority

- *TCL Air Conditioner v The Judges of the Federal Court of Australia* (2013) **Facts:** concerns private arbitration arising from a contract between China and Australia; party tried to resist enforcement of arbitral award on the basis that enforcing this award would be akin to giving arbiters judicial power **Decision:** there was not judicial power as there were two critical indicia missing: the arbiters lacked sovereign authority, and their decision was not binding ‘of its own force’, but depended on the exercise of judicial power to enforce
- Other authorities
  - *Huddart Parker & Co v Moorehead* (1909)
  - *A-G (Cth) v Breckler* (1999)
  - *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970)

## 2) Binding and authoritative

- Courts decisions must bind the parties to their orders
- This means that a decision of a body other than a Ch III court cannot be binding and authoritative
  - *Brandy v Human Rights and Equal Opportunities Commission* (1995) **Facts:** There was a challenge by Brandy that a finding of HREOC that Brandy was guilty of breaching the *RDA*; Brandy argued that the determination/registration system, which required the decision to be registered at the Federal Court, and would become enforceable after a certain period of time **Decision:** the court found that this granted the commission with binding and authoritative powers; HREOC was not a Ch III court, so this was a violation of the 1<sup>st</sup> limb of boiler-makers
    - CONTRAST with *Luton v Lessels* (2002) **Facts:** An application was to be made to a registrar under the *Child Support Act 1989* to make assessment of what amount of child support needed to be paid and also to determine whether that ordinary amount would be unjust and equitable in circumstances; if yes, the registrar would make a departure determination and assess a different amount of child support **Decision:** not judicial as two indicia missing: there was no controversy about existing rights and obligations, but a determination of future obligation; 2<sup>nd</sup> there was no binding and authoritative decision as there was a right to an appeal *de novo*
    - See also *TCL Air Conditioner v The Judges of the Federal Court of Australia* (2013) – not binding ‘of its own force’, but depended on the exercise of judicial power to enforce
    - See also *Federal Commissioner of Taxation v Munro* (1926) **Facts:** Executive board of review made determinations about tax liability; the HC could review decision in original jurisdiction **Decision:** administrative power because it was not binding and authoritative
      - EXAM – look to the appeal that is permitted!

## 3) Controversy about existing legal rights and duties / a ‘matter’

- A ‘matter’ is stated in ss 75 & 76 of the constitution, and thus, only a court may rule on a matter