

TOPIC 1 – INTRODUCTION & HISTORY

INTRODUCTION

WHAT IS PUBLIC LAW?

- **Definition and scope**
 - o Governs public power principles:
 - Parliaments (law-making)
 - Executive (law enforcement)
 - Courts (law interpretation & dispute resolution)
 - o Structures Australian government, shaping how branches operate legally and interact
- **Public power scope:** Immigration, resource management, taxation, infrastructure, social welfare, military.
- **Impact:** Shapes lives and societal welfare, underscoring public law's importance
- **Public vs private power**
 - o **Public:** Exercised by government; involves relationships between government entities or government and individuals
 - o **Private:** Involves individuals, and corporations, less regulated by public law
 - o **Blurred lines:** Private entities (e.g. utilities, transport) sometimes provide traditionally public services; government may engage in business-like functions
- **Justifications for constraints on public power**
 - o **Rule of Law:** Public power must be legally conferred and exercised
 - o **Accountability:** Prevents misuse of power, promotes democratic values
 - o **Comparison to private power:** Individuals may act freely within the law, while government officials require legal authority for actions
- **Coercive nature of public power**
 - o **Powers:** Detention, taxation, regulation of civil liberties
 - o **Role of public law:** Delineates and monitors coercive powers to ensure social/legal order
- **Evolving definition of 'public' functions**
 - o **Private involvement:** Increased private involvement managing public functions (e.g. prisons, visa processing, transport)
 - o **Government in business:** Government entities may also perform private-sector roles, complicating the public-private distinction

RULE OF LAW IN AUSTRALIA

The rule of law is a fundamental principle in Australian public law, while Anglo-Australian law introduced its version of the rule of law to Australia, Indigenous legal systems also embodied concepts of the rule of law.

Implications of the Rule of Law

- Government actors have **wide discretion** but must adhere to constitutional limits
- Legal challenges focus on constitutional consistency rather than the reasonableness of laws. Excessive or unfair laws may be challenged politically, not legally

Australian Communist Party v Commonwealth (1951)

FACTS: During Cold War, rising fear of communism. Parliament enacted *The Communist Party Dissolution Act 1950 (Cth)* aiming to dissolve the Aus Communist Party, confiscate their property & transfer it to the Cth, penalise individuals promoting communist ideology, and authorise the GG to declare individuals as communists, imposing restrictions (e.g. ineligibility for public office). Act received substantial public support, despite infringing freedoms of speech, association and thought.

HELD: HCA invalidated the act, not on grounds of individual right infringement but due to its exceeding constitutional limits on legislative power. Government powers are limited by the Australian Constitution.

- **Dixon J:** The rule of law “forms an assumption” of the Australian Constitution.

PRINCIPLE: Parliament must operate within the Constitution's legal bounds

CONSTITUTIONALISM AND ITS VARIATIONS

TOPIC 2 – LEGISLATIVE POWER

The Constitution – ss 1, 7, 9, 10, 24-27, 51, 52

CHAPTER I PART I – General

Section 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*.

PART II – The Senate

Section 7: The Senate

- **Senators' Election:** Directly chosen by the people of each state, voting as a single electorate (or divided by state Parliaments, as in Queensland).
- **Representation:** Each Original State has equal representation with no fewer than six senators unless Parliament decides otherwise.
- **Term:** Senators serve six-year terms, with certification of election results by the state's Governor to the Governor-General.

Section 9: Method of Election of Senators

- **Uniformity:** Commonwealth Parliament may set a uniform method for Senate elections.
- **State Authority:** In the absence of federal law, state Parliaments may decide the method for choosing senators, including setting times and places for Senate elections.

Section 10: Application of State Laws

- **State Election Laws:** Until federal legislation intervenes, each state's election laws for the more populous House apply to Senate elections as closely as possible.

PART III – The House of Representatives

Section 24: Constitution of House of Representatives

- **Composition:** Members are directly chosen by the people of the Commonwealth, with a total number nearly twice the number of senators.
- **Apportionment:** The number of representatives per state reflects the state's population, calculated by:
 - o (i) Determining a **quota** by dividing the Commonwealth population by twice the number of senators.
 - o (ii) Each state's representation is calculated by dividing its population by the quota; if there's a remainder over half of the quota, an additional member is included.
- **Minimum Representation:** Each Original State is guaranteed **at least five** representatives.

Section 25: Racial Disqualification from Voting

- If a state disqualifies a race from voting, those individuals are excluded from the state's population count for representation purposes.

Section 26: Representatives in the First Parliament

- **Initial Distribution:** Specifies initial numbers of representatives for each state, contingent on Western Australia's status as an Original State.

Section 27: Alteration of Number of Members

- **Adjustment Provision:** Parliament may adjust the number of representatives in the House, maintaining compliance with the Constitution.

Section 28: Duration of the House of Representatives

- **Term Length:** Three-year maximum term from the first meeting, unless dissolved earlier by the Governor-General.

Section 29: Electoral Divisions

- **Determination of Divisions:** State Parliaments may define electoral divisions until federal legislation provides otherwise.
- **Division Integrity:** Divisions cannot span across different states; by default, each state forms one electorate.

Topic 5 – The Representative Parliament

READINGS

5.1 THE RIGHT TO VOTE

The **CON** mandates that Parliament be directly chosen by the people (s 7 – The Senate; s 24 The House of Reps), but this gives the Parliament substantial authority to specify the quality and character of that choice.

5.1.1 Equality of the franchise?

VOTER EQUALITY

The concept of ‘voter equality’ within the framework of representative government, as required by sections 7 and 24 of the **CON**, was first judicially considered in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1. In this case, it was argued that the federal election held on 18 May 1974 was conducted under disproportional electoral distribution. The alleged maldistribution arose from the fact that electorates for the House of Reps were not equal in population size. The Ps contended that this violated the principle of “one vote, one value” and thus rendered the provisions of the *Commonwealth Electoral Act 1918* (Cth) and the *Representation Act 1905* (Cth) invalid.

Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1.

Murphy J’s dissenting opinion

Murphy J, dissenting in the *McKinlay case*, asserted that the phrase, “chosen by the people” in sections 7 and 24 of the **CON** mandated equal representation for equal numbers of people. He provided several key reasons for his interpretation:

- **Positioning and expression:** He emphasised the importance of the phrase “chosen by the people” due to its prominent placement and mandatory nature within the **CON**.
- **Democratic principle:** He argued that the **CON** embodied a democratic theme of equal sharing of political power, necessitating voter equality.
- **“People of the Commonwealth”:** The reference to the “people of the Commonwealth” underscores the **CON**’s intention to distribute political power, necessitating voter equality.
- **Lack of alternative remedies:** He highlighted that without constitutional protection, individuals deprived of equal representation would lack any effective means of redress.
- **US Constitutional influence:** The phrase “chosen by the people” was directly borrowed from the **US CON**, where it has been interpreted to require electoral equality. He argued that the framers of the Aus **CON**, aware of this history, likely intended a similar requirement in the Aus context.

He criticised the majority for interpreting the **CON** in a way that allows for unequal divisions or arbitrary exclusions, warning against reducing the **CON** to a “blank paper by construction”

Barwick CJ’s rejection of US Constitutional analogy

Barwick CJ strongly rejected any analogy between the phrase “directly chosen by the people” in the Aus **CON** and its counterpart in the **US CON** (Art 1). He provided a detailed rationale:

- **Historical and contextual differences:** He explained that the American colonies’ **CON** was born from a rejection of British institutions, leading to a system with checks and balances and an inherent distrust of centralised power. In contrast the **Aus CON** was developed in cooperation with British Authorities and reflects confidence in parliamentary sovereignty and ministerial responsibility.
- **Parliamentary sovereignty:** He emphasised that the **Aus CON** is an Act of the Imperial Parliament, crafted by Aus colonists, and doesn’t include a Bill of Rights, unlike the **US CON**. The Aus system is based on the principle that Parliament, rather than the courts, should have discretion in matters of electoral distribution and franchise.
- **Legislative discretion:** He argued that the **CON** grants Parliament significant power in determining electoral distributions, asserting that express words are necessary to limit Parliament’s otherwise plenary powers. He rejected the relevance of US judicial decisions regarding Art 1 of the **US CON** to the Aus context.

TOPIC 6 – THE EXECUTIVE

The Constitution – ss 2, 61, 62, 63, 64

CHAPTER I PART I – General

Section 2: Governor-General

- The Governor-General is appointed by the Queen* as her representative in Australia, with powers granted by the Queen, as defined by the Constitution.

CHAPTER II – The Executive

Section 61: Executive power

- The executive power of Australia resides in the Queen and is exercised by the Governor-General. This power extends to executing and maintaining the Constitution and laws of Australia.

Section 62: Federal Executive Council

- The **Federal Executive Council** advises the Governor-General in governing the Commonwealth. Members of the Council are appointed and hold office at the Governor-General's discretion.

Section 63: Provisions referring to Governor-General

- When the Constitution refers to actions by the "Governor-General in Council," it means the Governor-General is acting on the advice of the Federal Executive Council.

Section 64: Ministers of State

- The Governor-General may appoint officials to manage Commonwealth departments. These officials, who are members of the Federal Executive Council, serve as the Queen's Ministers of State.
 - o **Ministers in Parliament:** Ministers must be members of Parliament (either as a senator or a member of the House of Representatives) within three months of appointment.

A RESPONSIBLE EXECUTIVE

THE EXECUTIVE BRANCH

Core Offices of Executive Power:

- Queen; Governor-General or Governor; Prime Minister (or Premier); Cabinet, Ministers' departments
 - o **Prime Minister:** The person leading a party or coalition commanding the support of the majority of the House of Representatives on matters of confidence and supply.
 - By convention, the Prime Minister has effective control over:
 - Appointment and dismissal of other Ministers
 - Structure of the Ministry and Cabinet
 - Dissolution of the House of Representatives (subject to limited reserve powers of the Governor-General to refuse advice).
 - o **Cabinet:** Council of senior Ministers, empowered to make decisions binding on the entire Ministry.
 - **Operating Principles:**
 - Collective responsibility – see below
 - Solidarity – Ministers required to publicly support Cabinet policies; failure to do so can result in forced resignation
 - Confidentiality – allows for candid and open deliberations (attracts a public interest immunity to protect Cabinet in legal settings)

Executive Power Vested in the Monarch

- **Practical Reality:** Commonwealth executive power is "vested in the monarch as the formal head of State" and is exercised by the Governor-General as the monarch's representative in the Commonwealth (**Constitution s 61**; see also **M68** per Gageler J; **Banerji** per Gageler J).
- **Ministerial and Executive Officers' Functional Level:**
 - o The executive power of the Commonwealth is exercised at a functional level by Ministers and other officers of the Executive Government. This exercise of power is "susceptible of control by Commonwealth statute" (**M68** per Gageler J).

GOVERNOR-GENERAL'S ROLE

1. **Powers Exercised by the Governor-General on Advice:**

FACTS: During WWII, the government requisitioned De Keyser's Hotel under defence regulations, which required compensation. Government argued it could avoid compensating by invoking the Royal Prerogative.

HELD: HOL held that the statutory requirement for compensation overruled the prerogative.

- If a statute empowers the executive to do something, then the executive can only do that thing under and in accordance with the [statute] (Lord Atkinson)
- What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative? (Lord Dunedin)

PRINCIPLE: If a statute covers 'the whole ground' of a prerogative power, the statute 'rules', and the prerogative is in abeyance (Lord Dunedin)

EXECUTIVE CAPACITIES TO CONTRACT & SPEND

Definition of Executive Capacities:

- Cth and States, as artificial legal persons, hold certain capacities akin to private persons.
- Executive capacities are the **bare ability or permission** of the Executive to act, described as a "faculty" (M98, per Gageler J). Their legal effect arises **under the substantive law applicable to any actor**, not uniquely because they are executive actions.
 - o **Examples:** Entering contracts, spending money, setting up entities (e.g., CSIRO, Royal Commissions, *Davis v Cth*).
 - o Non-statutory funding is considered a **gift** if unregulated by law.

Executive Subject to Law:

- Non-prerogative actions (e.g. entering contracts) produce legal consequences similar to those of private actors, governed by the relevant legal frameworks (e.g. contract law)
- The Executive is bound by civil and criminal law, facing consequences for breaches unless statute or prerogative allows otherwise (M98, per Gageler J).

Key Questions for Approaching Executive Expenditure

(1) Was an Appropriation Made?

- **Requirement of Appropriation:**
 - o **Constitutional Basis:** Per ss 81 and 83 of the Constitution, **all Commonwealth revenue forms the Consolidated Revenue Fund (CRF)** and can only be **appropriated by law**.
 - o **Executive Contracting Without Prior Appropriation:** The Executive can enter agreements involving Commonwealth expenditure without prior legislative appropriation (*Bardolph*).

(2) Does the Expenditure Require Legislative Support?

- **Spending Authority and Legislative Support:**
 - o **Section 81 does not empower spending:** Authority to spend must be based on a law supported by a constitutional head of power (*Williams (No 2)*), unless within an exceptional category (*Williams (No 1)*), citing *Pape*.
 - o The Commonwealth's capacity to contract/spend, especially outside "ordinary administration," requires parliamentary authority to maintain accountability (*Williams (No 1)*).
 - o **Spending power is not as broad as legislative power:** The Executive's spending power is **not coextensive with its legislative power** and is not available for "all matters reasonably seen as of national concern" (*Williams (No 1; 2)*).
 - o **Incidental Power:** Legislation that authorises spending **cannot rely** on s 51(xxxix) alone, as merely incidental to the appropriation power (*Williams (No 2)*).

Exceptional Categories – Expenditure That May Not Require Legislative Backing

1. Ordinary Functions of Government:

- o Legislative backing beyond appropriation is unnecessary for the **core administrative functions** of the Commonwealth:
 - Operation of **Parliament**.
 - **Servicing departments of State** referred to in s 64, including activities they undertake.
 - **Commonwealth agreements with the States** (including those under s 51(xxxvii) referrals and s 96 grants) (*Williams (No 1)*).

- **Example of Non-Qualifying Expense:** Payments for a **national chaplaincy scheme** were deemed outside “ordinary functions” and required legislative support (*Williams (No 1)*).
- 2. **Possibly under the Nationhood Power:**
 - **Nationhood Expenditures:** Expenditure under the nationhood power may not require separate legislative authorisation if it involves **urgent national need** (e.g., economic or natural disaster) (*Pape*).
 - **Example of Non-Qualifying Expense:** Chaplaincy payments did not qualify as they lacked the national emergency or exclusive Commonwealth means required for nationhood expenditure (*Williams (No 1)*).
- 3. **Possibly Prerogative Powers:**
 - Expenditures connected to **prerogative powers** may also bypass additional legislative backing if they align with a relevant appropriation (*Williams (No 1)*).

Williams v Commonwealth (No 1) (2012)

FACTS: The Cth funded a National School Chaplaincy Program (NSCP) without statutory backing. Williams argued this spending exceeded the executive’s power under **s 61** of the Constitution. Williams argued NSCP violated s 116, prohibiting religious tests for public office (**rejected** by court).

ISSUE: Can the Cth fund the NSCP under the executive power without legislative support?

HELD (Majority (French CJ, Gummow, Crennan, Bell JJ): The NSCP exceeded **s 61’s** executive power and required legislative support, as the executive power is **not coextensive** with legislative power.

- **Heydon J (Dissent):** Believed spending could be valid if tied to legislative powers, here under **s 51(xxiiiA)** (benefits to students)

REASONING:

1. **Executive power limits:** Executive power doesn’t cover activities simply because they could be legislatively authorised. **Public spending** (involving public moneys (*Australian Woollen Mills*) for policy programs needs legislative backing (Gummow and Bell JJ)
2. **Federalism:** Spending in areas like education, a **State responsibility**, requires **State consent** (e.g. via s 96 grants) to maintain federal balance (French CJ)
3. **Parliamentary control:** Spending public funds required **Parliament’s oversight** to ensure accountability, reinforcing **responsible government**.

IMPLICATIONS: *Financial Framework (Supplementary Powers) Act 1997* was enacted to support Cth funding schemes.

Williams v Commonwealth (No 2) (2014)

FACTS: Following *Williams No 1*, the Commonwealth passed the *Financial Framework (Supplementary Powers) Act 1997 (s 32B)* to allow spending on programs like the NSCP without specific legislation. Williams challenged this new law, questioning whether it effectively bypassed the need for legislative scrutiny.

ISSUES: Can the Cth use executive power to spend on programs deemed of ‘national benefit or concern’ without legislative support? Does appropriation alone suffice as a basis for Cth spending?

HELD: The High Court held that **s 32B** was insufficient to authorise executive spending on NSCP and similar programs, as it broadly delegated spending power without sufficient legislative backing. The Court reaffirmed that Commonwealth spending power remains restricted by the Constitution and federal principles, especially in areas like education, traditionally within State control.

- HCA rejected the ‘national benefit or concern’ argument finding it overly broad and inconsistent with federalism, warning it could allow Parliament to ‘define its own spending limits’ without respecting constitutional constraints.
- Following *Pape* and *Williams (No 1)* the court affirmed that “simply appropriating funds does not authorise the expenditure [outside areas constitutionally permitted for the Cth]... appropriation indicates readiness to fund but requires additional statutory backing”

PRINCIPLE: **General authorisation statutes like s 32B do not replace the need for specific legislative approval for Commonwealth spending programs, emphasizing federalism and parliamentary oversight.**

NATIONHOOD POWER

Nationhood power (**s 61**, supplemented by **s 51(xxxix)**) allows Commonwealth actions addressing national concerns

TOPIC 8 – STAT. INTERP, PRINCIPLE OF LEGALITY & PUNISHMENT

STATUTORY INTERPRETATION & PRINCIPLE OF LEGALITY

Acts Interpretation Act 1901 (Cth)

- **Acts Interpretation Acts:** These statutes provide specific rules for interpreting other statutes. They exist at a federal level (*Acts Interpretation Act 1902 (Cth)*) and in each state.
- **Purpose:** They function like a 'dictionary and manual' for interpreting Cth Acts and related instruments. They set out practical rules to guide interpretation.
- **Common examples**
 - o Gender-neutral language: Words referencing a gender apply to all genders
 - o Singular/plural language: Words in singular form include plural, and vice versa
- **Key provisions of the *Acts Interpretation Act 1901 (Cth)***
 - o **Section 15AA:** Courts should favour interpretations that best achieve the purpose or object of the Act, even if this purpose isn't explicitly stated.
 - o **Section 15A:** All acts must be read to align with the Constitution, and to avoid exceeding Commonwealth legislative power.
 - o **Section 15AB:** Courts may refer to extrinsic materials (e.g. second reading speeches, explanatory memoranda) to aid in interpretation when necessary.
- **Role of interpretation acts:** Parliament can establish rules for interpreting its statutes, potentially overriding or coexisting with common law principles. However, statutory rules must still comply with the Constitution.

What is Statutory Interpretation?

- **Definition:** Process by which courts determine the meaning of a statute to apply the law established by Parliament in a binding way.
- **Interpretation vs Application:**
 - o *Interpretation:* Understanding statute meaning in general terms.
 - o *Application:* Applying this meaning to the specific case facts.

Process:

1. Read statute.
2. Interpret general meaning.
3. Apply to case facts.

Why is Statutory Interpretation Necessary?

1. **Language Ambiguity:** Words may have multiple meanings or technical/legal definitions (e.g., "bank" or "fruit").
2. **Inherent Imprecision:** Terms like "offensive" are vague and open to interpretation (*Evans v NSW*).
3. **Interpretive Assumptions:** Courts rely on constitutional principles and interpretive presumptions, like the Principle of Legality (statutes don't limit rights unless clearly stated).

Constructional Choice:

- **French CJ:** Courts choose between meanings, constrained by legal criteria (not mere preference), akin to selecting from possibilities like "quantum states" in physics.

Role of Lawyers: Duty to court and client; explore interpretations that serve client's interests without misleading court.

Scenarios for Interpretation (Examples)

- **Wildlife Hunting Prohibition:** Terms like "hunt" and "wildlife" may vary; consider extrinsic materials like legislative debates.
- **Tariffs on Non-Mechanically Propelled Vehicles:** Define "vehicle" for the context, potentially including or excluding items like wheelie bins.

Core Objective of Statutory Interpretation: Legislative Intent

SCAFFOLD - RESPONSIBLE GOVERNMENT AND RESERVE POWERS OF GG (TOPIC 6)

1. Identify and State the Issue

- **Purpose:** Begin by identifying the key issue and explaining the general principles of responsible government that will be examined.
- **Sentence Structure:**
 - "The primary issue is whether the [action or decision by the executive, e.g., dismissal of a minister, refusal to dissolve parliament] aligns with principles of responsible government and constitutional limits on executive power (or the reserve powers of the GG)."
 - "This involves /raises questions of (assessing the GG powers, the Minister's or Premier's accountability, confidence, accountability) and whether the executive's actions adhere to the constitutional framework under sections of Chapter II [relevant sections, e.g., ss 61, 62, 64 of the Constitution]."

2. Outline the Constitutional Basis of Executive Power

- **Step 2(a): Establish the Source of Executive Power**
 - **Purpose:** Detail the constitutional foundation of executive power, referencing the relevant sections.
 - **Sentence Structure:**
 - "Section 61 of the Constitution vests executive power in the Queen, exercisable by the Governor-General, which extends to the 'execution and maintenance of this Constitution and the laws of the Commonwealth.'"
 - "This executive power is formally exercised by the Governor-General, who, under s 63, generally acts on the advice of Ministers of the Federal Executive Council appointed to manage government departments as per s 64, except where reserve powers are involved."
- **Step 2(b): Explain the Doctrine of Responsible Government**
 - **Purpose:** Discuss the concept of responsible government as foundational to executive power.
 - **Sentence Structure:**
 - "Responsible government ensures that the executive remains accountable to Parliament, with Ministers collectively and individually responsible for their departments (*Banerji* per Gageler J)."
 - "The executive must command the confidence of the House of Representatives, with s 64 requiring Ministers to be members of Parliament, underscoring the principle of political accountability to the electorate."

3. Examine Principles of Ministerial Responsibility

- **Step 3(a): Collective Responsibility**
 - **Purpose:** Analyse the principle of collective responsibility, particularly if there is division within the Cabinet.
 - **Sentence Structure:**
 - "Under collective responsibility, Ministers must support Cabinet decisions publicly. If a Minister dissents publicly, it can undermine government unity and provide grounds for dismissal, as seen in *FAI Insurances v Winneke*."
 - "Here, [Minister's action, e.g., publicly opposing the Premier's decision] breaches this principle, potentially justifying dismissal to maintain Cabinet solidarity."
- **Step 3(b): Individual Responsibility**
 - **Purpose:** Highlight individual ministerial accountability, particularly relevant if a Minister refuses to resign.
 - **Sentence Structure:**
 - "Each Minister is responsible for the administration of their department and must uphold Cabinet decisions. Individual responsibility allows for dismissal if a Minister's conduct undermines government policy or administrative integrity."
 - "In this case, [Minister's name]'s refusal to resign after dissenting publicly suggests a failure to adhere to individual responsibility, warranting potential removal."

4. Examine the Governor-General's Reserve Powers and Their Applications

CHAPTER III SAFEGUARDS FOR JUDICIAL POWER: PROBLEM QUESTION APPROACH

Preliminary Questions for Chapter III Analysis

1. Is the law in question a State or Commonwealth law?
 2. Identify the law's purpose and function:
 - Does the law:
 - **A. Impose sanctions for past conduct?**
 - Proceed to **1A** for Commonwealth law or **2A** for State law.
 - **B. Confer functions on a non-court entity?**
 - e.g., Minister, Tribunal, Commission, Ombudsman.
 - **C. Confer functions on a court?**
 - **D. Confer functions on a judge in their personal capacity?**
 - **E. (For State laws only):** Does it confer State judicial power concerning a ss 75-76 matter on a non-court?
 - For any of the above, or if uncertain, proceed with the additional preliminary questions below.
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Additional Preliminary Questions (For B-E Only)

1. Does the law confer a function on an individual judge or on a body?
 - **Interpretation Requirement:** Determine if the function is conferred on a judge personally or on the court they serve (*Hilton*).
 - **Presumptions:**
 - *Conferral on a court:* Presumes that the court as an institution is intended to exercise the function.
 - *Conferral on a judge:* Assess if this indicates the judge is to act individually (*persona designata*), based on statutory construction.
 - **Nature of the Power:**
 - *Judicial Powers:* Likely intended for court exercise.
 - *Administrative Powers:* Likely intended for *persona designata* capacity if purely administrative and not incidental to judicial power.
 - **Indicators of Persona Designata:**
 - If the statute appoints "a person" (e.g., *Wilson*), refers to an "eligible judge" (e.g., *Grollo*; *Wainohu*), or specifies a judge for a tribunal, this often signals *persona designata*.
 - If **persona designata**, proceed to **1D** (Commonwealth) or **2D** (State).
 - If **not persona designata**, continue to **Question 2**.
 2. Is the entity a Chapter III Court?
 - **Federal Courts:** To be a Chapter III court, all judges must have s 72 tenure (until age 70).
 - If tenure requirements of s 72 are unmet, the entity does not qualify as a Chapter III court (*Alexander*; *Brandy*; *Wheat Case*).
 - **State Courts:** The court's composition should primarily include judges with Act of Settlement tenure to qualify as a "court of a state" under Chapter III (*Gatsby*, Bathurst CJ).
 - **Appointment and Removal Provisions:** Examine if judges can be removed on grounds that fall short of "proved misbehaviour or incapacity," which would indicate non-compliance with Chapter III standards.
 - If **conferring functions on non-court**, proceed to **1B** (Cth), or **2B or 2E** (State)
 - If no, proceed to **1C** (Cth) or **2C** (State)
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Steps for Commonwealth Law Analysis

1. If Law Imposes Sanctions for Past Conduct (**1A**):
 - Assess Chapter III compliance in the context of punitive or retroactive sanctions imposed by non-court entities.
2. If Law Confers Functions on a Non-Court Entity (**1B**):
 - Determine whether the function aligns with the judicial role or remains strictly administrative.
3. If Law Confers Functions on a Court (**1C**):

- Confirm that the court qualifies as a Chapter III court and that the functions align with institutional integrity.
- 4. **If Law Confers Functions on a Judge Personally (1D):**
 - Determine if the role is intended for judicial capacity or persona designata.

Steps for State Law Analysis

1. **If Law Imposes Sanctions for Past Conduct (2A):**
 - Verify consistency with Chapter III limitations on State-imposed sanctions.
2. **If Law Confers Functions on a Non-Court Entity (2B):**
 - Consider if the function involves judicial action or remains administrative.
3. **If Law Confers Functions on a Court (2C):**
 - Confirm the court's adherence to Chapter III, safeguarding judicial independence.
4. **If Law Confers Functions on a Judge Personally (2D):**
 - Confirm if the judge's role is in a judicial capacity or as a designated individual.
5. **If Law Confers Judicial Power on a Non-Court for ss 75-76 Matters (2E):**
 - For State laws involving federal judicial power, ensure functions assigned align with Chapter III principles for non-court entities.

COMMONWEALTH LAWS

1A: Commonwealth Law Imposing Sanctions for Past Conduct

Question (1): Does the law retrospectively make acts or omissions a crime in a way that targets specific individuals?

- **Invalidity Due to Targeting Specific Individuals:** If a Commonwealth law **expressly or impliedly adjudges a specific person or persons (identifiable by specific characteristics) guilty of an offence for past conduct and imposes punishment** for that offence without a court trial, it constitutes a **bill of attainder**. This usurps the judicial function and is thus invalid (*Polyukovich; Duncan; Boilermakers; Lim*).
- **Validity of General Retroactive Criminal Law:** However, if the law **generally renders certain past conduct criminal without targeting specific individuals**, it is valid. In this case, a court still determines whether an individual is guilty of engaging in the prohibited conduct, even if the conduct occurred before the law created the offence (*Polyukovich*).

Examples:

- **Valid:** A law that criminalises war crimes committed by any Australian citizen or resident during WWII, even if they had no connection with Australia at that time, is valid. This applies to a specific time and context (war in Europe) (*Polyukovich*).
- **Potentially Invalid:** A law stating that anyone who was a member of a particular enemy organisation during WWII is automatically guilty of a war crime. This could be seen as targeting specific individuals or groups without judicial process (*Polyukovich*).

Question (2): Was the passing of the law a usurpation of judicial power? (*Duncan*)

- **Non-Judicial Measures and Civic Disabilities:** Laws that impose **civil disabilities or terminate statutory benefits** without a criminal conviction, for a purpose other than punishment, do not constitute a judicial power or usurp judicial authority. Such legislative actions are valid as they serve non-punitive purposes, like promoting public integrity (*Duncan*).
- **Example of Valid Law:** A law cancelling exploration licenses for those found by ICAC to have engaged in corrupt conduct concerning those licenses. Since this law's purpose was to **promote public integrity** rather than to punish, stigmatise, or penalise, it was upheld as valid (*Duncan*).

1B: Commonwealth Law That Confers Functions on a Non-Court

For a problem question involving a Commonwealth law that confers functions on a non-court entity, the analysis must determine if the function is judicial in nature. Under **Chapter III of the Constitution**, judicial power can only be exercised by designated Chapter III courts, as per the *Boilermakers' Case*. If the non-court entity is conferred judicial power, the law may be invalid.

Introduction to the Problem

To determine if a Commonwealth law conferring functions on a non-court entity is constitutionally valid, the question centers on whether the function is judicial in nature. Under *Boilermakers'*, only Chapter III courts can exercise judicial power, which includes binding and authoritative decisions over rights and obligations. Therefore, if the non-court entity performs functions intrinsic to judicial power, this may breach Chapter III.

1. Identifying Judicial Power in the Function (*Boilermakers'* Test)

1. **Fundamental Principle – *Boilermakers'* Separation of Powers:**
 - *Boilermakers'* Case established two principles: that judicial power is exclusive to Chapter III courts and that such courts cannot perform non-judicial functions. If a non-court body is conferred judicial functions, this breaches Chapter III.
 - **Key Quote:** “Judicial power is vested exclusively in Chapter III courts, and non-judicial entities cannot exercise this power” (*Boilermakers'*).
2. **Defining Judicial Power:**
 - Judicial power is characterized by the **binding resolution of disputes** regarding rights and obligations under the law, enforceable by the courts. In *Huddart, Parker & Co v Moorehead*, the High Court defined judicial power as involving final, binding decisions that determine legal rights and obligations.
 - **Application:** If the non-court entity's role involves making binding, enforceable determinations about rights, this may constitute judicial power.
3. **Example Language for Answer:**
 - “The core principle of *Boilermakers'* mandates that judicial power is exclusively vested in Chapter III courts. A Commonwealth law that confers binding, dispute-resolving functions on a non-court body risks breaching Chapter III by granting judicial power to a non-judicial entity (*Boilermakers'*; *Huddart, Parker & Co v Moorehead*).”

2. Determining Whether the Function is Judicial (Nature and Characteristics)

1. **Characteristics of Judicial Power:**
 - Judicial power typically includes:
 - **Binding and conclusive determinations of rights.**
 - The application of established law to determine legal consequences.
 - Decisions that are final and enforceable.
 - **Example from *Brandy v HREOC*:** In *Brandy*, the High Court invalidated provisions that allowed HREOC's determinations to be registered as Federal Court orders, finding this was judicial power conferred on a non-court entity.
2. **Process and Procedural Characteristics:**
 - Judicial power involves procedural characteristics of a court, such as adversarial proceedings, application of rules of evidence, and a fair, open inquiry process.
 - **Example Language for Answer:**
 - “Judicial power requires adversarial proceedings, final and enforceable decisions, and a process akin to court procedure (*Brandy*). Where a non-court entity lacks these characteristics, its function may not constitute judicial power.”
3. **Applying *Brandy* to the Function:**
 - If the non-court entity issues decisions enforceable without court review, as in *Brandy*, this indicates an exercise of judicial power, likely rendering the law invalid.

3. The “Chameleon Principle” and Ambiguous Functions

1. **Chameleon Principle (*Tasmanian Breweries v Commonwealth*):**
 - For ambiguous or “innominate” functions, the **chameleon principle** applies: the function's nature may change depending on whether it is conferred on a court or a non-court. If conferred on a court, the function is likely judicial; if conferred on a non-court entity, it may be administrative.
 - **Application:** If the function is conferred on a non-court body and involves discretionary, policy-based decisions, it may be interpreted as non-judicial under the chameleon principle.
2. **Judicial Precedent – *Federal Commissioner of Taxation v Munro*:**