

# PRINCIPLES OF PUBLIC LAW

## EXAM NOTES

### Strategy:

9:00 - Read & Find Issues  
9:20 - Question 1  
9:55 – Question 2  
10:30 – Question 3  
11:00 – Question 4 (Short Essay)  
11:40 – Review Answers

(LAW 1504)

*If found please contact 0450 524 303*

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## Tips:

- Leave every other line blank
- Only write on one side of the paper
- Use **HEADINGS**
- Underline the authority and key points – highlight the underlined words if you have time

# Separation of Powers Doctrine

The doctrine of the separation of powers divides the institutions of government into three branches: legislative, executive and judicial: the legislature makes the laws; the executive puts the laws into operation; and the judiciary interprets the laws.

## Characteristics of the Branches of Government

### **Parliament/Legislative:**

- Legislative power in a federal bicameral parliament under [S1](#) of the Constitution
- House of Reps chosen by the people and proportionate to amount of people per state [ss24](#)
- Senate chosen by people of each state, same number of people per state [ss7](#)
- Senate has the power of the lower house except regarding bills on taxation or government spending [S53](#)

### **Executive:**

- Governor-General chosen through Cabinet and relevant ministries [S61](#)
- Federal Executive Council to advise the Governor-General [S62](#)
- Governor General acts on such advice of the FEC [S63](#)
- Responsible government – ministers responsible to executive who is responsible to parliament [S64](#)

## Requirements for Judges created by the Parliament under [S72](#):

- i) Appointed by G-G in council
- ii) Can only be removed by G-G in council, in address from both houses of parliament in same session, on grounds of proved incapacity or misbehaviour
- iii) Remuneration cannot be changed whilst in office

Protected by tenure until they reach 70 years of age.

## Two Limbs of Boilermakers

**First Limb:** Judicial power of the Commonwealth may only be vested in a Chapter III court under [S71](#) of the Federal Constitution, or state courts vested with federal judicial power under [S77\(iii\)](#). It is unconstitutional for a federal judicial power to be vested in a non-Chapter III body. *Only Judges can judge*

**Second Limb:** A federal Chapter III Courts cannot be vested with anything other than Commonwealth judicial power. It is unconstitutional for a court to exercise non-judicial power. *Judges can only judge.*

### **Exceptions to Boilermaker Limbs**

Taking away someone's individual liberty through detention is harsh, any form of punitive detention can only be exercised by the Judiciary or Military tribunals - non-punitive detention from executive is an exception to the SOP. Refer to [Lim or Al-Kateb](#) case in 'CASES' list if there is a problem question about this!

### *Indicia of Power*

#### Crucial Indicia:

- a) Sovereign Authority
- b) Binding Decision
- c) Judicial Manner (Rules of evidence, discretion)

#### *Chameleon Powers:*

- d) Inter partes
- e) Matter
- f) Ascertainment of law (Tribunals can deviate from Rules of Evidence)
- g) Determination of all the facts

## Apply the Indicia of Power Test

A tribunal **cannot** possess the three crucial indicia, if it does, it is breaching the first limb of boilermakers. However, *chameleon powers* act as an exception to the first limb of Boilermakers because tribunals may also possess these indicia. In summary, Chapter III can possess all the indicia, whereas tribunals cannot – this is how you determine whether a body is attempting to exercise federal judicial power. Kirby J cautioned against overuse of the chameleon doctrine - [Thomas v Mowbray](#)

## *Persona Designata*

Persona designate is the exception to the second limb of Boilermakers, and involves a Judge pursuing a matter in their personal capacity (often an administrative function) rather than on behalf of the Court.

### Apply the Persona Designata Test

Step 1. Is the power clearly conferred to the Judge in a personal capacity not as a court which they are a member? *Hilton v Wells*

Step 2. Does the Judge **consent** to the conferral of power?

*“must not be an unavoidable obligation to perform as a designated person, detached from the relevant court, administrative functions which are unrelated to the exercise of the jurisdiction of that court” – Grollo v Palmer*

Step 3. Are the non-judicial functions compatible with judicial responsibility? *Breadth of commitment (56 Federal Judges)*, integrity, discretion, **public confidence** - judges can recuse themselves if conflict arises.

*“must not be inconsistent with the essence of judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power” – Grollo*

### Public Confidence Test – Wilson

**a)** Whether the function is an integral part of, or is closely connected with, functions of the legislature or the executive?

If yes: go to questions *b* and *c*

If no: *valid*

**b)** Whether the function is required to be performed independently of any instruction, advice or wish of the legislature or the Executive government?

If no: *incompatible*

If yes: go to question *c*

**c)** Is any discretion to be exercised on political grounds not confined by factors expressly or implicitly prescribed by law?

If yes: *incompatible*

If no: *compatible*

### Addressing a Boilermakers' Problem

Step 1. Constitutional matter or a state matter? If constitutional, then *Boilermakers* applies. State both limbs of Boilermakers.

Step 2. Which limb of Boilermakers is being breached? Use an analogous case from table of cases.

*E.g.* Tribunal trying to make their decision binding is like *Brandy v HREOC* in which the first limb was breached because the commission used provisions for enforcement of decisions.

Step 3. Identify if there are any valid exceptions using the *Indicia of Powers* or *Persona Designata* tests.

### Pros and Cons of the Boilermakers' Principle (Critical Thinking Question)

#### **Strengths:**

- Protects the 'Rule of Law' idea and prevents arbitrary abuse of power
- Assurance that the independence of the judiciary is maintained and that every individual has a fair and impartial trial
- Each branch's independence helps keep the other from exceeding power, balancing the system, and protecting individual rights

#### **Weaknesses:**

- Legal system is slower because each body's decisions or actions must be reviewed by the other
- Can result in a weaker government due to political tension between the branches
- Expensive and ineffective to receive a binding decision from only one branch of power