

Boilermakers Principle Exceptions

1. Chapter III courts may exercise non-judicial functions provided they are **merely incidental to the court's judicial functions**
2. **Delegation of judicial powers to officers of the court** (subject to judicial control)
3. Judges acting *persona designata* and exercising executive functions

1. Incidental functions

- Incidental functions are those which are consequential upon a judicial decision
- If non-judicial functions are capable of being conferred independently of the judicial functions, then they are not incidental to the exercise of judicial power

2. Delegation of judicial powers

- Judiciary may delegate judicial powers, so long as they remain subject to the court's supervision and they do not compromise the integrity of the court
 - Two limitations to this – ***Harris v Caladine***
 - Delegation cannot be so extreme that it cannot be said practically, and theoretically, that judges constitute the court
 - The delegated decisions must be subject to review or appeal by a judge
- ***Harris v Caladine* (1991)**
 - Registrars in the family court able to exercise judicial functions such as consent orders
 - Held to be valid
 - Delegation was not complete – did not prevent court from also exercising these powers
 - Officers could perform tasks to be reviewed by judges – jurisdiction, powers, and functions must be effectively controlled and supervised by judges

3. *Persona Designata*

- A judge may exercise non-judicial functions in their personal capacity, provided that – ***Hilton***
 - The exercise is not incompatible with their judicial functions while holding office – ***Grollo***
 - They consent to the exercise of an executive function in their personal capacity – ***Grollo***

- **Hilton v Wells (1985)**

- *Telecoms Interceptions Act* authorised Federal Court Judges to issue phone tapping warrants if suspicion an offence was being committed
- Power conferred on 'judge of FCA'
- Held to be a valid exercise of power even though an administrative duty
 - It's not a power given to the FCA itself, but to a judge of the FCA in a personal capacity

- **Grollo v Palmer (1995)**

- Concerned the same Act as above – qualified the rule from **Hilton**
- Conferred functions only on eligible judges – those self-nominated in accordance with the Act, further clarifies the 'personal capacity' requirement
- Established the two requirements
 - Judges must consent
 - Function cannot be incompatible with the performance of their judicial functions
- Several ways in which a function may be incompatible
 - Non-judicial function may be so permanent and complete that there is no scope for further performance of judicial functions
 - Compromises their integrity as a judge
 - If public confidence in the judiciary is diminished as a result
- Here it was held to be a compatible, and valid function
 - Significant utility in judges performing

- **Wilson v Minister for Aboriginal & Torres Strait Islander Affairs (1996)**

- Minister for Aboriginal Affairs appointed a female judge to write a report on the Aboriginal heritage of an area associated with women
- Legislation simply required a person to be appointed to the role by a minister – could this person be a judge?
- Held to be in breach of Ch III and an invalid conferral of power
 - Placing judge in a position of ministerial advisor – section read down to be valid but remained incompatible with Justice's appointment
 - Impeded on the legitimacy of the judiciary – diminished the crucial feature of impartiality by permitting Justice to act in a ministerial manner just by 'cloaking actions' with colours of judicial action
- Reconciling with **Grollo**
 - Here the judge is advising, whereas in **Grollo**, they were merely checking the executive to determine if the phone tapping was an excessive use of power

JUDICIARY: Boilermakers Attack Plan

1. Is power being conferred on a Ch III judge?

- **YES**

- Judicial power can only be granted to courts as outlined in **s 71**
- Look to step 2, if judicial power is being exercised – *Boilermakers* satisfied and the conferral is valid, if the power is non-judicial look to the exceptions

- **NO**

- Look to step 2, if judicial power is being exercised, look to step 3, if an exception applies – the conferral is valid
- If judicial power is not being exercised – *Boilermakers* satisfied

2. Is 'judicial power' being exercised?

- The exact definition of 'judicial power' is unclear – HCA has consistently struggled to clearly define it and a large grey area exists surrounding the concept – ***Appleby***
- To decide whether a power is judicial, there are key indicia which should be referred to
 - Binding authoritative decisions which are enforceable – **judicial**
 - Relate to a live controversy dealing with existing rights and duties – **judicial**
 - Historical characterisation of power being exercised – **judicial**
 - Limitation on discretion of the decision maker – **non-judicial**
 - Chameleon principle
 - More judicial if exercised by a court
 - Less so if done by an individual
- It must also be compatible with the essential character of a court as an institution

Is power being conferred on a Ch III judge?			
Yes		No	
Is 'judicial power' being exercised?			
Yes	No	Yes	No
Boilermakers satisfied	Invalid conferral unless exception applies	Invalid conferral unless exception applies	Boilermakers satisfied

- ***Brandy v HREOC (1995)***

- Tribunal (non-Ch III court) registered decisions with FCA, making them enforceable
- Held to be conferring judicial power on non-Ch III court
 - 'Where a tribunal is able to make binding and authoritative decisions, all attributes of judicial power are clearly and plainly present' – ***Latham J***

- ***R v Trade Practice Tribunal (1970)***

- Tribunal looking at past conduct to determine a future course of action in regard to policy
- Held to be a non-judicial function as it was primarily administrative
- Future determination of rights and obligations is not judicial power, as opposed to punishing parties for past conduct

3. Is there a valid exception that applies?

(a) *Incidental power?*

- In certain instances, there will be things that a court must do that are consequential to their judicial function; for this exception to apply, the power has to be something highly connected with what the court is doing otherwise
 - Will not apply if the power is capable of being conferred independently; or
 - If the non-judicial function does not enable, support, or facilitate the exercise of judicial function by the court

(b) *Persona designata?*

- Potentially, non-judicial acts are permitted, should a judge be performing them in a personal capacity; applies when the judge is not acting in their capacity as a judge of the particular court
 - Permits judges to act as heads of tribunals or authorise telephone interceptions
- Cannot be incompatible with their function as judicial officer and they must consent

(c) *Delegation of judicial power?* (Non-Ch III judge and judicial power)

- Non-Ch III judges are able to exercise judicial power, should it be subject to supervision from Ch III courts – ***Harris***
- Subject to 2 conditions
 - Delegation cannot be so extreme that the court is not constituted of judges
 - Delegation must not be inconsistent with court obligation to act judicially
 - Judges must be able to remake decisions if improperly made

JUDICIARY: State (*Kable*)

- There is the potential for Cth powers to be vested in state courts
 - **s 77(iii)** provides ‘with respect to any of the matters mentioned in the last two sections, Parliament may make laws investing any court of a State with federal jurisdiction’
- ***Kable v DPP (1996)***
 - Kable had been convicted of manslaughter in 1990 and was coming to the end of his sentence; while in jail had been writing nasty letters to the relatives of his wife
 - Act introduced after concerns of his release, was likely to commit serious acts of violence; allowed Supreme Court to make preventative detention order against him
 - Act keep him detained even though he had not been found guilty of a new offence
 - 3 objects and application of Act
 - Protect the community by providing for the preventive detention of Kable
 - In the construction of this Act, the need to protect the community is to be given paramount consideration
 - This Act authorises the making of a detention order against Kable and does not authorise the making of a detention order against any other persons
 - Held by a 4-2 majority that this Act was constitutionally invalid
 - State/Federal parliaments can’t legislate in a way that might undermine the role of state courts as repositories of federal power
 - State courts cannot be vested with functions incompatible with the exercise of federal judicial power
 - Courts capable of exercising federal jurisdiction need to be free from and perceived to be free from legislative/executive interference – otherwise public confidence would be lost
 - **NSW court was being vested with an executive function** (to make law)
 - **SC became an instrument of the legislature, initiated by the Executive**, to imprison Kable by a process that is far removed from the judicial process
 - Although not protected by a strict SoP under the state constitutions, state courts are part of the integrated system and therefore must remain capable of exercising federal judicial power as is contemplated under **s 71 and s 77(iii)**
- Post-*Kable* test is **if a court of a state has the capacity to be vested with Commonwealth judicial power under Ch III, has the State purported to vest the Court with a function that substantially impairs its institutional integrity**