

- *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361
 - Justices were influenced by the fact that the power vested in the TPT was relatively new, so “no traditional concepts” could be applied (Kitto J at 373)
- *Palmer v Ayres* (2017) 259 CLR 478 at 494
 - The Court warned that ‘[h]istory alone does not provide a **sufficient basis** for defining the exercise of a power as a judicial power’

The ‘Chameleon Principle’

- Apart from enforceability, the **margins are unclear** between judicial and non-judicial powers
- It’s also true that some powers are **neither inherently judicial nor non-judicial**, and therefore they ‘take their character from the tribunal in which they are **reposed** and the way in which they are to be exercised, and thus, may be conferred on courts and tribunals as the Parliament chooses’
 - Parliament is the one who decides whether to confer this power to the judiciary or to a non-judicial body
- ‘**Chameleon principle of innominate functions**’ – Kirby J, *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007)
 - He also warned that it could ‘subvert the constitutional separation of powers’ if ‘left uncontrolled’
 - However, the application is always up to the courts
 - It does not effectively allow Parliament ‘to draw the constitutional line’
 - The Court decides whether the decision made by Parliament is according to the Constitution or not

Judicial Power of the Commonwealth

- Judicial power is split between the Cth and the States
- Cth judicial power is under ss 75 and 76

| Section of the Constitution | |
|-----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| s 73 | HC has appellate jurisdiction |
| s 75 | <ul style="list-style-type: none"> ● Lists matters which are deemed to be within the original jurisdiction of the HC |

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| | <ul style="list-style-type: none"> ‘Original jurisdiction’ – matters that the Constitution itself is put into the hands of the HC as such matters cannot be removed from the HC except by constitutional amendment Cth, Parliament and Cth gov’t cannot remove those matters from the HC’s jurisdiction Matters include <ul style="list-style-type: none"> Any treaty Affect consuls or other reps of foreign countries Where the Cth or a Cth rep is a party Interstate in character e.g. dispute between states Where certain orders are being sought against a Cth officer/authority e.g. mandamus, prohibition or injunction |
| s 76 | <ul style="list-style-type: none"> Options Cth may confer original jurisdiction on the HC with matters listed in this section, though it can choose not to, or may remove such jurisdiction if conferred to the HC Matters include <ul style="list-style-type: none"> Under the Constitution or concerning its interpretation Under any law of the Cth Parliament Admiralty and maritime jurisdiction ‘relating to the same subject-matter claimed under the laws of different states’ → HC has not elucidated the meaning of the power yet |
| s 77 | Cth may also confer jurisdiction over ss 75 and 76 matters upon federal courts and state courts |

Commonwealth Separation of Judicial Powers

- Two distinct principles derived from Ch III of the Constitution
 - Cth may only confer judicial power on so-called Ch III courts described in s 71
 - Cth may not confer non-judicial power on Ch III courts
- The principles **ensures the quarantining** of the functions of the federal judicature from those of the Legislature and Executive → it guarantees the real separation between Parliament, the gov’t and Judiciary at the Federal level

Principle 1: Judicial power may *only* be exercised by Ch III Courts

- NSW v Commonwealth (Wheat case)* (1915) 20 CLR 54
- Majority found s 71 expressly provided an **exhaustive description** of the bodies which could be invested with judicial power of the Cth
- Such as implicit in the words of s 71

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.

- Includes HC, Federal Court, Family Court and the Federal Circuit Court

Principle 2: The *Boilermakers Case* – Federal Courts May Not Exercise Non-Judicial Power

- *R v Kirby; Ex parte Boilermakers Society of Australia* (Boilermakers case) (1956) 94 CLR 254
- Powers of the Cth Court of Conciliation and Arbitration were at issue
 - *Conciliation and Arbitration Act* 1904 conferred a mixture of judicial and non-judicial powers upon that Court
 - **s 25** – to settle industrial disputes through the process of conciliation and arbitration, and to make orders and industrial awards to regulate working conditions within industries → classified as non-judicial in *Waterside Workers*
 - **s 29** – to impose penalties for breach of orders or awards, to order compliance, to interpret and to issue injunctions to prevent contravention of the orders and awards
 - **s 29A** – to punish for contempt as were vested in the HC
- **Issue:** HC was asked to consider whether the simultaneous vesting of judicial and non-judicial power in the one body was a breach of Ch III
- **Decision**
 - Majority found that the investiture of such a mixture of powers was indeed a breach of the constitutional doctrine of the separation of powers
 - Because the Act allocated to the Court some non-judicial powers

Wakim: Extension of the *Boilermakers* Doctrine

- *Re Wakim; Ex parte McNally* (1999) 198 CLR 511
- Adherence to the second limb of the doctrine was indicated in this case
- **Issue:** The validity of the cross-vesting scheme was challenged (State jurisdiction was conferred on the Federal and Family Courts)
- Purpose of the cross-vesting scheme was to
 - Enables the federal courts to build up expertise and promote uniformity throughout Australia in particular legal issues (especially in corporation and family law)
- The Cth can certainly vest State courts with Federal jurisdiction per s 77 but the **Constitution makes no indication to the reciprocal situation**
- 5:1 found the state jurisdiction could not be vested in federal courts
 - Thus, *Wakim* extends the *Boilermakers* doctrine
 - **The Cth couldn't vest non-judicial power in Ch III courts**
- *Wakim* prescribes that only judicial power in the Cth (confined to matters listed in ss 75 and 76) can be vested in federal courts

- Thus, states were **not permitted to vest state judicial power in federal courts**, nor can the Cth authorise the reception of such judicial power by federal courts
- Majority rejected arguments based on the convenience and efficacy of the cross-vesting scheme
 - Such arguments had *no basis* for ignoring the constitutional limits to the power that can be conferred on federal courts

Exceptions to the Principles

- Strict adherence to both principles can prove inconvenient
- There are exceptions built into the principles

Principle 1

- Delegation of Judicial Power
 - General exception: The judicial power may, within limits, be delegated to non-judicial bodies by Ch III courts
 - e.g. *Harris v Caladine* (1991) 172 CLR 84, the Court found s 37A of the *Family Law Act 1975* (Cth) valid
 - 37A authorised the delegation of discrete judicial functions by the Family Court to Family Court Registrars, namely the making of consent orders for the dissolution of a marriage, custody, guardianship and welfare of children
- Discrete Exceptions
 - s 49 deals with 'the powers, privileges and immunities' of the Parliament, authorises the Cth Houses of Parliament to punish for contempt of Parliament
 - *R v White; Ex parte Byrnes* (1963) 109 CLR 665
 - Held that public service disciplinary tribunals were permitted to impose punishments for disciplinary offences by Cth public servants

Principle 2

- **Incidental powers**
 - Courts may exercise those non-judicial powers which are **incidental** to the effective exercise of their judicial functions
 - In *Boilermakers*, the Court outlines an exception:
 - s 51(xxxix) **extends to furnishing courts with authorities incidental** to the performance of the functions **derived under or from Ch III** and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judiciary
- **Persona Designata Exception**
 - Judges may act in non-judicial roles in their personal—as *opposed to official* (member of a court)—capacity
 - *Hilton v Wells* (1985) 157 CLR 57 with 3:2 majority held it was valid