Separation of Judicial Powers Commonwealth

**SOJP Cth Exam Question**

1. Is the decision-maker/tribunal a Chapter III court?
2. How are decision-makers appointed, e.g. do they have tenure?
3. What powers are vested in the body, judicial/non-judicial?
4. If non-judicial powers, do any of the exceptions apply?
   a. Are the non-judicial powers incidental to the exercise of judicial powers?
   b. Have the non-judicial powers been conferred on an individual judge as ‘persona designata’? Are they compatible with the judge’s role?

**NB:** Cth can delegate legislative power (Dignan)

**Ex Parte:** with respect to or in the interests of one side only or of an interested outside party

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_**may argue that** (section/law) is invalid by reason of breach of the separation of judicial power (SoJP).

The Separation of Judicial Power (SoJP) is implied from the text of the constitution (ss 1, 61, 72) as well as it’s divided structure (Ch I, II, III). Two principles give effect to the SoJP. Firstly, only Ch III Courts may exercise judicial power (*Wheat Case*). Secondly, Ch III Courts may only exercise judicial power (*Boilermakers*).

To decide if the power was conferred validly, both the nature of the power and of the body/individual exercising it must be examined.

1. **Is the Power a Judicial or Non-judicial Power?**

   The classic definition of ‘judicial power’ is ‘the power which every sovereign must of necessity have to decide controversies’ and ‘give a binding and authoritative decision’ (*Huddart Parker per Griffith CJ*). Whilst easy to define in the abstract it has proven difficult to apply with certainty in practice. Accordingly, the best approach is to look for indicia of judicial power on the facts (*Hanks’ Australian Constitutional Law, 978*). Whether _**_ (The Power) is JP or N-JP will be relevant to whether it may be conferred on (The Court/Body).

**Indicia of Judicial Power (JP):**

<table>
<thead>
<tr>
<th>Enforceability (<em>Brandy; Rola Co v Cth per Latham CJ</em>)</th>
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<tr>
<td>• This is the strongest indicator of JP.</td>
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<tr>
<td><em>Brady</em></td>
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<td>• In <em>Brady</em> the decisions of the Human Rights and Equal Opportunity Commission (HREOC) were enforceable when registered with the Federal Court. <strong>This made it a JP.</strong></td>
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<td>• High Court held that these <strong>amendments were invalid</strong> because they breached the separation of powers principle by authorising the enforcement of decisions of a non-judicial body (HREOC).</td>
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<td>• If a court acts as a mere ‘rubber stamp’ for another body’s decisions (ie it does not have independent input into the decision), that body’s decisions will be seen as enforceable (<em>Brandy</em>)</td>
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| *Alinta* |
| • By contrast in *Alinta* the Takeovers Panel had power to make declaration of ‘unacceptable circumstances’ under the *Corps Act* but these could only be enforced when registered with the federal court acting in an independent capacity as opposed to a rubber stamp. NJP. |
| • If a body’s decisions are enforced by the courts acting in an independent capacity rather than a mere ‘rubber stamp’, the first body’s decision will not be seen as enforceable (*Alinta*), pointing towards non-judicial power. |

**Binding and conclusive decisions:**

• JP is said to involve the making of a final and conclusive decision about existing rights.
A decision will not be binding and conclusive if, on appeal, there is a hearing de novo (all evidence is considered again). This indicates that the first body is exercising non-judicial power (*Luton*).

Decisions from Courts that are subject to appeal are still JP because appeal is usually on a point of law rather than de novo.

If the appeal decision is restricted to questions of law (a restricted appeal), the first body’s decision is binding and conclusive, indicating judicial power (*Brandy*).

In *Brandy* it was argued that the ability to go to Federal Court and appeal cut against JP. However, these appeals were not de novo and new evidence could not be introduced.

If parties have to elect to submit to jurisdiction it is unlikely judicial (*Breckler*).

### Need for a controversy:

- If the decision-maker acts as an impartial umpire to settle a controversy between two or more parties, the decision is more likely to be judicial (*Huddart v Parker*).
- Mere advisory opinions are NJP (*Momcilovic* at 65, 95 & 185).
- This is non-conclusive as unopposed bankruptcy applications, grants of probate, etc only have one party (*R v Davison*).
- Exception *Ex parte* hearings.

### Breadth of discretion:

- The broader the discretion conferred the less likely the function is judicial (*Spicer*).
- However, judges almost invariably limit broad discretion through accepted principles of interpretation and the doctrine of precedent. For example many equitable doctrines such as ‘unconscionability’ are prima facie broad but are constrained by legal tests which have developed in the case law.
- In *Mowbray* the majority held that the power to issue control orders was a JP despite the seemingly broad category of ‘reasonableness’.
- Consideration of a wide range of policy and political considerations exemplifies NJP rather than JP. BUT in *Mowbray* Gummow and Crennan JJ commented that policy can be included in ‘the curial interpretative process’.
- If no discretion at all is granted and the Court is just a rubber stamp that would indicate NJP.

### Decisions on existing rights and duties:

- If the body/individual makes decisions regarding existing rights and duties, it is likely that it is exercising judicial power.
- Judicial decisions tend to identify and declare existing rights and obligations.
- Legislature is normally focused on creating new rights and duties but when judiciary interprets it they decide the existing rights and duties under the statute.

### Creation of New Rights and Duties:

- Arguably bail and control orders create new rights and obligations. The majority in *Mowbray* accepted this but relied on historical considerations in characterising the power as JP.
- Industrial awards create new rights (*Alexander’s Case*).
- In *Alinta* the powers of the Takeovers Panel were seen as creating new rights and duties which was a factor in the Courts decision to characterise the power as NJP.
- Creating new obligations based on policy factors (deciding whether an agreement contrary to the public interest) (*Tasmanian Breweries*) NJP.

### Historical considerations:

- Functions may be historically judicial or non-judicial despite the weight of the abovementioned indicia (*Mowbray*).
- Bankruptcy declarations are historically judicial.
- Bail is historically seen as a JP and by analogy to bail the power to make control orders is a JP (*Mowbray*).

### Neither inherently JP or Non-JP

However, some functions may not be inherently judicial or non-judicial. They may take their character from the tribunal on which they are conferred and way in which they are to be exercised, as Parliament decides. This has been described as the ‘chameleon principle of innominate functions: Kirby J in (*Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*).
### Case Summary of Judicial and Non-Judicial Powers

<table>
<thead>
<tr>
<th>Power</th>
<th>JP or Non-JP</th>
<th>Federal or State</th>
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<tr>
<td>Issuance of control orders, bail and apprehended violence orders</td>
<td>JP per Mowbray</td>
<td>Federal</td>
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<tr>
<td>Power to issue injunctions</td>
<td>JP per Wheat Case</td>
<td>Federal</td>
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<tr>
<td>Power to have decisions enforced upon registration with Federal Court</td>
<td>JP per Brady</td>
<td>Federal</td>
</tr>
<tr>
<td>Issuance of warrants</td>
<td>NJP per Hilton and Grollo</td>
<td>Federal</td>
</tr>
<tr>
<td>Industrial Awards</td>
<td>NJP per Waterside</td>
<td>Federal</td>
</tr>
<tr>
<td>Preventative Detention Orders</td>
<td>NJP per Kable</td>
<td>State</td>
</tr>
<tr>
<td>Freezing assets prior to trial</td>
<td>NJP per International Finance</td>
<td>State</td>
</tr>
<tr>
<td>Power to make ‘declarations’ of criminal organisations</td>
<td>NJP per Wainohu</td>
<td>State</td>
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### 2. JP may only be exercised by Ch III Courts

Only Ch III Courts may exercise judicial power (*Wheat; Waterside; Boilermakers*) This principle is a necessary structural implication from s.72, which guarantees independence of the judiciary: the effect of s.72 would be undermined if judicial power could be conferred on others without guaranteed independence.

Accordingly, since the power being exercised is judicial, whether the body is a Ch III court must be considered – if it is not, the conferral is invalid.

s.71 gives an exhaustive definition of Ch III courts; if the body does not fall within those described in s.71, it is not a Ch III court.

### Chapter III

- HCA (*s 71 Const*)
- Federal Courts created by the parliament (*s 71 Const*):
  - Federal Court;
  - Family Court;
  - Federal Magistrates’ Court; and
  - Industrial Relations Court;
- Courts vested with federal jurisdiction:
- State Supreme and Magistrates’ Courts (see below)
- A single Federal Court judge (*Hilton v Wells*)
- Any newly created Ch III Courts must have tenure until 70 (*s 72 Const; Wheat; Waterside*)
- The purpose and intention of a body’s creation will be important however the name is not conclusive (*Waterside*)
- This principle is thought to uphold the integrity of the judicial process and protect an individual’s right to a fair trial
- In *Brandy* this principle was applied to prevent the HREOC from exercising JP

### Case Examples

*Brandy*: EOHRC given power to enforce decisions and therefore invalid vesting of JP in non ChIII Court

*Wheat*: Interstate Commission given power to award injunctions. Invalid vesting of JP.
3a. Exception of Valid Delegation: Only consider if it is not a Chapter III court

As the body is not a Ch III court, it may only exercise federal judicial power if there is an exception to the *Wheat* rule.

A general exception to principle 1 is that judicial power may, within limits, be delegated to non-judicial bodies (*Harris*). The Court in *Harris* set two conditions that determine whether delegation of the power is permitted:

1. The delegation must not be to an extent where it can no longer be said that judges constitute the Court; and
   - *Judges continue to bear the major responsibility for the exercise of judicial power, at least in relation to the more important aspects of contested matters.*
2. The delegation must not be inconsistent with the obligation on a Court to Act judicially and the decisions of the officers exercising delegated jurisdiction must be subject to review by judges of the Court
   - *The exercise of judicial power by a court officer is subject to review or appeal by a judge or judges on questions of both fact and law.*
   - *Their honours stated if the review ‘is by way of hearing de novo, the delegation will be valid’ (per Mason CJ and Deane J)*

3b. Discreet Exceptions: Only consider if it is not a Chapter III court

- Military tribunals can exercise judicial power in punishing members of armed forces for breaching disciplinary rules (*R v Bevan; Ex parte Elisa and Gordon*).
- Public service disciplinary tribunals can impose punishments for disciplinary offences by Cth public servants (*R v White; Ex parte Byrnes*).
- Houses of Parliament can order people to be imprisoned for contempt (*s 49 Const; R v Richards*).
- Power of public service disciplinary bodies to punish Commonwealth public servants (*R v White*).
- Courts martial: Power of army to discipline its staff for breaches of military law (*R v Cox per Dixon CJ*).

**Sub-Conclusion**

If not a Ch III court and no exception, the conferral of judicial power is invalid; if it is either a Ch III court or it is not but there is an applicable exception, the conferral is valid.

4. Chapter III Courts may not exercise NJP (principle 2)

Federal courts may not exercise non-judicial powers, or a combination of judicial and non-judicial powers (*Boilermakers*) because Ch III is an ‘exhaustive statement’ of the manner in which powers can be vested to Ch III Courts (*Boilermakers*).

**Arguments against principle 2**

- ____ may argue that principle 2 should be reversed because it is merely an ‘implication’ which leads to much inconvenience and little protection (*Wakim per Kirby J*).
- Further, the constitutional logic of principle 2 can be faulted. Arguably structuring the Constitution into chapters was merely a convenient way of organising the document and no significance should be attached to it (*Hanks, 976*).
- Furthermore, applying the *Boilermakers* reasoning to Ch I and II would demand that executive and legislative power should be untangled. Further, Ch III courts can only exercise federal judicial power not state judicial power (*Wakim*). Although the Cth can vest judicial power in State Courts the reciprocal situation cannot occur (*Wakim*).
Is there an Exception to Principle 2 (Chapter III court exercising NJP)

a. Persona Designata

Judges may act in non-judicial roles where they are acting in their personal capacity (**Hilton**) provided that they consent and the power vested in them is not incompatible with the judges official duties (**Grollo at 364; Wilson**).

**Grollo** Majority outlined 2 main conditions on the persona designata principle:

1. **Judge must consent to exercising** the non-judicial power (at 364)
2. **Role must not be incompatible with the judge’s role:**
   a. the commitment required of the judge in performing the non-judicial function **must not be too onerous**;
   b. the non-judicial function must not compromise or impair the ability of the judge to perform his or her **functions with integrity**; and
   c. the non-judicial power must not be of such a kind as to **diminish public confidence** in the court system or in the ability of the judge to perform his or her functions with integrity.

**Wilson** offers a three-step test for incompatibility

1. **Is the NJP an integral part, or closely connected with the functions of the legislature or executive?**
   a. If no such close connection is evident, there is no constitutional incompatibility.
   b. If there is such a close connection, then ask the next question:
2. **Must the function be performed independently of the advice or wishes of the Executive, Legislature or other bodies?**
   a. If the function is not necessarily performed independently, incompatibility arises.
   b. If the function is to be performed independently, a final question arises:
3. **Is the discretion given to the Judge required to be exercised on political grounds?**
   a. If no, no incompatibility.
   b. If yes, then the appointment is invalid
4. **Does the function involve a judicial manner of performance?**
   a. e.g. rules of evidence and procedure, two parties, non-political discretion, etc)
   b. If the power does not involve a judicial manner of performance then it is incompatible

The majority’s application of the above test in **Wilson** demonstrated that steps 2 and 3 are strict

Issuance of warrants is not incompatible (**Hilton; Grollo**) whereas writing reports for government is incompatible (**Wilson**)

In **Grollo** the judge was given power to issue telephone tap warrants. Was valid under persona designata.

In **Wilson** judge was commissioned to write a report. Terms of appointment did not guarantee independence and manner of performance was not judicial. Therefore not a valid persona designata.

b. Incidental Power

**Boilermakers** outlined one exception to the second limb of the SoJP whereby Ch III Courts can wield NJP if it is incidental to their exercise of JP. This was upheld in **R v Joske**.

- In **R v Joske** the Industrial Court’s ability to rectify or validate actions, approve of schemes and re-organize trade unions was seen as incidental to its JP because they formed consequences of an Order of Invalidity which the Court could make.
- Chapter III courts can exercise non-judicial powers where those powers are incidental to the exercise of judicial powers:
- ‘Section 51(xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chapter III and no doubt to dealing in other ways with