PART II – THE COURTS

I *The High Court*

A *Types of Court*

The *Constitution* creates three kinds of courts: federal courts established under the *Constitution* and Commonwealth Acts of Parliament, state courts established under state legislation, and territory courts. Such courts are said to exercise judicial (as distinct from executive or legislative) power.

Chapter III of the *Constitution* vests Commonwealth judicial power in three types of court: the High Court of Australia, federal courts able to be created by Parliament and other state courts vested with federal jurisdiction by Parliament. The High Court has a special role in the judicial system: it is the final court of appeal and also the court of first instance for several causes of action.

B *Structure and Composition*

Section s 71 of the *Constitution* vests judicial power in the High Court of Australia and courts created by or vested with federal jurisdiction by Parliament:

> ***Section 71 — Judicial power and Courts:***
>
> 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, in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The minimum composition is two Justices and a Chief Justice. Parliament may increase the number by legislation.

1 *Appointment and Removal*

The circumstances of appointment and removal are set out in s 72 of the *Constitution*:

> ***Section 72:***
>
> The Justices of the High Court and of the other courts created by the Parliament —
>
> (i) Shall be appointed by the Governor–General in Council;
> (ii) Shall not be removed except by the Governor–General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court … Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years. …

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor–General.

The Governor–General appoints Justices to the High Court (in practice, upon the advice of the Prime Minister, who in turn receives advice from the Attorney–General and possibly Cabinet): *Constitution* s 72(i). There are no qualifications for appointment (not even a law degree). Since 1979, appointment has usually taken place following consultation between the Standing Committee of Attorneys–General.

Removal is possible only on the grounds of 'proved misbehaviour or incapacity' (s 72(ii)) or old age. Such an allegation has only been made against one justice: Justice Lionel Murphy. However, a failed prosecution against his appointing government (*Sankey v Whitlam*) and alleged transcripts of telephone conversations proved insufficient to establish a 'proved' misbehaviour. This suggests that the evidence would need to be compelling. Support for removal would also presumably need to be bipartisan.

These strict requirements protect the independence of the judiciary, and evince respect for the constitutionally enshrined separation of powers doctrine. They stand in marked contrast to the appointment procedure, which is an executive function and may allow 'court stacking' (increasing the size of the court and making politically coloured appointments until the original members form a minority). In theory, there is nothing to prevent Parliament from swamping the court with 15 partisan judges. In practice, however, it is unlikely that such a law would receive support.

The following list outlines the composition of the High Court since its inception:

- 1903: Griffith, Barton, O'Connor
- 1906: Griffith, Barton, O'Connor, Isaacs, Higgins
- 1913: Griffith, Barton, Isaacs, Higgins, Gavan Duffy, Powers, Rich
- 1920: Knox, Isaacs, Higgins, Gavan Duffy, Powers, Rich, Starke
- 1930: Isaacs, Gavan Duffy, Rich, Starke, Dixon
- 1931: Gavan Duffy, Rich, Starke, Dixon, Evatt, McTiernan
- 1935: Latham, Rich, Starke, Dixon, Evatt, McTiernan
- 1940: Latham, Rich, Starke, Dixon, McTiernan, Williams
- 1946: Latham, Rich, Starke, Dixon, McTiernan, Williams, Webb
- 1950: Latham, Dixon, McTiernan, Williams, Webb, Fullagar, Kitto
- 1952: Dixon, McTiernan, Williams, Webb, Fullagar, Kitto, Taylor
- 1958: Dixon, McTiernan, Fullagar, Kitto, Taylor, Menzies, Windeyer
- 1961: Dixon, McTiernan, Kitto, Taylor, Menzies, Windeyer, Owen
- 1964: Barwick, McTiernan, Kitto, Taylor, Menzies, Windeyer, Owen
- 1970: Barwick, McTiernan, Menzies, Windeyer, Owen, Walsh, Gibbs
- 1972: Barwick, McTiernan, Menzies, Walsh, Gibbs, Stephen, Mason

- 1974: Barwick, McTiernan, Menzies, Gibbs, Stephen, Mason, Jacobs
- 1975: Barwick, McTiernan, Gibbs, Stephen, Mason, Jacobs, Murphy
- 1976: Barwick, Gibbs, Stephen, Mason, Jacobs, Murphy, Aickin
- 1979: Barwick, Gibbs, Stephen, Mason, Murphy, Aickin, Wilson
- 1981: Gibbs, Stephen, Mason, Murphy, Aickin, Wilson, Brennan
- 1982: Gibbs, Mason, Murphy, Wilson, Brennan, Deane, Dawson
- 1987: Mason, Wilson, Brennan, Deane, Dawson, Toohey, Gaudron
- 1989: Mason, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh
- 1995: Brennan, Deane, Dawson, Toohey, Gaudron, McHugh, Gummow
- 1996: Brennan, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby
- 1998: Gleeson, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan
- 2003: Gleeson, McHugh, Gummow, Kirby, Hayne, Callinan, Heydon
- 2005: Gleeson, Gummow, Kirby, Hayne, Callinan, Heydon, Crennan

Justices may also retire voluntarily, as, for example, Justice Mary Gaudron elected to do.

2 *Tenure*

Until 1977, justices were treated as holding puisne tenure (life appointment). This was said to be implied by para (ii) of s 72 of the *Constitution*, which said that justices '[s]hall not be removed except … on the ground of proved misbehaviour or incapacity' (*Wheat Case*).

By constitutional referendum, this implication was rebutted and an upper threshold on the age of retirement was set at 70 years of age. This brought to an end the trend of late retirement initiated by Rich (1950 at age 87), Starke (1950, 79) and McTiernan JJ (1975, 84). From 1977 onwards, new appointments (whether as Justice or Chief Justice) were bound by the new compulsory retirement age. This was most recently applied to Justice Michael McHugh, who retired in November 2005 upon attaining the age of 70.

During a justice's tenure, their remuneration may not be decreased: *Constitution* s 72(iii). Presumably this is to prevent Parliament (which sets the judiciary's salaries) unduly influencing the decision-making process.

Other federal courts adopt slightly different tenure arrangements (see below).

C *Jurisdiction*

The High Court has two jurisdictions conferred upon it by the *Constitution*: appellate and original. Its original jurisdiction allows the Court to hear most constitutional cases. Its appellate jurisdiction places the Court at the apex of the Australian court hierarchy as the final court of appeal. The scope of both jurisdictions is defined in Chapter III of the *Constitution*.

When exercising both jurisdictions, written submissions must be made to the High Court not exceeding 20 pages. (Because there is no set word limit, this leads to ingenious compacting techniques of varying legitimacy.) If a case raises constitutional issues, s 78(b) of the *Judiciary Act 1903* (Cth) requires notice to be given to the Attorneys–General, who may make submissions.

1 *Appellate*

Section 73:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences —

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court;
(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
(iii) Of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

The appellate jurisdiction of the High Court comprises four kinds of matters:

1 Internal appeals
From a single justice of the High Court to a full bench

2 Appeals from federal jurisdictions
This includes any 'federal court, or court exercising federal jurisdiction' (including state supreme courts)

3 Former Privy Council appeals
This includes any matter heard by any court which it would previously have been possible to appeal to the Privy Council

4 Appeals from the Interstate Commission on matters of law
No longer relevant (see *Constitution* ss 101–3)

Federal Parliament may prescribe 'exceptions' and 'regulations' in relation to appeals from state supreme courts. However, it cannot exclude Privy Council matters.

An example of the kind of regulation envisaged by the *Constitution* is provided by s 35 of the *Judiciary Act 1903* (Cth), which provides that no appeal from any state court may be heard 'unless the High Court gives special leave to appeal'. This is a valid law (*Smith Kline & French Laboratories v Commonwealth*).

There are no limits to the exceptions or regulations Parliament may prescribe in relation to appeals from federal jurisdictions (*Watson v Commissioner of Taxation*). This allows statutes to exclude or confine appeals to the High Court (see, eg, *Family Law Act 1975* (Cth) s 95). However, the High Court has taken a narrow view of permissible exceptions.

There is no appeal to the High Court as of right. The Court is able to control its workload and the type of cases it hears. Constitutional cases are most likely to be heard, as are civil cases having national relevance. Criminal appeals are also preferred. Whether leave to appeal is granted normally depends on questions of principle rather than technicalities.

2 *Original*

The High Court's original jurisdiction is the range of matters able to be initiated in it directly rather than proceed by appeal. Such hearings take place before a single Justice of the Court, who can refer the case to the relevant inferior court if it would be more appropriate to conduct the hearing in another setting.

The range of matters to which this original jurisdiction applies are outlined in ss 75–6 of the *Constitution*:

Section 75:

In all matters —

(i) Arising under any treaty;
(ii) Affecting consuls or other representatives of other countries;
(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
(iv) Between States, or between residents of different States, or between a State and a resident of another State;
(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

Importantly, the use of the words 'shall have' entails that this jurisdiction is irrevocable. Common to these matters is that '[i]n every one of them the principle of *political identification or differentiation is present*' (*Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* per Isaacs J).

As a result of the decision in *Re East; Ex parte Nguyen*, it is doubtful whether s 75(i) is capable of meaningful application. Disputes arising 'under a treaty' will generally not create a 'matter' cognisable by a court.

However, s 75(v) is of significant importance in administrative law. It entrenches a 'constitutionally unassailable'[1] jurisdiction to issue mandamus, prohibition or injunction against a Commonwealth officer. This has been held to imply the existence of an ancillary jurisdiction to grant certiorari (*Re Coldham; Ex parte Brideson*). Such writs are correctly termed 'constitutional' rather than 'prerogative' writs, because they derive force from the *Constitution* and not the judiciary (*Re Refugee Tribunal; Ex parte Aala* per Gaudron and Gummow JJ and Kirby J).

The High Court's power to issue writs under s 75(v) cannot be curtailed by legislation (though a similar power conferred upon the Federal Court by statute has been validly curtailed in relation to immigration matters: *Abebe v Commonwealth*). Parliament cannot take away the High Court's original jurisdiction. For this reason, legislation commonly includes a provision to the effect that:

> *Nothing in this Part is intended to affect the jurisdiction of the High Court under s 75 of the* Constitution.[2]

[1] Blackshield and Williams at 557.
[2] See, eg, *Border Protection(Validation and Enforcement Powers) Act 2001* (Cth).

Aala provides an example of the issue of a writ under s 75(v). The relevant statement of principle is that 'if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if [it has not been excluded], the officer exceeds jurisdiction in a sense necessary to attract protection under s 75(v) of the *Constitution*)' (Gaudron and Gummow JJ).

In practice, specific questions of law are reserved for determination by the High Court. However, it does *not* determine facts. Facts are first determined by a lower court.

Section 76 lists several additional areas in which federal Parliament is able to expand the High Court's original jurisdiction:

Section 76:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter —

(i) Arising under this Constitution, or involving its interpretation;
(ii) Arising under any laws made by the Parliament;
(iii) Of Admiralty and maritime jurisdiction;
(iv) Relating to the same subject-matter claimed under the laws of different States.

Section 76(i) is implemented in the form of s 30(a) of the *Judiciary Act 1903* (Cth).

Section 76(ii) grants a broad power to confer original jurisdiction: essentially, any valid legislative instrument may confer power on the High Court to conduct hearings in respect of its enforcement. With the repeal of an instrument, jurisdiction is correspondingly narrowed (what Parliament giveth it can taketh away).

Section 77 qualifies the operation of ss 75–6 of the *Constitution*:

Section 77:

With respect to any of the matters mentioned in the last two sections the Parliament may make laws —

(i) Defining the jurisdiction of any federal court other than the High Court;
(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
(iii) Investing any court of a State with federal jurisdiction.

Section 77 essentially confers federal Parliamentary power to fully determine the jurisdiction of federal courts and how that jurisdiction interacts with state courts.

Importantly, it also confers power to partially determine the jurisdiction of state courts in that it may invest any state court with federal jurisdiction: s 77(iii).

D *Exercising Jurisdiction*

There are several limitations — some Constitutional, some statutory and some self-imposed — placed upon the jurisdiction of the High Court. They reflect the judicial self-restraint commonly associated with Courts' reluctance to answer questions of law unless it is necessary to do so.

1 *Concurrence*

Where the Court is called upon to make a decision 'affecting the constitutional powers of the Commonwealth', at least three justices must concur: *Judiciary Act 1903* (Cth) s 23(1). See, eg, *Field Peas Marketing Board v Clements & Marshall*.

In other (non-constitutional) situations in which the High Court acts in its appellate jurisdiction, an equal majority and minority will result in the decision of the lower court being affirmed: *Judiciary Act 1903* (Cth) s 23(2). However, if the Court is exercising original jurisdiction the presumption is that the outcome supported by the Chief Justice will prevail. This presumption has been criticised by Murphy J, who thought that such legislative provisions intruded too far into the independence of the judiciary: *Federal Commissioner of Taxation v St Helens Farm*.

2 *Matter*

Only 'matters' may be heard by the Court. Advisory opinions are not given. An attempt to enable the provision of such opinions was held to be unconstitutional (*In re Judiciary and Navigation Acts*).

In re Judiciary and Navigation Acts (1921) HCA:

Facts:

- Federal Parliament purported to introduce s 88 to the *Judiciary Act 1903* (Cth), which enabled the Full Court of the High Court to give advisory opinions
- This was first considered in relation to the *Navigation Act 1912* (Cth), whose validity was questioned before they came into force

Issue:

- Can s 76 of the *Constitution* support the legislation, or does an abstract question of law go beyond the 'any matter' there referred to?

Reasoning:

- Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ:
  - With the purported s 88, Parliament intended to obtain an authoritative declaration of the law
  - This is a judicial function and must be performed by a Court
    - The Court leaves to one side the question of whether Parliament can impose non-judicial duties upon judges ('it is not within our province')
  - Is there a matter within the meaning of s 76?
    - 'We think not.'
    - A matter is more than merely a legal proceeding; it means 'the subject matter for determination in a legal proceeding'
    - No matter will arise 'unless there is some immediate right, duty or liability to be established by the determination of the Court'
  - The legislature cannot authorise the Court to make a declaration of law 'divorced

from any attempt to administer that law'
    - A matter 'must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law'
    - This may occur either *inter partes* or *ex parte* but not to determine 'abstract questions of law without the right or duty of any body or person being involved'

Decision:

- (5:1) No, 'matter' means a claim of right in litigation between parties, not an abstraction of law; therefore, s 76 does not support legislation purporting to enable determination of such an abstract question

In re Judiciary speaks of a 'right or privilege or protection given by law' being necessary to create a matter which can be the subject of judicial jurisdiction. In *Mellifont v Attorney–General (Queensland)* this was described as an 'immediate right, duty or liability'. Such a matter may arise as a result of the threat of possible criminal prosecution (*Croome v Tasmania*).

Croome v Tasmania **(1997) HCA:**

Facts

- The plaintiffs are homosexuals living in Tasmania, where 'carnal knowledge of any person against the order of nature' and 'indecent practice between male persons' were offences under the *Criminal Code 1924* (Tas) ss 122–3
- In 1994, the Human Rights Committee stated that these provisions were an 'arbitrary interference with privacy' under international law (*Toonen*)
- Consequently, the *Human Rights (Sexual Conduct) Act 1994* (Cth) was enacted, which sought to bring Australian law into conformity with international law
- The plaintiffs seek to establish inconsistency between the *Criminal Code* provisions and the legislation; however, they have not yet been prosecuted under the Code
- Tasmania argues that there is no matter to confer jurisdiction upon the High Court

Issue

- Is there a 'matter' arising for determination?

Reasoning

- Brennan CJ, Dawson and Toohey JJ:
    - A matter is not a proceeding; it is 'the subject of controversy which is amenable to judicial determination in the proceeding'
    - A matter may consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is involved and the polity whose law it purports to be (*Toowoomba Foundry v Commonwealth*)
    - 'It is a misconception of the principle in *In re Judiciary and Navigation Acts* to suggest that, in proceedings for a declaration of invalidity of an impugned law, no law is administered unless the executive government has acted to enforce the impugned law'
    - Even in the absence of enforcement, there is still a law being administered in the sense that constitutional law is being applied to determine validity: the law governing the impugned law is being administered
    - If it were otherwise, state Attorneys–General could not seek declarations that a Commonwealth law is invalid, yet this is the 'classical vehicle' for calling upon the High Court's constitutional jurisdiction
    - The 'right, title, privilege or immunity' spoken of previously is here the declaration

of an impugned law's invalidity

- Gaudron, McHugh and Gummow JJ:
  - Ch III of the *Constitution* is not an exhaustive statement of judicial power that may be conferred for the exercise of federal jurisdiction
  - A determination of questions of law could be made on a reference by the executive to the Court, but there must be 'some immediate, right, duty or liability to be established by the determination'
  - *In re Judiciary* does *not* establish that no right, duty or liability will arise until a criminal provision is enforced against a citizen
  - A citizen seeking to establish invalidity of a criminal law under s 109 has his duty to observe particular norms of conduct and criminal liability affected
  - 'It was significant enough that the plaintiffs "faced possible criminal prosecution".' (at 138)

Decision

- Yes, there is a relevant matter
- The threat of possible criminal prosecution is sufficient to give rise to an immediate right, duty or liability

If a claim is not a relevant 'matter', it cannot be brought before the Court (*In re Judiciary*). However, 'matter' is broad enough to encompass circumstances where a party is in violation of a law, thinks it's invalid but wants to know whether he can continue to so violate.

3 *Standing*

Second, the plaintiff must have *locus standi* (standing) in order to bring an action. Without standing, a case cannot be heard.[3] Standing is premised on a medieval dichotomy between public and private matters. A public nuisance affects the community as a whole, and will not give rise to a private cause of action in any single individual. Instead, criminal prosecutions would be instituted by a public officer. By contrast, private wrongs gave rise to private remedies.

4 *Amici Curiae and Interveners*

As Dixon J noted in *Australian Railways Union v Victorian Railways Commissioners*, litigation is normally conducted by 'parties, and parties alone'. However, although litigation is conducted primarily on the basis of submissions made by parties to it, it is possible for third parties who are not directly connected with a case to 'intervene' in proceedings.

Under s 78A(1) of the *Judiciary Act* 903 (Cth), state and Commonwealth Attorneys–General are able to do so in any matter 'arising under the *Constitution* or involving its interpretation'. Such interventions have been found to occur in only a minority (10 per cent) of cases. Any intervening party may make oral and written submissions as a party, but is potentially liable in the event that a costs order is made.

Private bodies are not granted a statutory right to intervene, and are not normally given leave to so do. However, such parties may offer submissions as *amici* curiae ('friends of the court'). Whereas an intervener becomes a direct party to the proceedings (in relation to specific issues), an *amicus curiae* simply assists the Court and are not subject to costs orders.

[3] See below Part [???] (discussing the role of standing in the administrative law context).

According to Dixon J in *Australian Railways Union*, an *amicus curiae* will only be heard where they seek 'to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law…'. More recently, health organisations were granted leave to be heard as *amici curiae* in *CES v Superclinics*.

The test for granting leave to intervene has since been stated by Brennan CJ to as follows:

> *Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person's legal interests without that person being given an opportunity to be heard.*[4]

However, 'indirect affectation' is insufficient because it is assumed that Courts will determine the law correctly so that the result is inevitable. Only in situations where submissions made by parties to the proceeding may not fully canvass the relevant issues will it be necessary to prevent an error that might affect the intervener's interests. In that case, Kirby J agreed that 'this Court should maintain a tight rein on interventions.'[5]

The situation with respect to an *amicus curiae* is different: leave is discretionary and will be granted where a person 'is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.'[6] This approach is substantially broader than that applied in relation to interveners, to whom the High Court remains relatively wary of opening proceedings for fear of reducing the efficiency of litigation before it.

An example of these practices is provided by *McBane's Case*. McBane, a doctor, found himself caught between state and federal laws: having been approached by an unmarried couple seeking artificial insemination, if he refused to perform IVF on the basis that it would be contrary to the Victorian IVF legislation he would be contravening Commonwealth marital anti-discrimination laws. In this case, a group of Catholic Bishops offered submissions, which McBane opposed; the Court granted leave to the Bishops to make submissions as *amici curiae*. The Bishops lose, but because they are not parties to the case they could not appeal the decision or seek mandamus under s 75(v). If the Bishops had been interveners, they might have been able to appeal.

5 *Precedent*

Being the highest Court in Australia, the High Court is not bound to follow its own decisions or those of other courts. In practice, however, much respect for the doctrine of *stare decisis* may be observed. The current approach to precedent is broadly cautionary. There are two stages for determining whether to overrule a previous decision:

1. **Leave must be granted to put the argument (*Evda Nominees*)**
   (Cf Deane and Kirby JJ: lawyers should be able to argue whatever helps their client)

2. **The Court's historical reluctance to overrule must be overcome**
   This reluctance is predicated on the view that changes to the bench ought not to result in changes to the law (or constitutional interpretation); to do otherwise would undermine the rule of law

However, the High Court of Australia has indicated willingness to depart from previous authorities where they are 'clearly wrong' (*Engine-Drivers' Case*).

[4] *Levy v Victoria* (1997) 189 CLR 579, 603.
[5] Ibid 650.
[6] Ibid 604.

***Australian Agricultural Co v Federated Engine-Drivers & Firemen's Association* ('*Engine-Drivers' Case*') (1913) HCA:**

Reasoning

- Isaacs J:
  - The Privy Council has never accepted that its decisions are immutable, unlike the House of Lords
  - It is the 'primary duty of even that august tribunal, to consider for itself at the instance of every suitor before it, what is the law by which he is bound'
  - 'A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong, in the opinion of those whose present function is to interpret and enforce the law; and if the reasons given appear when examined to be unsound, then, say the Judicial Committee, they are bound "to give effect to their own view of the law"'
  - The position of the House of Lords 'is anomalous' and is a result of its 'anomalous position in the constitutional and juristic history of England'
  - '…where a former decision is clearly wrong, and there are no circumstances countervailing the primary duty of giving effect to the law as the Court finds it, the real opinion of the Court should be expressed' (at 278–9)
  - 'In my opinion, where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of this Court to declare the law truly.'

Historically, the House of Lords treated its earlier decisions as binding (see, eg, *Beamish v Beamish*) until *London Tramways v London County Council*. Interestingly, as Blackshield and Williams note, this case, in overruling previous authority that denied the validity of overruling previous authority, created a logical paradox: the overruling was what made itself possible. A statement was subsequently issued to the effect that 'precedents are not rules of law, but only rules of practice, and can therefore be changed simply by the adoption of a different practice.'[7]

A more modern statement of approach was provided by the High Court in *Evda Nominees*. It suggests that a party must seek leave to challenge an earlier decision.

***Evda Nominees Pty Ltd v Victoria* (1984) HCA:**

Reasoning

- Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ:
  - 'Although the Court is not bound by its own decisions, that does not mean that the Court will hear full argument on every occasion when counsel wishes to contend that a previous case was wrongly decided'

- Deane J:
  - Counsel does not require the Court's permission to present argument that a previous decision should not be followed

Decision

[7] Blackshield and Williams at 596.

- 'The Court does not consider that it should now how further argument urging it to depart from the actual decision reached in those cases.'

Departure from established precedent was later described in *John v Federal Commissioner of Taxation*, where it was said that 'such a course is not lightly undertaken' (per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ at 438). Their Honours outlined four factors, on the basis of an earlier judgment of Gibbs CJ, which were said to be relevant in determining whether departure is justified:

1 Series of cases
Whether the earlier decisions rested upon 'a principle carefully worked out in a significant succession of cases' (departure more likely where isolated decision);

2 Unanimity of *ratio decidendi*
Whether the reasoning of majority justices differed (no uniform ratio or overall minority in reasoning but not outcome suggests departure more likely);

3 Lapse of time (*Territory Senators*)
Whether the earlier decisions had caused 'considerable inconvenience' (consequences are likely to be more significant after a longer period of time); and

4 Reliance
Whether earlier decisions had not been relied upon in a way that made reconsideration inappropriate.

However, when construing a statute, their Honours noted (at 440) that the Court should not follow precedent if it differs from present understandings of 'the true intent of the statute'. This approach has also been advanced in relation to constitutional interpretation (see, eg, Zines). Arguably, when interpreting the *Constitution* the Court should be less bound by *stare decisis*, since the *Constitution* is the supreme law above all decisions about it. The Court's primary objective should not be to follow previous decisions *about* the *Constitution*, but to correctly construe and give effect to it.

That said, stability can be an important consideration: too much willingness to depart from previous authority may lead to capricious relitigation once the Court's composition changes (see, eg, *Territory Senators*).

These competing approaches to precedent reflect tension between two judicial rationales: accuracy/correctness of law, and stability of law. Stability is especially important in a criminal context, where parties may be liable to imprisonment depending upon the vagaries of a court.

See further *Stevens v Head* (1993) 176 CLR 433, 461 (Deane J), 464 (Gaudron J).

No prospective overruling is possible. If a previous decision was wrong, it was always wrong regardless of when its incorrectness is subsequently pronounced by the Court. A decision will not be made to take effect only in the future.

E *Other Federal Courts*

Under s 77 of the *Constitution*, the federal Parliament has the power to create federal courts and to vest state courts with federal jurisdiction. Federal courts are subject to different tenure

arrangements and the precise circumstances for the appointment and removal of federal judges is determined by the Act establishing each court (eg, *Federal Court of Australia Act 1976* (Cth)).

However, such statutes are curtailed by any constitutional requirements that may exist. For example, a threshold retirement age of 70 years continues to apply to federal courts as a result of the amendments to s 73, irrespective of any provisions to the contrary in statutes creating them.

Issue: can Parliament create a court whose judges sit for a fixed period of appointment, subject to discretionary renewal? Can acting judges be created and demoted at will?

- Such courts would be exercising judicial power
- They would therefore be subject to the requirements in Ch III
- Judges could not be demoted or their salary reduced during their term
- Judges would need tenure
- A fixed period of appointment may be possible, but discretionary renewal would not be

II *Separation of Powers*

A *Meaning and Justification*

The *Constitution* establishes three branches of government, each exercising a different kind of power. The legislative branch exercises *legislative power* — the power to create, amend and repeal laws of the Commonwealth. The executive branch exercises *executive power* — the power to administer (execute) and give effect to laws by means of enforcement or application. Executive power usually entails application of legal rules from statutes to particular factual situations, and may occasionally have a legislative element (delegated regulations).

Judicial power is a wholly distinct species of governmental authority. A judge interprets and applies laws with greater authority than a member of the executive: their decisions are binding and form precedent. Successive decisions create an authoritative body of case law interpreting and applying the law. Judges can issue remedies and determine punishments. They have power to control the conduct of a proceeding, bring parties before them and determine rights and obligations according to law.

The separation of powers doctrine treats these three forms of power as conceptually and institutionally distinct. Although there is some personnel overlap (between, say, members of the executive Cabinet and members of Parliament, and judges and tribunal or commission members), their operation is separated.

The justification for this separation is connected with the rule of law. By avoiding concentrations of power (which are prone to arbitrary abuse), different branches act as checks and balances on exercises of power authorised by the *Constitution*. In a sense, separating governmental powers may be seen to achieve a similar objective to a bill of rights, protecting individual freedoms by ensuring no single member or branch of government has absolute power.

The doctrine's operation is as follows:

- **Administrative decisions** made by the executive: subject to judicial review (supervised by a separate and, by s 72, independent judicial body, capable of issuing remedies: s 75)
- **Executive and legislative power** are only weakly separated since the composition of the executive is largely members of the legislature
- **Executive regulations** are subject to parliamentary review or revocation of the delegated regulatory power
- **Parliamentary legislation** is subject to nullification by a Court for reason of constitutional invalidity; there is strong separation between the executive and judicature

B *Judicial Power*

Judicial power is impossible to define comprehensively. Whether or not a given exercise of power is classified as judicial will depend on a number of factors, and is not an absolute characteristic. Rather, judicial power exists along a continuum of degree.

At one end sit essentially judicial powers: criminal adjudications, binding findings, court orders, and the like. Such powers cannot be conferred upon anything other than a judicial body (court). At the other end sit essentially non-judicial powers: making awards, non-binding determinations, performing administrative functions, *et cetera*. However, these categories are not dichotomised: in between exists a diverse range of indeterminate powers: powers which might equally be given to either the judicature or executive.

Whether or not a power is seen as judicial depends on several factors. However, no single factor is determinative:

1 **The nature of the body upon which it is concerned**
A clearly executive body is less likely to exercise judicial power

2 **Whether adjudication occurs *inter partes***
Decisions made as between parties are more likely to be judicial

3 **The nature of the discretion conferred**
The less discretion available, the more likely a power is to be judicial

4 **Whether the decision is binding**
Decisions capable of legal enforcement are more likely to be judicial

5 **Historical classification of power**
Whether the power is normally characterised as judicial

If an award or determination is legally enforceable, it is almost certainly judicial, as *Brandy's Case* illustrates.

Brandy v Human Rights and Equal Opportunity Commission **(1995) 183 CLR 245 ('*Brandy's Case*'):**

Facts:

- This case concerns legislation governing HREOC, an administrative body given the power to determine disputes in respect of certain matters
- A complainant could lodge with the Commission details of their complaint
- The other party would be notified, a hearing called and lawyers present, after which a decision would be made as to compensation and costs
- (However, if the winner actually wants to obtain damages they have to go to the Federal Court; this is an inefficient process since the case needs to be run again in full)
- To obviate this inefficiency, legislation made an award enforceable as if it was an order of the Federal Court; the decision still had to be registered with the Court, but if it was not challenged by the respondent employer, the order becomes enforceable
- Mr Brandy is found to have discriminated against a fellow employee at ATSIC and is ordered to pay damages
- He challenges that order on the basis that it cannot be binding

Issue:

- Can the legislation validly make orders of the Commission binding?

Reasoning:

- The power to award damages is a judicial function; however, the Commission is not a court (judicial body)
- Per Deane, Dawson, Gaudron and McHugh JJ at 267–8:
    - 'It is traditional to start with the definition advanced by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision

made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion.' (footnote omitted)

- If it was not for the fact that orders were enforceable, it would not have been a judicial power; thus, the old regime was acceptable
- However, the new enforcement orders made the awards judicial in character
- Because the body was non-judicial, this was an invalid conferral of power
- Enforcement 'almost certainly' (Kris Walker) tips a power over into the realm of judicial power
- The result is that HREOC loses power to authoritatively determine disputes

Decision:

- The legislation is invalid so the order is not binding

Where detention is punitive in nature, it is likely to be characterised as judicial and hence requiring exercise by a judicial body (*Lim*). However, as McHugh J noted in that case, simply applying analytical tests and descriptions cannot absolutely determine the correct classification of a power; historical and other value-laden classifications must often be relied upon.

Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1:

Facts:

- Lynn challenges the government's policy of automatically detaining illegal immigrants on the basis (*inter alia*) that it is a judicial power that is conferred upon a non-judicial body (the Department of Immigration)

Issue:

- Is a power to detain essentially judicial?

Reasoning:

- In general, detention is essentially judicial; however, there are some exceptions
- Judicial detention is punitive in nature in that it occurs with court authorisation and usually against the wishes of the detainee
- Exceptions:
    - Protection of the detainee from harming themselves or others (psychological)
    - Prevention of the spread of a contagious disease
    - Ensuring the efficient conduct of a trial or proceeding
    - Pending deportation
    - During wartime (people who oppose the war effort, or enemy combatants)

- Majority:
    - The executive cannot normally detain for punitive reasons
    - So too, Parliament cannot authorise (by legislation) the executive to so detain
    - Australian citizens have constitutional immunity from peacetime detainment except by court order
    - The legislation prevents the High Court from ordering release in certain circumstances and usurps its role as arbiter of detention

        - Such intrusion into the judicial function is impermissible because the Parliament cannot withdraw inherent jurisdiction conferred by the *Constitution*
    - Therefore, a law which seeks to detain without a court order is unconstitutional

- McHugh J:
    - There is no constitutional immunity from non-punitive detention
    - Ordinarily detention would be punitive; however, this is not an inherent characteristic of such a law
        - The specific law in question must be examined
        - It will be valid so long as the law is not for the purpose of punishment
    - Non-punitive detention may be seen as an 'indeterminate power'
        - However, laws allowing it must be brought within a head of power
        - Most heads of power won't support legislation authorising such detention, but some — like the aliens, defence and incidental powers — may provide support
    - Whether a power is characterised as judicial depends largely on contextual value judgments:
        - 'The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character.'

Decision:

- Note: the fact that detention conditions are often experienced as punitive is not relevant to the purpose of a law and cannot override parliamentary intention in that respect (*Beyer's Case*)

Woolley confirms that the power to exclude unlawful aliens extends to keeping them separate from the community while their visa applications are being investigated, and that this constitutes non-punitive, administrative detention. However, this may not extend to detention of citizens.

Re Woolley; Ex parte Applicants M276/2003 **[2004] HCA 49:**

Issue:

- What is the nature of judicial power?

Reasoning:

- 'First, where legislation confers upon the Executive authority to detain an alien in custody, if the exercise of such authority is properly characterised as an incident of executive power, rather than as an exercise of judicial power, it is a law with respect to aliens, and does not offend Ch III or the principle of the separation of powers.'
- 'Secondly, … [d]eprivation of liberty, when applied to a citizen, is ordinarily a form of punishment incidental to the exercise of judicial power. Detention of an alien for the purpose of exclusion, dealing with an application for permission to enter, or removal

bears a different aspect.'

- 'Thirdly, if a law is reasonably capable of being seen as necessary for the purpose of exclusion, dealing with an application for permission to enter, or removal, then ordinarily it will be proper to regard it as having the character of an incident of the executive power to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport.'
- 'Fourthly, … [i]f a non-citizen enters Australia without permission, then the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature.'
- 'It was not suggested in *Chu Kheng Lim*, and would be inconsistent with the decision in that case, that the validity of mandatory administrative detention of aliens seeking visas, pending resolution of the application process, depends upon evidence, case by case, that the applicant is likely to abscond, or upon the individual hardship involved in detention. The legislation under challenge in *Chu Kheng Lim* dealt with what are now called unlawful non-citizens, who had entered the country without permission, as a class. **The power of exclusion was held to extend to keeping them separate from the community, in administrative detention, while their visa applications were being investigated and considered.**'
- 'The context in which the power of detention was given, and the purpose for which it existed, was seen as definitive of its character as an incident of executive power. **A vital aspect of that context was that it was given in relation to non-citizens, and that the exclusion of non-citizens is an aspect of territorial sovereignty.**'

Additional factors relevant to determining whether a power is judicial include:

- The terms in which the law itself is framed
- The surrounding circumstances leading to the law's enactment
- The mischief at which the law is aimed
- Parliamentary debates
- The number of parties to a proceeding (*Tasmanian Breweries*: only one party so power not judicial)
- The nature of the task performed by the body (adjudicating facts suggests judicial power)

C *Separating Judicial Power*

The issue in *Boilermakers* was whether it was legitimate to confer judicial power upon an essentially non-judicial body. This was held to be invalid.

1 *The* Constitution

The separation of judicial power from other government branches is said to be implied by the text and structure of the *Constitution*. Section 71 vests judicial power in the courts, but this is insufficient to give rise to an implication of exclusivity (ie, s 71 does not explicitly state that only the courts may exercise judicial power, which is an element of the *Boilermakers* principle).

Instead, the implication derives from the division of the *Constitution* into discrete Chapters, each dealing with a separate arm of government. Chapter III, which vests judicial power, is the only Chapter dealing with courts. The implication is that a strong separation of powers was intended by the framers, and consequently that the exercise of judicial power is confined to the institutions in which it is vested by Chapter III.

Additionally, the federal system implies a strong and independent judicial body to adjudicate disputes between different levels of government. It is therefore important that the High Court is not seen as too connected to the federal Parliament or executive.

It might well be asked: 'why does the same logic not apply to enforce a strict separation of parliamentary and executive functions?' The answer lies in sections like s 64, which accept that Ministers may sit in Parliament. This represents an explicit conflation, rather than a separation, of executive and legislative power.

1 *The* Boilermakers *principle*

Boilermakers established the basic principle governing the separation of judicial power from other arms of government. The separation of power is defined negatively:

1. It is impermissible to confer **judicial power** on a court **not** described in **Chapter III** of the *Constitution* ('rule 1'); and

2. It is impermissible to confer **non-judicial power** on a court that **is** described in **Chapter III** of the *Constitution* ('rule 2').

The order of enquiry for applying these rules is as follows:

1. Is the body upon whom power is being conferred a Court described in Chapter III of the *Constitution*?

    - If not, judicial power cannot be conferred upon the body
    - If so, only judicial power may be conferred upon the body

2. Is the power being conferred on the body judicial or non-judicial (and the related question of what constitutes judicial power)?

    - The judicial character of the power may be determined by reference to several relevant indicia; these include:
        - A protected (guaranteed) salary;
        - Tenure;
        - The title by whom officers of the body are known; and
        - The maximum age of retirement; among others.

On these points, see *Lim*, *Brandy* and *Re Woolley*. In *Brandy*, a commissioner is held to exercise judicial power, but the commission was not created by Ch III of the *Constitution*. The conferral of power was therefore invalid under *Boilermakers*. *Lim* considered mandatory detention legislation which directed the High Court not to order release in certain circumstances. To this extent, the intrusion into the judicial function was impermissible; the Parliament cannot withdraw inherent jurisdiction conferred by the *Constitution*.

Essentially, *Boilermakers* means that the High Court of Australia and federal courts created by Parliament and provided for by the *Constitution* may *only* exercise judicial power. Thus, even if Parliament wanted to confer legislative power upon a court, that would be constitutionally

impermissible and hence invalid. Similarly, *only* the High Court of Australia and other federal courts may exercise judicial power. Thus, authoritative, binding decisions of a judicial character cannot be given by a body that is not a court.

2 *Exceptions thereto*

The *Boilermakers* rules are not absolute. Four main exceptions exist to the requirement that judicial power be separated from non-judicial bodies; they may be characterised as follows:

1. **Contempt of parliament**
   Parliament is endowed with limited abilities to exact criminal punishment, including imprisonment. This is an exception to rule 1, in that it confers judicial power upon a non-judicial body.

2. **Military court–marshal**
   Criminal offences by (and, perhaps – though this is somewhat controversial – against) members of the armed forcers are liable for punishment before a military body. This is another exception to rule 1.

3. **Court registrar**
   The registrar of a court performs minor (and usually uncontested) judicial functions. A registrar is not a judge, but is subject to judicial supervision (eg, in small claims cases and matters conducted before the Family Court of Australia). This is another exception to rule 1.

4. ***Persona designata***
   Despite rule 2, it is still possible to confer non-judicial power upon a person who happens to be a judge. This is termed the 'persona designata' (designated person) exception. It permits conferrals of non-judicial power upon a designated person, even if that person is a member of the judiciary. As such, it is an exception to rule 2.

2 Persona designata

This principle has been applied without incident or controversy in England for some time now, largely because the United Kingdom does not observe a strict separation of powers. It is also used at the state level in Australia. Its application at the Commonwealth level (ie, in relation to courts invested with federal jurisdiction) is rather more contested. This is the subject of the present analysis.

The relevant cases outlining the exception, its scope and limitations are *Grollo* and *Wilson*. According to *Grollo*, the *persona designata* exception applies only to the extent that the conferral of power is compatible with the judicial function and where acceptance of the power is not required or compelled. Exercise of a power will be inconsistent with the judicial function when it is practically incompatible with the continued performance of judicial duties, or where it would impair the public's confidence in the relevant court.

***Grollo v Palmer* (1995) HCA:**

Facts

- This case concerns the power to issue a warrant under the *Telecommunications Act* (Cth) to police, typically in connection with an investigation

- It is normally a criminal offence to wiretap a telephone line, but not when warranted
- The power to issue said warrants is conferred upon judges of the Federal Court
- It is common ground at trial that this power is a non-judicial function
- The nature of the application for a warrant is somewhat peculiar:
    - *Ex parte* (ie, made by one party – the police investigator – only)
    - Not made public (especially not to the subject of the application)
    - Judge's identity is secret
    - Execution of the warrant is never brought to the suspect's attention
    - No records of the application or its outcome are kept
    - The decision is unreviewable and executive in character
    - It 'authorise[s] clandestine surveillance'

Issue

- Is the conferral of non-judicial power upon judges of the Federal Court in violation of the second *Boilermakers* rule?

Reasoning

- The power is administrative (ie, executive) in nature
    - Therefore, such power could not, ordinarily, be conferred upon the Federal Court itself
    - However, the Act confers the power on designated people (who just happen to be judges on the Court)
- Though a similar grant of power was held to be valid in *Hilton v Wells* (3:2 majority), the legislation has since changed and warrants reconsideration
- The *persona designata* exception to *Boilermakers* is legitimate
    - However, used excessively it could undermine the second limb of *Boilermakers* and so subvert the separation of powers
    - It is therefore necessary to limit the exception in some form
- Test for the scope of the exception

    Where the conferral of power

    - *Is incompatible with judicial functions; or*
    - *Purports to 'require' or 'compel' judicial acceptance of the power;*

    the exception will not operate and the conferral will be invalid.

    A power will be incompatible with judicial functions in one of two situations:

    (a) **Practical incompatibility**
    Power cannot be inferred if it would interfere with the performance of the judge's existing judicial duties;

    (b) **Impairment of public confidence**
    Power cannot be inferred if it could impair the public confidence in the court of which the judge is a member.

- There are several ways in which the judicial granting of a warrant may be said to impair public confidence in the Court:
    - The proceedings are secret
    - They are *ex parte* (no right of reply by suspect)
    - The power conflicts with judicial power (in that determination is made without hearing both sides)
    - It clothes an essentially executive function in judicial legitimacy

    - It may lead to the perception that courts (which are supposed to impartially decide criminal charges) are linked to police investigations of those charges
- Even so, the legislation is valid and the power can be conferred
    - This is quite a wide formulation of the exception
    - The majority notes that the regime they have established is 'troubling', and may be abused
        - Eg, the same judge who secretly hears a warrant application may later hear the criminal trial that is the result of the warranted investigation without the accused knowing
        - Eg, a judge may hear evidence in support of the warrant that would otherwise be inadmissible
        - Eg, a judge who hears a warrant application but does not sit on the subsequent trial (in which the accused is vindicated) may hold this against that party when giving evidence or appearing in a later matter (and thus influence any subsequent decision involving the warrantee)
    - The secrecy of the warrant proceedings are particularly troubling
        - For this reason, it is 'suggested' that, as a matter of respectability and judicial convention, a judge ought not sit on any case to which the warrant relates
        - This is considered to be an appropriate practice, but is not intended to be enforced
        - The secrecy of proceedings also makes enforcement impossible
    - These guidelines were not actually followed in *Grollo* itself: the warrant-issuing judge *did* actually sit on the case when it went to trial
        - This suggests that the best practices set out by the Court can't be enforced
        - Essentially, they are guidelines with which compliance is left to individual judges' discretions
- The majority also supported the legislation on the basis of what would occur without judicial oversight:
    - The executive has, when left to themselves, frequently abused the privilege (this damages the presumption of innocence in criminal matters)
    - It is good for trained judges to supervise what would otherwise be an accountable decision-maker
    - It would be worse for the secret procedure to be conducted by the investigators with absolute discretion
- Around 99% of all warrants applied for have since been granted – this is probably because the arbitrators of such applications hear only one side of the argument

<u>Decision</u>

Majority (5:1, McHugh J dissenting): the conferral of power is not in violation of *Boilermakers* and therefore valid. *Persona designata* is a valid exception thereto; however, it does have some limits: it cannot confer power practically inconsistent with judicial responsibilities, and the recipient thereof is not under any duty to accept it.

Worth noting is that there has yet to be a case where limit (a) has been held to have been breached. Thus, for example, in *Drake's Case*, it was held that conferring power to hear claims as President of the Administrative Appeals Tribunal upon a justice of the Federal Court is not practically incompatible — even though it would effectively prevent the judge from sitting on their own Court. As a result of the decision, it seems likely that it is acceptable for judges to sit on tribunals and other bodies whilst simultaneously holding judicial office.

There have also been cases (most notably Dixon J and Latham CJ, during World War II) where justices of the High Court have validly been made 'special envoy' (ambassador) to foreign countries, which necessitated living in those countries. It has rarely occurred, however.

Wilson v Minister for Aboriginal and Torres Straight Islander Affairs **(1996) HCA:**

Facts

- This case formed part of the litigation culminating in *Kartinyeri v Commonwealth* (see above [4.3.2])
- For the responsible Minister to declare an area as falling within the *Heritage Act*, a report about the relevant land must be submitted for his evaluation
- The Act requires a 'person' to write the report, but does not place any restrictions upon who may investigate
- An aboriginal woman seeks a declaration under the Act, and the Minster appoints Mathews J to write the report
- She investigates, writes a report and submits it to the Minister for consideration
- The report is challenged on the basis that its commission violates the separation of powers

Issue

- Is the Minister's attempt to confer non-judicial power upon a judge justifiable by reference to the *persona designata* exception to *Boilermakers*?

Reasoning

- The power is investigative in nature and hence non-judicial
- *Grollo* suggests that, at least prima facie, the grant is permissible
- However, it is necessary to consider whether the limits of the exception permit the conferral
- A three-stage test (plus a fourth, additional and non-determinative factor) is proposed to determine whether a conferral of power would undermine the public's confidence:

1 *Is the function part of or closely connected to the legislative or executive branch?*

- If no, not incompatible
- If yes, continue…

2 *Is the function to be exercised independently of legislative or executive function?*

- If no, incompatible
- If yes, continue…

3 *Is any discretion that is conferred to be exercised on political (as opposed to legal) grounds?*

- If no, not incompatible
- If it is a policy decision, incompatible

4 *How is the power exercised?*

- This is not determinative but can be relevant

        - If judges have performed the function historically, this suggests that it is not incompatible
        - If the function is public and not secret, this suggests that it is not incompatible

- Majority: applying this test —
    - Mathews J was acting just like a ministerial advisor
    - This function is closely connected with the executive
    - Though it was arguably exercised in an independent and self-directed fashion, it was ultimately performed at the request of the Minister and pursuant to a declaration being made by the executive
    - The appointment is therefore incompatible with the judicial function: a Federal Court judge cannot be made to report to a Minister
    - However, the legislation merely specifies a 'person'; this can be read down to exclude federal judges

- Kirby J:
    - This case is different to *Grollo*
        - Here, the power is not exercised in a secret manner
        - Instead, a public report is tabled with the Minister and the exercise of power is clearly visible to interested parties
        - Therefore, if *Grollo* was acceptable, this must surely also be so
    - Mathews J was acting independently
        - The legislation did specify that she was required to follow ministerial direction
        - However, in practice she was an independent researcher (conducting interviews and analysis in the field and of her own initiative, etc)
        - In this sense, Mathews J was not that different from a Royal Commissioner

<u>Decision</u>

Majority (Kirby J dissenting): the appointment of a justice of the Federal Court to a position effectively equivalent to ministerial advisor is incompatible with their judicial functions. Because the legislation refers to the investigator as a 'person' without further specification, it will – in accordance with the rules of statutory interpretation – be 'read down' so as to render it constitutionally valid. This means that it applies only insofar as 'person' is defined as excluding federal judges.

Minority (Kirby J): the conferral of power is compatible with the judicial function. Kirby J uses different principles (and a substantially different factual analysis) to reach this conclusion.

In summary, the relevant test for determining whether a conferral of power is valid as a result of the *persona designata* exception to *Boilermakers* is as follows:

1 *Is the power incompatible with judicial functions* (*Grollo*)*; or*

(a) Would it be practically incompatible with performance of the judge's existing functions?
(b) Would it impair public confidence in the court? (*Wilson*)
    (i) Is it closely connected to legislature or executive?
    (ii) Is it exercised independently from those branches?

(iii) Does it confer discretion? If so, is it a policy choice or a legal decision?
(iv) How is the power exercised? For example, is it used secretly or has it been used in the past?

2 *Does the conferrer 'require' or 'compel' the judge to accept the power?*

If the answer to either of these questions is 'yes', the conferral of power falls outside the exception, and such conferral will be invalid as a result of *Boilermakers*.

D *Separation of Powers at the State Level*

1 *Under the state constitutions*

Issue: does *Boilermakers* apply to the states, such that judicial power, and only judicial power, may be granted to state judicial bodies, and only judicial bodies?

The *Victorian Constitution* does not embody the separation of powers in a strict, *Boilermakers* sense. In a broad descriptive sense, it does. However, this cannot give rise to an enforceable rule. Historically, this was due to the fact that the state *Constitution* was not entrenched, so that inconsistent Acts of Parliament were simply taken as implied repeals of the *Constitution* to the extent of any inconsistency.

Kable v Director of Public Prosecutions (1996) HCA ('_Kable's Case_'):

Facts
- Gregory Wayne Kable was to remain in prison after serving a prison term for murder
- He was singled out as the target of a state law specifically to increase his sentence

Issue
- Does the New South Wales *Constitution* embody a separation of powers?

Reasoning (Dawson J)
- There is nothing in the structure of the *Constitution Act 1902* (NSW) to support such an implication from the New South Wales Act itself
- It is to be contrasted with the *Commonwealth Constitution* ss 1, 61 and 71, which vest legislative power in Parliament, executive power in the executive and judicial power in the judicature
- The New South Wales *Constitution* is silent as to the vesting of judicial power
- Comparisons with other constitutions are inapplicable

Decision
- Judicial power is not isolated from other powers of government by operation of the state *Constitution*

Thus, for example, the Victorian Civil and Administrative Tribunal is a non-judicial body whose judges are not appointed and do not have tenure, yet it exercises judicial power. State courts are also vested with some non-judicial power.

2 *Derived from the* Commonwealth Constitution

Kable's Case makes it clear that the *Commonwealth Constitution*'s separation of powers does have an impact on state distributions of power. The nature of this effect is that state courts cannot have functions conferred upon them that are incompatible with the *Commonwealth Constitution*.

***Kable's Case*:**

Facts

- The *Community Protection Act 1994* (NSW) enabled the Supreme Court of New South Wales to make 'preventative detention orders'
- The legislation was passed because Kable had written letters while in prison threatening his children and his deceased wife's sister
- Kable challenges the Act, arguing that in singling out an individual person for detention and imposing preventative detention in the absence of any crime, the Act imposed a 'legislative judgment' that embodied a 'legislative usurpation of judicial power'

Issue

- Does the New South Wales *Constitution* embody a separation of powers by implication from the *Commonwealth Constitution*?

Reasoning

- Toohey J:
  - Preventative detention 'is not an incident of the exclusively judicial function of adjudging and punishing criminal guilt. It is not a part of a system of preventive detention with appropriate safeguards, consequent upon or ancillary to the adjudication of guilt'
  - The Act requires the Supreme Court to exercise judicial power in a manner 'inconsistent with traditional judicial process'
  - 'If the power to detain were the consequence of the actual commission of a serious act of violence, it might be a little different from the power to impose an indeterminate sentence'
  - The function judges are being required to perform is to make a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt
  - Here, the performance of such a non-judicial function is of a nature that would diminish public confidence in the integrity of the judiciary of an institution (*Grollo*)
- McHugh J:
  - The Act is invalid because it purports to vest functions in the Supreme Court that are incompatible with the exercise of federal judicial power by that Court
  - Although the state *Constitution* does not embody a separation of powers, it is still subject to implications from the *Commonwealth Constitution* to regulate the exercise of judicial (and non-judicial) power by state courts
  - The *Commonwealth Constitution* 'requires and implies the continued existence of a system of state courts'; therefore, state supreme courts cannot be abolished
  - 'Because the state courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no state or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power. Thus, neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of

New South Wales that are incompatible with the exercise of federal judicial power.'

- Even though the Act is directed at the exercise of state (rather than federal) judicial power, it can still have 'the effect of violating the principles that underlie Ch III'; if it has such an effect it will be invalid
- Here, the Act undermines the public's confidence in the impartiality of the Supreme Court
- Although the state Parliament could enact laws providing for preventive detention 'when those laws operate in accordance with the ordinary judicial processes of the state courts', it cannot invoke the Court's authority to make orders that compromise the institutional impartiality of the Court
- Thus: 'ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy.'

Decision

- The incompatibility doctrine prevents a state court from exercising power incompatible with its exercise of federal judicial power
- Thus, regardless of whether the Act was a valid exercise of legislative power, the function it purported to grant the Supreme Court was incompatible with its exercise of federal judicial power

Essentially, because state courts are capable of exercising federal judicial power, no functions may be conferred upon them that are incompatible with the *Commonwealth Constitution*.

E *Hypothetical*

1 What is the nature of the power?

(a) Factors suggesting judicial power:
   (i) Investigate corruption
   (ii) Call witnesses
   (iii) Subpoena documents
   (iv) Report to the Minister and make recommendations

(b) Factors suggesting non-judicial power:
   (i) Not determinative
   (ii) No capacity for enforcement (*Brandy*; *Wilson*)
   (iii) Minister decides what to do
   (iv) Advisory role only

(c) Therefore non-judicial

2 Is a non-judicial function conferred upon a judicial body? (*Boilermakers*)

(a) No: may be valid ,so long as the conferral falls within the limits of the *persona designata* exception

(b) Conferred upon a person who happens to be a member of the Federal Court

(c) Valid unless:

(i) No consent? Need more information

(ii) Practical incompatibility: can she still carry out her judicial role for the two year period? Need more information. However, unlikely to be incompatible: president of the AAT is a judge, but that is acceptable. A high threshold of incompatibility is required.

(iii) Impairs public confidence? (*Wilson*)

1. Close connection? Yes, executive: commissioned by executive, acted on by executive (look broadly at the commission reporting to the Minister)
2. Independent exercise? Look at the Act: terms of reference; can Minister terminate the commission at will? (*Wilson*) Need more information. Can she ignore Ministerial instruction? Note question of independence of the role of an investigative reporter (*Wilson* majority; cf Kirby J: independence despite a clause requiring the reporter to obey ministerial directives)

   Engage in a close analysis of the legislation: emphasise its actual content, not second reading speeches or other general statements
3. Discretions? Need to see the terms of the Act: nature of decision-making (is corruption a political issue?), discretions conferred
4. How is the power exercised? Not determinative (*Wilson*) Here quasi-judicial: looks like a court hearing with witnesses and the like; but not determinative; the Court in *Wilson* seemed comfortable with using judges as Royal Commissioners so long as it doesn't entangle a judge with political decisions