Public Law – Notes

Topic 1: Key Themes in Australian Public Law

What is public law?

Crawford et al (2017), "Public law and Statutory Interpretation"

- Public law is the law that applies to public power → concerned with the scope (nature, limitations) of public power, as exercised by the institutions of government (Parliament, Executives, Judiciary)
- Exercise of public power determines how a legal system (and nation) operates → affects entire nation, and shapes the society we live in
- In Australia, exercise of public power determines who can enter Australia, have licences, taxation, public institutions (hospital, public transport), welfare payments, action of military…
- **Public vs Private Law**
  - "Private power" = powers enjoyed by private individuals, corporations and other legal entities recognised by the law
  - Private law regulates the relationship between 'private' actors.
  - Public law regulates the relationship between governmental institutions exercising public power, or between governmental institutions exercising public power and the people.
  - Distinction is not always clear.
  - Public power may be more coercive than private power → e.g., public powers to arrest, detain, imprison and tax people against their will → private actors can't use violence, or take money
- **Constraints on Public Power**
  - Private actors do what we want unless law prohibits it.
  - Public law is different because no one person enjoys inherent public power → it must be conferred by law and exercised in accordance with the law.
    - This distinguishes societies governed by the rule of law, from those where certain individuals hold power (as of birth right or they seized it by force)
    - Often, people with public power are appointed to act as the representatives of the people, or are otherwise accountable to them.

Key Constitutional Elements and Relationships

- The influence of the British legal system on Australian law, the history and purpose of the Constitution, federalism, constitutionalism, the separation of powers, the rule of law, responsible government.
- An example of how the institutions of government interact is considered through a discussion of the principle of legality.

Crawford et al (2017), "Public law and Statutory Interpretation"

- *Constitutionalism*
  - Related to the rule of law
  - Concept that government power should be limited, and its exercise controlled
  - Limits of government power operates as higher (constitutional) principles
  - A society's constitution establishes and empowers the highest organs of government, and establish control mechanisms to limit their powers
  - Constitutions may be "written" (codified by law → "flexible" as can be amended), or "unwritten" (common or customary law → "rigid" in that harder to amend)
  - Methods to limit government power:
    1) *Confining* → keeping the power within defined boundaries
    2) *Structuring* → regulating the procedures by which it can be exercised
    3) *Checking* → ensuring it can be reviewed by an external agency
  - "Legal" constitutionalism → legal limits on government power enforced by the courts
  - "Political" constitutionalism → political mechanisms (e.g., elections) to control government power
  - Australian Constitution combines both → e.g., no legal constitutional rule requiring Parliament to act with regard to human rights → but rights protection is conferred by Parliament actions (subject to scrutiny in the electoral process)

Public Law – Seminar Activities

Seminar 1: Key Themes in Australian Public Law

Seminar Questions:

- **Power**
  - Who has power?
  - What power do they have?
  - What is the source of the power?
  - How may the power be exercised?
  - What limits apply to the power?
  - Who can scrutinise the exercise of the power, and how?
- **Current Affairs and Public Law**
  - Travel restrictions, COVID rules, lockdown → HCA held lockdown rules were Constitutional
  - Uluru Statement → 2017 → calls for this to be implemented into Australian Constitution to give Indigenous Australians a voice
- **Key Terms**
  - Public → Public power goes beyond private power
  - Power, authority → needs checks and powers due to how extensive public power is
  - Government → 3 government departments (Executive, Parliament, Judiciary)
  - Executive, Ministers → mixed with Parliament in Australia → some Legislature are Executives, but not all → so an imperfect separation of powers in Australia
  - Parliament/legislature
  - Judiciary/judges/courts → independent from Legislature and Executive
  - Commonwealth → is interchangeable with the "federal" government → to be contrasted with the State government
  - States → each State has its own Constitution
  - Constitution
  - Judicial review → review of government decisions
  - Referendum → vote by citizens with election right, as to a change to the Constitution
  - Crown → the British monarchy, and Queen's Governor-General
- **Key Themes**
  - **Separation of powers – why do we have it**
    - Prevent corruption and totalitarianism
  - **Federalism – how does it manifest in the Constitution**
    - Specifies what Federal and State powers are
    - Federal laws prevail over State laws
    - Constitution allows free trade between trade → no tariffs in inter-state goods
    - States have equal voting rights in Parliament
  - **How does representative government operate? In what section of the Constitution is relevant?**
    - Elections every 3-4 years
    - Members of house of representatives elected in every election; senate is elected every second election (ss 7, 24)
  - **Inter-institutional interactions**
    - Legislature and Executive → Ministers are responsible for their department, but also participate in voting in Legislation creation
    - Judiciary and Legislature → Judicial review of legislation passed, how the interpret legislative intent, judiciary creates common law where there are gaps in statutory interpretation → judges review executive (police) decisions, and interprets parliament rules to see if executives acted accordingly
- **Principle of legality**

Current Legislation Franchise

- Adult (18 years +)
- Australian citizen (or closed British subject class)
- Unless:
  - Unsound mind
  - Treason
  - Sentence 3years +
  - Outside Australia for 6 years +

Problem Questions [Representative Parliament]

Problem 1

You work for the House of Representatives Committee on Electoral Matters. It is currently conducting a review of the *Commonwealth Electoral Act 1918* (Cth). The Secretary of the Committee has referred to you two submissions that it has received.

(a). The submission of the Electoral Fairness Association argues that the *Commonwealth Electoral Act* should be amended so that any person convicted of an electoral corruption offence, such as bribery or interfering with the political liberty of a person, shall be removed from the electoral roll and be ineligible to vote for a period of three years, as occurs in Canada.

(b). The Domestic Violence Collective's submission seeks the amendment of the *Commonwealth Electoral Act* to disenfranchise anyone who within the last 12 months has been convicted of a domestic violence offence or who has been found by a court to have failed to meet his or her obligations to pay maintenance to a spouse or child. The Collective argues that such action would show society's disapproval of the anti-social actions of people who refuse to accept their family responsibilities. It justifies the provision by reference to the fact that at the time of federation, New South Wales had such a law.

Advise the Secretary whether these proposed amendments, if made, would be likely to be upheld as valid by the High Court of Australia.

Question based on *Roach*

- There is an implied right to vote → point out ***Roach*** and constitutional bedrock

PART A

- Constitutional bedrock – s7, 24
- Lack of information about how long the sentence term is → is it less than or more than 3-years (see ***Roach***)
- These facts more distinguished from ***Roach*** → here, the offence here is electoral corruption, so more affects the electoral integrity, and preserves representative democracy
  - ***Roach*** concerned the seriousness of the offence, so less impact on electoral integrity
  - It must be consistent with representative democracy
  - Electoral corruption offences → would not prevent a lot of electorates from voting, in comparison to Provision B
  - Corruption – similar argument of integrity for treason
- Is this 'proportionate and appropriate'?
  - Provision A is ok, since it does not limit the ability to vote forever → allows person to repent and come back to the society to vote → this is distinguished from Provision B → Provision A is more proportionate and appropriate and adapted
  - BUT, no matter how serious the corruption is, they are all banned for 3-years → this may be unfair and disproportionate

PART B

- ***Vella*** and ***Thomas v Mowbray*** – judicial power is generally adjudicating on past conduct, rather than preventing future conduct – but such preventative future orders are within the judicial powers
- Lack of judicial discretion – Court "must" make order (like ***Totani*** – was invalid for the "must") → whereas ***Vella***, it was valid, since court maintained lots of discretion
  - Talk about the degree of discretion
  - **S3(2)** – Court "must" make detention order if satisfied that the order may prevent → vague criteria, but more discretion than in ***Totani*** where the court had to be satisfied the person was a member of the organisation
  - So, closer to ***Vella*** than ***Totani*** – and likely to be valid

FEDERAL:

- Invalid if non-incidental, non-judicial powers (***Boilermakers***), or if incompatible with institutional integrity (***Lim***)
- <u>Judicial powers</u>
  - Control orders are innominate – can be judicial powers (***Thomas***), so not contrary to ***Boilermakers***
- <u>Integrity of court</u>
  - Risk assessment → 'satisfied' that would prevent this risk → satisfied is a low standard (Gageler J in dissent in ***Vella*** said that it was such a low standard since it relied on the DPP's prior assessment), but Majority in ***Vella*** said that 'satisfied' required judicial standards, and was accepted in previous cases like ***Pompano*** → lower standard than ***Thomas*** (substantially assist)
  - Balancing criteria → DPP that considers what is appropriate to prevent corruption, not the court – the court must impose what the DPP assessed, so the Executive is stripping away the court's ability to make its own determination
  - Judicial independence

STATE:

- Invalid if incompatible with institutional integrity (***Kable***), regardless of its non-judicial or judicial powers

Section 4 – delegation of legislative power to cancel statutory permissions corruptly obtained

- ***Falzon*** and ***Lim***
- Executive imposing a fine, equivalent to a court fine → so invalid
- ***Lim*** – criminal guilt punishment is function of judiciary
- ***Polyukhovich*** – federal executive can't usurp that power
- But at state level, no strict separation, unless it relates to a federal matter
- ***Duncan*** – taking away a statutory benefit that had been granted – broadening scope of ICAC
- **S4(1)** → made at an individual level, distinguished from ***Polyukhovich***
- Question is whether it is punitive → ***ACMA*** (adjudication of criminal guilt on the way to make an executive decision)

ISSUE: executive is usurping judicial powers

FEDERAL LEVEL:

- Contrary to ***Alexander, Boilermakers*** → non-courts can't exercise judicial powers, and the essential judicial function is adjudication of criminal guilt (***Lim***)
- Is this an adjudication of criminal guilt?
  - **S 4(1)(a):** Cancellation of statutory licences is not an adjudication or punishment of criminal guilt (***ACMA; Duncan; Falzon***) → these are administrative actions, so are non-judicial
  - **S 4(1)(b):** Then, it requires the court to penalise these people – that is a bill of attainder maybe – the executive cannot direct the court to impose the executive's findings of guilt
  - **S 4** requires the GG to do both at the same time, so **s 4(1)** may be entirely invalid

STATE LEVEL:

- There is no strict separation of powers, so legislature may usurp judicial powers
- Only problem is where a court is involved – since ***Kable*** concerns a court → here, no court is involved, so no problem

- Longer term of senators and staggering of the House and Senate terms serves as constraining influence on the executive government formed in the lower house
- Constitution does not provide number of members in House of Rep → but it requires the number to be in proportion with the number of people in each state, with minimum of 5 in each State, and must be twice of the number of senators (**s24**)
- Same number of senators from each original State (**s7**)
- National Representation
  - Government is formed in the House of Rep when a party receives majority of the seats across the nation, regardless where those seats are located
  - **S128** → majority of voters in nation for referendum
- Federal Representation
  - Representation of states and their people
  - **S7** – states be equally represented in the Senate
  - S128 – majority of people in majority states as well for referendum
- State Legislature
  - Similar structure to federal legislature
  - QLD – only one House of Parliament, Legislative Council abolished in 1921
  - NT and ACT – also unicameral
  - Legislative Assemblies in state parliaments have 4-year terms (except QLD – 3-year term)
  - Legislative Council – SA and NSW = 8-year term, Tasmania = 6-year term, WA and Victoria = 4-year
- Role of HCA
  - Final guardian of the Constitution
  - Court determines if laws that affect fundamental principles (e.g., representative government) are constitutional, by asking whether encroachment of the principle is "reasonably appropriate and adapted" or "proportional" to a legitimate end to be achieved by the law
  - Courts have an interventionalist role where there is possibility of abuse → otherwise, if democratic institutions make rational choices, then courts defer them to be

Standing for Election

- **S34 –** qualifications for election
- **S163(1) *Commonwealth Electoral Act 1918* (Cth)** – people eligible to stand for election for House of Rep and Senate are Australian citizens 18 and over
  - In States, person also must be living in the state to have standing
- **S44** – lists 5 grounds for ineligibility to sit as MPs:
  - **(i)** Acknowledgement of allegiance…to a foreign power
  - **(ii)** Attainted of treason, convicted and is under sentence for any offence punishable under Cth or State law for one year or longer
  - **(iii)** …
  - **(iv)** Holds an "office for profit under the Crown"
  - **(v)** Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Cth
- ***Alley v Gillespie*** → HCA (as a Court of Disputed Returns) does not have jurisdiction to determine disqualification under a common informer action against a sitting member, thus precluding the ability of individuals to challenge the qualification of MPs outside of the time limit (40 days after election result)
- ***Sykes v Cleary*** → HCA held that Cleary's election was void because he held "an office for profit under the Crown" (**s44(iv)**) – he took leave without pay 2 years from his job as school teacher prior election, but only resigned after he was elected.
  - HCA also held that the Liberal and ALP candidates with dual citizenships were illegible since failure to renounce citizenship with Greece and Switzerland meant that they were entitled to rights of a citizen of a "foreign power" in contravention of **s44(i)**
- ***Sue v Hill*** and ***Re Canavan* (2017)** → HCA held that a dual citizen is ineligible per **s44(i)**, even if they did not know they held another citizenship, and they must follow the law of the foreign country to divest

1) **Do the limits on the Commonwealth's capacity to detain identified in *Lim* apply to the Commonwealth's participation in executive detention in Nauru?**
   - **No** – French CJ, Kiefel and Nettle JJ (joint judgment) and Keane J
     - held that ***Lim*** only applies where the plaintiff is in the custody of the Commonwealth executive
     - (Finding = plaintiff not in Commonwealth custody on Nauru).
   - **Yes** – Bell and Gageler JJ
     - The relevant constitutional principles apply to the Commonwealth Executive whenever it has "de facto control over the liberty of the person who has been detained, in relation to which actual physical custody is sufficient but not essential".
   - **Yes** – Gordon J
     - The Commonwealth was detaining the plaintiff on Nauru, ***Lim*** not limited to detention 'in custody'.
2) **Were the constitutional limits on the Commonwealth's capacity to detain complied with?**
   - **No need to answer** – Joint judgment and Keane J
     - The constitutional limits identified in ***Lim*** did not apply (see their answer to 1).
     - The Commonwealth's legal authority to participate in detention on Nauru supplied by **s198AHA**.
   - **Yes** – Bell and Gageler JJ.
     - Section 198AHA was valid.
     - The detention is for the purpose of regional immigration processing and meets the requirements of ***Lim***.
   - **No** – Gordon J (so in dissent as to the result)
     - **Section 198AHA** constitutionally invalid.
     - The Commonwealth's detention of the plaintiff in Nauru did not fall within recognised exceptions to the rule in ***Lim***, nor form the basis of a new exception (i.e., the plaintiff's detention in Nauru was not for processing for an Australian visa or removal from Australia).

- **All the majority judgments** (apart from Gordon J) – rested on the statutory amendments with retrospective effect enacted in response to the litigation (**Migration Act 1958, s 198AHA**).

GAGELER J

- (Obiter – shows the need to understand the constitutional provisions on the Executive in context of the principles of responsible government)
- [115] → relationship between Executive Government (Ch II – *Constitution*) and Parliament and Judicature (Ch I and II – *Constitution*)
- [116] → Development of Responsible Government in colonies in 2nd half of 19th century
  - Gradual development of the 'Executive Government' independent of the Queen
- [118] → Privy Council recognised 'the Government' in Australia
- [119] → Ch II – *Constitution* was framed against such political and practical background:
  - Executive Government = form of responsible government – own distinct national identity and own distinctly national sphere of governmental responsibility.
  - The executive power, although vested in monarch (formal head of State), but exercisable by Governor-General = monarch's representative.
  - Federal Executive Council "to advise the Governor-General' → made up of "Ministers of States" whom the Governor-General was to appoint to "administer such departments of States as the Governor-General may establish" (s64 – Constitution)
- [120] →
  - Ministers of State must become senators and House of Reps members
  - Governor-General could remove all other officers of the Executive Government
- [**128**]
  - Executive power under s61 is vested in Monarch, exercised by Governor-General → but is ultimately exercised by the Ministers of the Executive Government → and always susceptible to control by Commonwealth statute

- The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy.
  - Any prerogative to dispense from the laws that was exercised in the past no longer remains
- The principle, as expressed in the ***Act of Settlement***, is that all officers and ministers ought to serve the Crown according to the laws.
- Griffith CJ (**Clough v. Leahy 37**):
  - "If an act is unlawful - forbidden by law - a person who does it can claim no protection by saying that he acted under the authority of the Crown."
- This principle "is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies".

DEANE J

- 592: Two propositions of law that cannot be moved:
  (i) that neither the Crown nor the executive has any common law right or power to dispense with the observance of the law or to authorize illegality
  (ii) that the courts of this country will not enforce the terms of a promise not to disclose information in circumstances where such enforcement would obstruct the due administration of the criminal law.

Prerogative Powers – categories; statutory regulation and extinguishment

- Prerogatives are certain powers that used to repose in the Crown and have not been extinguished by statute or desuetude (lack of use).
- In the narrow sense used in this course, prerogatives are 'those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.' (Brennan J in ***Davis* (1988)** → citing William Blackstone in late 18th century).
- The cases focus on the relationship between statute and the prerogative.
- **Prerogatives:**
  - Those powers once possessed by the monarch.
  - Residual in nature;
  - New prerogatives cannot be created – but can be developed (e.g., war prerogative to new circumstances of cyber terrorism)
  - **Miller [2017] UKSC** → "...a prerogative power however well-established may be curtailed or abrogated by statute...The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication....a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute."
    1) A statutory regime may **regulate** a prerogative;
    2) Alternatively, a statutory regime may wholly supplant or **extinguish** a prerogative, so that now the power depends wholly on statute.

Prerogative powers and capacities

- The key difference between a prerogative executive power and an executive capacity, is that the prerogative power is 'capable of interfering with the legal rights of others' (Gageler J, ***Plaintiff M68***, Reading p 70).
  - It is a special legal power that only the executive can exercise and which has legal effects.
- In contrast, an executive capacity is shared by other legal persons eg the capacity to enter into contracts, to own property, to employ people, and to sue in a court. The Crown, as a body politic, has these capacities along with others. It has been described as an ability to act or a 'faculty'.
  - Any legal effects of such acts are as a result of the application of the general law to all such acts (e.g., the law of contract).
  - It doesn't give any special powers to the Executive government.

Aroney et al, *The Constitution*, 445-451

The common law: Prerogatives and Capacities

- The Act provides some examples of public interest considerations in favour of disclosure that do not limit decision-making in any way (**GI(PA) Act (NSW), s12**)
- Some matters are taken out of this balancing process – there are conclusive presumptions of an overriding public interest against disclose of some matters (**GI(PA) Act (NSW), s14(1), Sch 1**) → e.g., overriding secrecy laws, Cabinet and Executive Council information, Legal professional privilege, contempt, law enforcement, and some specific matters (e.g., info relating to adoption and Aboriginal heritage)

- **Queensland Scheme – exceptions**
  - ***Right to information Act 2009* (Qld)**
  - Agencies and Ministers must give access, unless giving access would, on balance, be contrary to the public interest
  - Public interest test is set out in a serious of steps – Schedule 4 provides guidance as to factors favouring non-disclosure, disclosure and irrelevant factors not to be considered
  - Grounds of refusing access are to be interpreted narrowly (**s47(2)(a)**)
- **Cth Scheme – exceptions**
  - ***Freedom of Information Act 1982* (Cth)**
  - Cth Act retained categories that are familiar from the old legislation, but they have been divided into 2 types:
    (1) outright exemptions that have no public interest test attached (***FOI Act 1982* (Cth), s11A(4), Part IV Div 2**) → Cebinet documents, documents affecting national security, law enforcement
    (2) conditional exceptions that are subject to the public interest test (***FOI Act 1982* (Cth), s11A(5), Part IV Div 3**) → these documents are to be made available, subject to a public interest test, with a strong public interest in disclosure
  - Increasing attempts in Cth statute to increase exemptions that are conditional, and so subject to a public interest test (e.g., personal privacy, business affairs, research exemptions = now conditional)
  - Preference for disclosure is reinforced by the factors listed in favour of disclosure – including the promotion of objects of the legislation and informing public debate, AND irrelevant matters that are not to be taken into account (e.g., disclosure would cause government embarrassment
  - But no factors are listed that favour withholding information – the Act provides no assistance to agencies on how to identify factors against disclosure → but see Australian Information Commission, ***Guidelines, Part 6 Conditional Exemptions,* Step 4: Identify the factors against disclosure**
- **Tasmania Scheme – exceptions**
  - ***Right to information Act 2009* (Tas)**
  - Like the Cth Scheme, the TAS Act retained categories of exemption – those not subject to public interest test (Part 3, Div 1), and those that are (Part 3, Div 2)
  - The TAS Act also contains list of matters relevant (Sch 1), and irrelevant to the assessment of public interest (Sch 2)

Some old Tensions

- Many elements of FOI reform has widespread support – presumptions favouring disclosure, oversight and guidance by information commissioners, proactive releasee of information
- But still lingering tensions:
- Who bears the costs?
  - The costs of administering FOI processes, and who would bear those costs, are ongoing tensions
  - Government agencies do not bear full cost of FOI
  - Application fees and processing charges, and the basis upon which they are calculated, vary between jurisdictions
    - Charges may be applied for → search and retrieval time, additional charges for decision-making time, copying and postage charges
  - These processing charges can add up to significant amounts
    - They are not calculated on a full cost recovery basis, but the amounts that are charged can significantly deter applicants

- Provisions made in **Ch III** operate as justiciable limits on the legislative power of Australian parliaments, enforceable in judicial review of legislation.
- We won't cover all established **Ch III** limits on leg power – see **Reader part 5-6** for scope

QUESTIONS TO ASK – Ch III invalidity

Preliminary questions: If you are asked to advise whether a law is invalid because inconsistent with **Ch III** of the Constitution, it is useful to start with these questions:

1. Is the law in question a State or Cth law?
2. What does the law *do*? Does it:
   A. Impose sanctions for past conduct?
   B. *Confer function(s) on an executive branch entity – minister, tribunal, commission, ombudsman …?
   C. *Confer function(s) on a court?
   D. **Confer functions on a judge in her personal capacity?**

*The distinction between an adjudicative tribunal and a court may present some difficulty – generally you will take your cue from the name of the institution and its predominant functions. However, if appointment etc provisions to a **Cth** institution are **not** consistent with **s 72**, it is not a court for the purpose of Ch III rules.

This is a question of statutory construction – refer ***Wilson* (1996); ***Grollo*** (1995)

1. COMMONWEALTH LAWS:

- Strict separation of judicial powers is required at the federal level

A. CTH LAW THAT IMPOSES SANCTIONS FOR PAST CONDUCT:

- **Principle** (***Polyukhovich*** (1991)) → The law would breach the first separation rule (***Alexander***) if it were characterised as a legislative enactment of criminal guilt for past conduct
- **Application** (***Polyukhovich*** and ***Duncan*** (2015)) → These two cases illustrate how a law imposing sanctions for past conduct may avoid characterisation as a legislative enactment of criminal guilt

B. CTH LAW THAT CONFERS FUNCTIONS ON NON-COURT:

- **Principle** (***Alexander***) → The law breaches the first separation rule if it vests judicial power
- **Application** → Follow the HCA's approach (see cases in Topic 9.3 and 9.7) to determine whether the function involves an exercise of judicial power.

C. CTH LAW THAT CONFERS/REGULATES COURT FUNCTIONS:

Q1: Does the law confer non-judicial power, contrary to the second separation rule (***Boilermakers' Case***)?

- **Principle** (***Boilermakers' Case***) → The law breaches the second separation rule if it vests a non-ancillary function on a court that involves an exercise of non-judicial power
- **Application** → Follow the HCA's approach (see ep cases in Topic 9.2, 9.3and 9.6) to determine whether a non-ancillary function involves an exercise of non-judicial power.

Q2: Is the law inconsistent with the essential character of a court exercising federal jurisdiction or with the nature of judicial power (***Lim*** **(1992)** regarding **s54R**)?

- **Principle** → Cth legislative power does not extend to laws that are inconsistent with the essential character of a court or the nature of judicial power (***Lim*** re **s54R**)
- **Application** → Follow the HCA's approach (see ***Lim*** and cases in Topic 9.4, 9.6) to advise whether the law is compatible with the institutional integrity of the court.

D. CTH LAW THAT CONFERS FUNCTIONS ON A JUDGE IN HER PERSONAL CAPACITY:

Does the law confer anon-judicial function incompatible with judicial appointment (***Grollo***; ***Wilson***)?

- **Principle** → The judge's performance of a non-judicial function in her personal capacity is invalid if the function is incompatible with the institutional integrity of the courts (***Grollo***; ***Wilson***)
- **Application** → ***Grollo*** and ***Wilson*** authority that incompatibility arises if:
  - The function is conferred without the judge's consent

- The court was mandated to have closed hearing, ex parte hearing
- Law upheld – ***Condon v Pompano***
  - The court had discretion as to whether to conduct closed hearing – and could end proceedings for procedural fairness

***International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319** (from Winterton) → **Procedural fairness**

FACTS:

- NSW legislation (**s10, *Criminal Assets Recovery Act***) provided NSW Crime Commission authority to elect to make an ex parte application to the Supreme Court for an asset freezing order up to 2 days before applying – with notice to the asset holder – for an asset forfeiture order.
- Asset freezing orders made against persons suspected of engaging in serious crime-related activity – and could be made in the absence of criminal conviction
- If the Commission so elected:
  - The Court must determine the application ex parte [without other party]
  - The Court must make the order if it considers that the Commission's affidavit (of an authorised officer stating the person engaged in serious crime-related activity) – shows reasonable grounds for suspicion that assets are derived from serious crime related activity
  - After 2 days, the freezing order remains in force while a forfeiture order is pending in the Court – this could be for an indefinite period (no statutory obligation on the Commission to prosecute the application for a forfeiture order with any expedition)
  - The asset holder can apply for an order excluding assets from the freezing order, but bears the onus of proving that they were not fraudulently or illegally obtained.

HELD (4:3):

- The statute (**s10**) was invalid – as it engaged the Supreme Court in an activity repugnant to judicial process because:
  - Mandated 'ex parte' procedure = no decisional authority to exercise discretion to make or not make 'ex parte' hearing → large departure from ordinary criminal law processes
  - Court "must" make an order based on "reasonable grounds" → that is a departure from the ordinary standard of "beyond reasonable doubt" → but the court still retains some decisional authority to find that there was no reasonable grounds
  - Indefinite freezing period = significant departure from ordinary criminal law processes
  - Other party is able to argue their case, but the onus is on them → departs from the ordinary criminal law processes of requiring the prosecution to prove beyond reasonable doubt → and the defendant could not respond before the order was made [contrary to the standard processes]

FRENCH CJ:

- 354 [54]:
  - Procedural fairness or natural justice is at the heart of the judicial function
  - It is an incident of the judicial power pursuant to **Ch III**
  - It requires court to appear and be impartial, provide parties equal opportunities to be heard and respond to the case put against it through argument and evidence
  - Based on circumstances, procedural fairness can vary
  - Ex parte applications for interlocutory relief ordinarily involve discretion whether to hear the application without notice to the party affected → based on legitimate interests of the moving party, damage to the affected party and provisions to allow the affected party to have a say
  - Executives may initiate an ex parte application validly based on legislation → but **s10** goes further by requiring the SC to hear and determine such an application ex parte → that is a direction to the court as to the **manner** in which it exercises its jurisdiction and thus deprives the court of an important characteristic of judicial power [the power to ensure fairness between the parties]
- 355 [55]-[56]:
  - The Commission's power to require the SC to hear and determine an application for a restraining order without notice of the affected party is incompatible with judicial functions

- ***Lim*** → general proposition that involuntary detention of a person in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt
  - Exception = arrest and detention in custody to ensure they are available to be dealt with by court
- If detainment permitted was significantly beyond the 4-hours allowed by the statute – then it can be punitive as it is disproportionate for the purpose of investigating and charging

GAGELER J (dissent):

- Police may detain arrested person in custody for up to 4 hours – and the period is left to the police's discretion
- That power is undefined – since it is not constrained to be exercised to ensure the person is detained only for a time reasonable and practicable to enable the person to be brought before a court
  - Also not constrained by the requirement to protect the person detained from harm
- The ***Lim*** principle concerns the protection of personal liberty
  - The exception of arrest and detention → the court in ***Lim*** noted that this power to detain pending trial is ordinarily subject to the supervisory jurisdiction of the courts
- It is difficult to draw a bright-line distinction between penal detention and protective/preventative detention (e.g., ***Fardon***)
  - It necessarily depends on the object sought to be achieved by the law authorising detention
- Executive detention exercised under a statutory power to detain is punitive unless the duration of detention is:
  1) Reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment.
  2) Capable of objective determination by a court at any time and from time to time.
- Detention of a person intoxicated, or for the purpose of questioning/investigating satisfied these requirements → but the Act here does not satisfy the above conditions since the duration of detention (max 4 hours) is not limited by reference to a statutory purpose – but is left to police discretion
- The police who made the arrest is also determining the detention period → so that police is effectively the judge of guilt, and not accuser
- Detention is punitive – so is an exercise of judicial power – so invalid

NETTLE & GORDON JJ:

- Detention power here falls within the arrest and detention in custody exception to the ***Lim*** principle
- That is so, even if the person is issued an infringement notice and will not be dealt with by a court – the statutory regime provides a diversion from, rather than a substitute for the judicial determination of guilt
- Thus, not separation of powers not infringed

Al-Kateb v Godwin **(2004) 219 CLR 562, [44] - [45]** (McHugh J), **[264] - [268]** (Hayne J), **[153] - [154]** (Kirby J, dissenting), **[139] - [140]** (Gummow J, dissenting) → **"Reasonable necessity" and purposes incapable of fulfilment**

- **Facts**
  - See above for facts
  - We previously focused on the Court's approach to the interpretation of provisions in the ***Migration Act 1958 (Cth)*** for the mandatory detention of non-citizens who do not hold a valid visa
- **Issue**
  - Can the Minister continue to detain an unlawful non-citizen for the purposes of deportation when there is no likelihood of his or her actual deportation?
  - Court held – Yes.
- **Held**
  - Majority held that the Act did authorise detention of a non-citizen facing indefinite detention, i.e., where there was no practical prospect of removal from Australia in the reasonably foreseeable future
- **Principles:**