



## APL Notes 11144

Australian Public Law (Australian National University)



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## Constitutional validity of laws

The Commonwealth Parliament has the source of power to enact this act through (broad constitutional heads of power, s51), nationhood power.

## Candidates

### What is the source of power?

The Commonwealth has the power to make laws on the election of members to the House of Reps (HoR) and the Senate under ss 16, 34, 51(xxxvi), 43, and 44 of the *Constitution*. X law deals with the election of members to the HoR/Senate, therefore the Cwlth has the power to make this law.

### Limitations

#### Does the Candidate hold a pecuniary interest in an agreement with the Commonwealth?

If a candidate has any direct or pecuniary interest in any agreement with the Cwlth, they may be subject to disqualification under s44(v) of the *Constitution*. The interest in the contract must be more than transient, provide the possibility of financial gain, and must last for a substantial period that it could conceivably influence the contractor in parliamentary affairs (*Re Webster*).

Move onto analysis and conclusion.

#### Does the candidate hold an office of profit under the Crown?

If a candidate is holds an office of profit under the crown, they are incapable of being chosen as a member of the HoR/Senate (s44(iv)).

Taking leave without pay does not alter the character of the office which is held, it is still considered to be held by the candidate (*Sykes*).

Analysis and conclusion

#### Is the candidate a citizen of a foreign power?

If the candidate is a citizen of a foreign power, they are incapable of being chosen as a member of the HoR/ the Senate (s44(i)). The candidate must take reasonable steps to denounce their foreign nationality, these steps depend on their individual situation, requirements of the foreign law, and the extent of the connexion between the individual and the foreign state which they are alleged to be a citizen (*Sykes*).

Analysis and conclusions.

#### Is the candidate subject to sentencing or has been sentenced for an offence punishable by a year or longer?

If the candidate is subject to sentencing or has been sentenced for an offence punishable by imprisonment for one year or longer, the candidate is incapable of being chosen as a member of the HoR/Senate (s44(ii)).

Sub-issue: If an annulment is given after the candidate nominates, the annulment does not act retrospectively and the candidate was still convicted and subject to sentencing at the time of nomination. The process of being chosen: a process which operates from the date of nomination until the return of writs for the election (*Culleton*).

## Electoral Boundaries

### What is the source of power?

The Commonwealth has the power to make laws on the boundaries for the elections of the House of Reps (HoR) and the Senate under ss 24 and 29 in conjunction with s51 (xxxvi). The Commonwealth Electoral Act 1918 (Cth) sets out how electoral boundaries are to be maintained and distributed.

### What limitations are there on the exercise of this power?

Changes to electoral distributions are permitted under s24, though, they must not reach the point where they are so grossly disproportionate that the members may not have been directly chosen by the people (*McKinlay*).

## Political Parties

Political parties must have at least 500 members to ensure that parties demonstrate a minimum verifiable public support. The Constitution allows for some level of discrimination as long as it is not too unreasonable, Parliament has a very broad power to make laws in the electoral system (*Mulholland*).

## The Right to Vote

### What is the source of power?

The Constitution protects the rights of an Australian citizen to vote through ss 7 and 24 (*Roach*).

### Can the Commonwealth validly pass laws that preclude certain persons from voting in federal elections?

In determining the validity of legislation that affects the right to vote, the Court considers whether it is reasonably appropriate and adapted to serve an end which is consistent with the maintenance of the constitutionally prescribed system of representative Government (*Roach*).

Is it reasonably appropriate?

- What is the purpose

Is it consistent with rep government?

1. Does the definition of the excluded class or group need to have a rational connection with the identification of community membership or with the capacity

to exercise free choice?  
(Gleeson CJ)

*Examples:*

1. Roach – Excluding all prohibited prisoners is disproportionate, excluding prisoners who have terms of over 3 years is proportionate – as these prisoners have such a manifest rejection of civic responsibility which committing a serious crime entails.
2. Rowe: Passing laws that remove the grace period for new enrolments and abbreviating it for transfers is disproportionate.
3. Murphy: Some suspension of the rolls is proportionate – it ensures that there is accuracy and certainty in the lists produced. There is a rational connection to the purpose of closing the rolls and the action.

***(a) Implied freedom of political communication***

An Act is invalid if it interferes with the freedom of political communication, where no exceptions arise for such interference.

Freedom of political communication is an implied freedom in the Constitution via ss 7 and 24 (*Nationwide News, ACTV*)

To sustain a representative democracy, freedom of public discussion of political and economic matters is essential (*Nationwide News*)

This implied freedom is not absolute (*ACTV*).

Two part test used to determine whether law impinges on the freedom (*Lange*)

1. Does the law burden freedom of political communication about government or political matters either in its terms, operation or effect?

Note: Political communication is communication that *could* affect voter choice in federal elections (*Lange*)

2. Is the law reasonable appropriate and adapted to serve a legitimate purpose?

Legitimate aim, or aim consistent with representative government (*Lange*)

Laws must not undermine the 'effective operation of a system of representative and responsible government' (*Lange*)

*Lange*

Facts

- Lange sued ABC for allegedly defamatory statement in TV program.

**Judgment**

- Freedom of political communication does not confer personal rights on individuals.
- It precludes the curtailment of the protected freedom by exercise of legislative or executive power.

Defendant could not claim personal immunity from suit



### ***Nationwide News v Wills***

#### **Facts**

- Constitutional validity of statutory provision making it an offence to use words calculated to bring the Industrial Relations Commission into disrepute

#### **Judgment**

- Provision invalid.

Implied freedom of political communication existed on the reasoning for the Constitution to function politically. Communication between individuals is necessary.

### ***Australian Capital Television v Cth (ACTV)***

Issue: *Invalid because it infringed a constitutionally guaranteed freedom of political discussion?*

#### **Facts**

- Validity of an Act that imposed a blanket prohibition on political advertisements on radio or television during federal election periods

#### **Judgment**

- Invalid, as political communication is necessary for the efficacy of representative government.

**Political communication is necessary for the efficacy of representative government.**

**Freedom is not absolute.**

## **State Power to make laws:**

Source of Power & Jurisdiction.

State parliaments are given plenary power to make laws for the peace, welfare, and government from s 2(1) of the Australia Act 1986.

A state law is invalid if it deals with a topic committed exclusively to the Cwlth Parliament – s 52 Constitution.

Matters withdrawn – s 114 maintenance of military, s 115 – coinage.

S109 – When a law is consistent with the laws of the Cth, the latter shall prevail.

## Manner and Form

### **What is the source of power & jurisdiction?**

The principle of Parliamentary sovereignty denies the current Parliament from binding a successive parliament, but s 6 of the *Australia Act* creates an exception to this rule so long as the new law concerns the Constitution, Powers, or Procedures (CPP) and complies with the manner and form requirements (*Trethowan*).

### **The test is whether the law that purports to amend or repeal the entrenched provision is one respecting the constitution, powers or proceedings of the Parliament.**

#### **Does the later Act respect the CPP of the Parliament of the State?**

If the amending act relates to the CPP of the Parliament, it must then conform with manner and form requirements (s6 Australia Act). Here, act X relates to (use one of the examples). Thus, this would be considered to relate to the CPP and the act must comply with manner and form provisions.

#### **Is the later Act a law that respects the CPP of the Parliament of the State?**

For the amending act to be valid, the act must relate to the CPP of the Parliament of the State (s6 Australia Act). Here, the act X respects (nature and composition of parliament/ prescribes rules for Parliament's dealings/respects Parl's powers with its own legislative authority).

*Examples:*

*Deals with the duration of Parliament;*

*Number of members of the Houses;*

*Powers to enact legislation;*

*Procedure of the Parliament (powers of the Speaker, size of a quorum, etc);*

*The privileges and immunities of the Houses;*

*The power to make standing orders;*

*Requirements as to the passage of bills (majorities, referenda, etc).*

*Prescribes rules for Parliament's dealings*

*Respects Parliament's powers with its own legislative authority.*

**If no:**

Not a. CPP act, not bound by any valid m/f provisions.

#### **Does the amending act impose a valid manner and form provision?**

A valid manner and form provision must be doubly entrenched and operate strictly in the legislature (*Trethowan*; *West Lakes*).

*Examples:*

- Valid manner and form requirements deal with procedure and not the substantive content of the legislation (South East Drainage Board).

- Must not be a provision which has the effect of abrogating or otherwise unreasonably constraining the power of later Parliaments to pass laws (e.g. *Westlakes Case* requiring unanimous vote requirement).

#### **Has the manner and form requirement been complied with?**

Stems from earlier law.

Apply this to facts of case.

In conclusion, the Parliament has acted in accordance with this effectively entrenched manner

and form provision. - Talk about what step fails.

Or: If trying to repeal:  
Is it a doubly entrenched?

### **Commonwealth M&F:**

The Commonwealth cannot bind future Parliaments due to s 128 in the *Constitution*.

## **Delegation and Abdication of legislative power**

Essentially a balancing act – find analogous cases and weigh everything up together.

### **What is the source of power & jurisdiction?**

State and federal parliaments are able to delegate their legislative power to the executive, though, the separation of powers doctrine prevents them from completely abdicating this power (*Dignans; Stevedoring*).

### **Does the delegated legislation fall under one of the legislature's heads of power?**

For the delegated legislation power to be valid, the subject matter of the delegated legislation must be narrow enough to fall under one of the legislature's heads of power (Victorian *Stevedoring*).

E.G. *Stevedoring* gave GG power to make regulations with no legal regime, regulations could be imposed with respect to employment of transport workers in anyway whatsoever.

### **What is the scope of the power?**

Delegation of subject matters that are too wide or uncertain may amount to abdication (*Dignan's Case*).

### **Is the delegated power revocable?**

If Parliament retains power to repeal or amend legislative authority, it is less likely to be abdication (*Capital Duplicators*).

### **Does Parliament have supervision over the delegation?**

If Parliament retains capacity to scrutinize a delegated legislation, it is less likely to be abdication (*Dignan*).

### **To what degree does the law conflict with the separation of powers?**

In considering whether the delegated legislation is valid, the degree in which the legislation conflicts with the separation of powers is an important consideration (*Victorian Stevedoring*). E.G. does it allow it to create new legislatures?

It is likely that the Court would find that (delegation/abdication) has occurred as a result of (1 of 3 factors).

## **State Parliament delegation:**

### **Does the state constitution empower the Parliament to create other legislatures and are any constitutional principles at risk by such a transfer?**

If a state parliament creates another legislature, the separation of powers doctrine may be at risk by such a transfer of power (*Capital Duplicators*).

**Is the delegated power restricted or plenary?**

The extent of the scope of the delegation of power is a heavy consideration when determining whether the State has abdicated its legislative power (Cth Aluminium Corp; Cobb). Here, the power is X.

**Does the Government preserve its own capacity and retain control over the power?**

If the main Parliament is unable to repeal or amend the legislative authority possessed by the delegated power, it is likely that the main Parliament has abdicated its power to a new legislature (Capital Duplicators; Aluminium Corp; Cobb and Co).

**Does the Government have parliamentary oversight over the new body?**

Tabling, scrutiny and disallowance mechanisms can constitute as accountability mechanisms to ensure that the power is not being abdicated and is being delegated accordingly (Cobb).

**Did the legislation create a new authority?**

Did it give them powers to do what the parliament did not - higher standard as parliament's plenary power allows them to create bodies that can make by-laws and regulations.

**Does the Government preserve its own capacity and retain control over the power?**

The scope of delegation and control possessed by the legislature is strongly considered when determining whether the delegated legislation is valid (Cth Aluminium Corp; Cobb & Co).

It is likely that the Court would find that (delegation/abdication has occurred).

## Parliamentary Privilege

**Source of power: Cwlth**

The Cwlth Parliament is given parliamentary privileges as reasonably necessary for the proper exercise of its functions and duties through s 49 of the Constitution (Chadwick).

**Justiciability:**

It is for the courts to judge the existence of the privilege, but if it is an undoubted privilege, it's for the House to judge the manner of its exercise (Browne). X is dealing with the blah of the privilege, so it is justiciable.

**Source of Power: State**

State Parliaments have inherited those privileges which are reasonably necessary for the proper exercise and existence of their functions and duties (Carson).

**Did X action breach parliamentary privilege?**

The exercise of parliamentary privilege must be reasonably necessary for the proper exercise of its functions and duties (Willis).

Here, the Parliament has done/asked/demanded for (called for documents/etc) to uphold (specific principle/ responsible government/ function of the Government).



*Counter-argument:* Though, tabling the documents could have led to (other competing principle) being diminished. In Chadwick, competing constitutional principles were met with a com

Example:

- Willis – demanded for certain documents, asked to explain his actions the next day – was considered reasonable.
- Chadwick – demanded for a member of the Exec to table documents to uphold responsible gov. Exec member decline to under the basis of pub interest. Courts held that you can have the docs that wont conflict pub interest – ones that will not compromise the principle of collective Cabinet responsibility.

## Non-justiciability – s57 issues

May arise when someone tries to seek an injunction/court order on someone considering something in either of the Houses.

### Should the Court intervene?

The Court does not possess jurisdiction to intervene in the process until the procedural requirement remedy unless there is no adequate remedy after the process is complete (*Cormack*).

### Is there an adequate remedy?

The Court may declare or treat any law as invalid if it's made without the authority of the Constitution, this is seen as adequate remedy (*Cormack*).

### E.G. PMA case

In the PMA case, the validity of a law was dependent on whether the JS procedure was valid under s 57. The court held that there was no remedy in this instance.

### E.G Cormack v Cope

Even though the JS may have been invalid due to procedural requirements, the Court could provide an adequate remedy by overturning it after the sitting had occurred.

## Powers of the Executive

### Source of power & Jurisdiction:

1. **Statute based:** S61 and the relevant statute should be the first source of authority as to whether the power exists and has been abrogated. The statute must link to a relevant head of power under s 51.
2. **Prerogative powers:** Prerogative powers arise from s 61 and include the residual discretionary or arbitrary authority which is legally left in the hands of the Crown for the public good (*Tampa;Laker Airways*). Look at accepted prerogative powers.
3. **Legal person:** The Crown can function as a legal person, however, this power is not open-ended as Gov action is public and is inherently different to private action (*Davis;Williams*).

## Examples:

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- Conduct public relations (*MacDonald v Hamence* 1984)
- Conduct inquiries and Royal Commissions (*Clough v Leahy* 1904, plus other cases) – unclear whether this is actually a prerogative power (Dixon J in *McGuinness v A-G (Vic)* 1940).
  - o No limits exist as to the powers of inquiry of the executive government at common law (Stephen J in *R v Collins; Ex parte ACTU-Solo Enterprises* 1976)
- Can own property, enter into contracts and form companies (*NSW v Bardolph* 1934)
- Incorporate a company to carry out a government program (*Davis v Commonwealth* 1988)
- Establish government departments and other administrative machinery necessary to administer the policies of the government (*Victoria v Commonwealth and Hayden (AAP Case)* 1975)

### Limitations

- *Williams v Commonwealth* 2012:
  - o Power to function as a legal person is “not open-ended.” ([38] per French CJ)
  - o The CW’s capacity to contract is constrained by the distribution of powers in the Constitution (at [63] per French CJ)
- *NSW v Bardolph* 1934
  - o Can only enter into contracts “incidental to the ordinary and well recognized functions of government” or “in the ordinary course of administering a recognized part of the government of the State.”
- *Davis v Commonwealth* 1988
  - o Can only incorporate a company as a means of carrying out a government program within the Commonwealth’s powers.

- Powers when acting as a sovereign state under international law
  - Declaring or conducting war (*Farey v Burrett*)
  - Commanding armed forces (*Marks v Cth*)
  - Making peace
  - Entering other treating (*R v Burgess*)
  - Preventing aliens from entering territory (*Tampa*)
    - This has fallen into disuse, and is contentious
  - Requesting extradition of a person triable for an offence against Australian law (*Barton v Cth*)
  - Issuing passports
  - Protecting citizens abroad
- Domestic Powers
  - Keeping the peace (*R v Secretary of State for the Home Department (UK)*)
  - Prerogative of Mercy (pardoning convicted offenders)
  - Conferring honours
  - Martial law (*Digest*)
  - Power to conduct inquiries (*Huddart Parker*)
  - Power to grant land within sovereign (autonomous) territory (*Wik v Qld*)
  - Coining Money
- Proprietary prerogatives
  - Right to mine all gold and silver in the real (*Cadia Holdings*)
  - Right to take whales and sturgeon

## Abrogation

### Has Parliament intended to abrogate this power?

Statute can extinguish the prerogative powers held by the Crown, though, the legislation must expressly state its intention to do so or necessarily imply it (DeKeyser; Barton). This is a matter of construction, and the Court must interpret this intention through construction (*Tampa*). Here, 'Analyse statute to find necessary implication'.

### Does the statutory power achieve the same objective as the prerogative power?

The statute is less likely to displace the prerogative if 'the area of operation of the statute ... does not extend to the whole area that is covered by the prerogative power (*Barton*)'.

### Was the Act inconsistent with the continued operation of the prerogative power?

Interferes with the ability to continue with prerogative power is considered an abridgment of the powers (*Tampa*).

### What is the significance of the prerogative?

The more significant the prerogative power is to national sovereignty, the less likely it is that Parliament intended to extinguish it without express intention (*Tampa*). – Analyse how important the prerogative power is.

### What is the nature of the interests that are affected by this decision?

The executive power of the Cth absent statutory abridgement would extend to do X. Find an example of this.

## Nationhood Power:

### Source of power:

Nationhood powers includes powers peculiarly adapted to the Government of a nation and cannot otherwise be carried on for the benefit of the nation, incidental to s61 and s51(xxxix) (AAP Case).

### Is doing X a matter that falls into the peculiar province of the Cwlth Government?

If the Government exercises its nationhood power, this power must be particularly suited to the Commonwealth as a national government compared to the individual states (*Davis*). Here, the interest of States doing X is more limited than the interest of Cwlth doing X, as this issue concerns blah blah. In addition, this service would not be carried on otherwise due to (blah blah consideration of the states (money/politics/care)).

- **Consider duration - Pape**
- **Degree of coordination.**
- **Practical capacity of the State**
- **Competition with State legislative or exec functions.**

### Is doing X proportional to achieving Y?

These laws must be proportional to achieving their legitimate objective and the broader the scope of NP, the less coercion it is allowed to be (*Davis*). Doing X leads to Z, which may be considered proportional/unproportional to achieving Y as it infringes on B. – Probably best to analogise.

## Crisis Nationhood Power:

### Source of Power:

Parliament cannot legislate in aid of any subject which the executive government regards as of national interest and concern, though, nationhood power allows the Parliament to do so if only the Cwlth Government possesses the resources to do so compared to the states (*Pape*).

### Is the crisis serious?

The executive government is capable of and empowered to respond to a crisis (*Pape*).

- Crisis has to be relatively serious like GFC.

### Degree of coordination and integration required to meet the need?

**Pape example best.**

## Executive Powers to Contact and Spend

### What is the source of power?

Appropriation powers under s 83 and s 81 are not spending powers, the Cwlth executive cannot spend money without legislative authorisation with respect to a Cth head of Power (*Pape*; *Williams No 1*; *Williams No 2*). – Find respective head of power to allow legislation to allow them to spend.

Or:

The Executive retains the power to spend money with L.A. on these issues (*Williams No 1*):

- Administration of dept of states pursuant to s64;
- Execution and maintenance of the laws of the Commonwealth under s61;
- Exercise of power conferred by or derived by an Act of Parliament;
- Exercise of Prerogative Powers;
- Exercise of nationhood powers.

### Can the Executive rely on NP to fund this program?

To bypass s 96 and spend money without statutory authority, there must be an emergency where the states do not have the legal and practical capacity for and the Cwlth does as a national Government with large resources (*Williams No 1*).

### Do the states have the practical capacity to fund this program?

### How long is the emergency?

- **Look at Pape example.**

Common assumption was overturned. Federalism imposes limits on the Exec's capacity to spend money without legislative authority.

Must not compete with state competence in doing so.

It was not a short-term and urgent emergency like *Pape*, but rather an issue that states can solve.

- Would undermine the role of the senate.

## Judiciary

*Can the Parliament confer this power to this body?*

1<sup>st</sup> Lim: The legislature cannot confer judicial power (JP) to a non-judicial body and as it violates the first limb of the separation of judicial power (*Boilermakers'*). Here, the legislature is conferring a possible judicial power (state the power) to a (tribunal/body) that is non-judicial. This may be invalid dependent on whether the power is judicial.

2<sup>nd</sup> Limb:

The legislature cannot confer a non-judicial power (JP) to a Chapter 3 court as it violates the second limb of the separation of judicial power (*Boilermakers'*). Here, the legislature has given the judiciary a power that could potentially be non-judicial. If this power is non-JP, then the conferral will become invalid.

### **Is the body exercising judicial or non-judicial power?**

To consider whether a body is exercising a judicial power, the court weighs up a number of indicia present and absent to decide (*Lim*).

### **Does the body's decision pertain to existing rights and duties out of the past conduct?**

If the body creates or deals with new rights and obligations rather than resolving disputes based on existing rights, this weighs heavily on the power being non-judicial (Tasmanian Breweries). Ascertaining existing rights by judicial determination of fact or law falls exclusively upon the Courts, such that Parliament cannot confide this function to any other body (ss 71, 72).

E.G. Creating a new industrial award entails creating new rights, an exercise of non-judicial power (Alexander's Case).

### **Does the body deal with dispute or controversy?**

Judicial power must settle existing disputes or controversies, rather than providing advisory opinions on the law (*Momcilovic*).

E.G. empowering a court to issue a declaration of inconsistent interpretation from the Victorian Supreme Art was considered to be an advisory opinion and non-judicial (*Momcilovic*).

### **Does the body have narrow and measurable discretion based on legal standards?**

The exercise of JP must be based on a measurable legal standard that is objective and narrow (*Wheat*). The wider the discretion conferred, the less likely it is to be a judicial function as wide policy and political considerations are better suited to the executive branch of government (Tasmanian Breweries).

Examples:

'May' considered TW; Spicer

Unreasonable conditions TW; Spicer

‘Tyrannical’, ‘Oppressive’ TW; Spicer

‘Reasonably necessary’/ ‘reasonably appropriate and adapted’; OKAY - Mowbray

### **Is the exercise of power historically judicial?**

If the assigned role is historically a judicial function or there is an analogous judicial function, this weighs towards the existence of JP (Lim).

Examples:

Analogy between control orders and AVOs - familiar part of judicial power to make orders restraining the liberty of the subject. (Mowbray).

### **What is the nature of the body in which the power is located?**

The nature of the body in which the power is located can indicate JP, entrusting it into a court may infer JP whilst a tribunal infers no JP (White; Hegarty). The existence of tenured judges, providing reasons for a decision, impartiality, independence, and exercise in a judicial manner characterise a body as a court (s 72; Wainohu). Though, a chameleon principle exists, where the JP can adapt based on the body it is given to (White).

### **Nature of the decision-making process:**

Impartial and independent procedures are essential incidents of judicial power (Bass).

Must be performed in a judicial manner, which is rule-based, adversarial (Was Breweries).

Impartiality and independence.

### **Is the restriction of liberty imposed by the power penal or punitive in character?**

Adjudgment and punishment of guilty under a law of the Cth is exclusively a judicial power, where a legislature confers a power on the executive to involuntarily detain a citizen, this may be an invalid attempt to confer JP on a non-judicial body (Lim).

NB Exceptional cases:

Involuntary detention in cases of mental illness

Committal to custody awaiting trial

Traditional powers of Parliament to punish for contempt;

Military tribunals.

*Lim exception:*

Under aliens power in s 51(xix) Cn, the exec can detain aliens for the purposes of expulsion, deportation, receipt, investigation and determination of applications for admission to this country, though this power must be limited to what is reasonably capable of being seen as necessary (*Lim*).

- Temporal element: Purposes must be pursued and carried into effect as soon as reasonably practicable (*Plaintiff S4-2014*).

*Al-Kateb Exception:*

If there is no foreseeable means of deportation/removal from the country, the exec has the power to indefinitely detain an individual.

### **1<sup>st</sup> Limb:- Does the body fall into any exceptions of the first limb?**

- Contempt (Browne)

Military Tribunals (White)

Delegation of judicial functions to non-court members (Harris v Caladine):

But delegation must not practically or theoretically remove the constitution of judges in the court.

Delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court must be subject to review or appeal by a judge of the court.

**If (4) Is the judge exercising his personal capacity?**

Non-judicial power can be exercised in a judge's personal capacity, though, there is a presumption that if a power is conferred on a court or a judge the legislature intended to confer the power in a judicial sense (*Hilton*).

E.G. Conferring power to issue search warrants.

*What is the nature of the power conferred?*

If judicial in nature, then it is meant to be exercised by the judge as a member of a CH 3 court (*Hilton*).

*Does the legislation express an intention to invest the court with jurisdiction?*

Test broader statute - does it say anything about statutory context that the power is conferred on a 'court'. Are the judge's actions enforced under a Court Act?

**Has the judge consented?**

No non-judicial function, bar functions that arise from incidence in judicial actions, can be conferred onto a judge without their consent (*Grollo*).

**Is the power given to the judge incompatible with their role in the judiciary?**

If the nature of the functions given to the judge prejudices their independence or ability to perform judicial functions, this may undermine public confidence in the judiciary and be incompatible with their role as a member of the judiciary (*Grollo*).

**Does the performance of the function make it practically impossible to function as a member of the judiciary?**

The performance of a non-judicial function may be a major and permanent time commitment that could impede with the Judge's ability to perform judicial functions (*Grollo*).

**Does performance of the function undermine public confidence in the integrity of the judiciary as an institution or the capacity of the judge to perform their judicial actions?**

1. Is the function an integral part or closely connected with the functions of the Legislature or Executive?
2. If no, then no issue.
3. If yes, then: Is the function to be performed independently of any influence of the Legislature or Executive?
4. If yes then: the Separation of powers has been breached and incompatible.
5. If no then: Is any discretion purportedly possessed by the Ch 3 to be exercised on political grounds - that is on grounds that are not confined by factors expressly or implied by law?



## State Second limb issues

### Is the conferral of power on the State Court incompatible with the exercise of judicial power?

State Courts are vested with federal jurisdiction arising from ss 71, 77(ii), and there is no separation of powers doctrine at the state level (*BLF Case*). Though the integrated court system and the exercise of federal jurisdiction in State supreme courts prevents State Parliaments from conferring powers that impair the Court's integrity as a repository of federal jurisdiction. Here X could be considered to impair the Court's ability to (act independently/impartially/procedural fairness) and affect its institutional integrity.

### Does the conferral of power undermine institutional integrity?

Find what it affects and analogise.

Kirk principle – Parl cannot remove the courts reviewability through a privative clause.

- Decisional independence is seen as a necessary condition of impartiality. Impartiality is an essential characteristics of all courts including courts of the states and could be considered to affect the integrity of the courts (*Totani*).
- Where there is a departure from accepted judicial process, the court must consider whether this impedes with independence and impartiality (*Pompano*).
- Where the court is deprived of determining procedural fairness, the legislation severely undermines the institutional integrity of the courts (*International Finance*).
- Provided that the Court has discretion on how confidentiality is to be maintained, it is not considered to impair institutional integrity (*K-Generation*).
- Where it is the Court's decision to determine what evidence/fact would be released on the opinion of a member of the Executive, it is not considered to impair institutional integrity (*Gypsy Jokers*).

### Can States use the persona designata exception to avoid incompatibility?

Though the function can be given to a judge in a personal capacity, the Courts are unable to enact laws that confer upon a judge of the State court a non-judicial function which would be incompatible for his role as a member of the judiciary (*Wainohu*). The performance of the function may impair the defining characteristics of the court.

SOCCA failed because the judge does not have to give any reasons for his decision. This has the consequence that a judge performs a function integral to the exercise of jurisdiction by the Court but lacks the reasons provided. This appearance will negatively affect the perceptions of the role of a judge to the Court, to the detriment of the Court.