**SEPARATION OF POWERS**

**ENGLISH**
- When legislative/executive power combined – threat of tyranny in execution: *The Spirit of the Laws* (1748)
- If one person has too much power it will be abused. Judge’s limited role because they apply the law not enforce it

**AMERICA**
- When America broke away from England → adopted separation of powers
- James Madison: “Accumulation of all powers... the very definition of tyranny”
- Australia copied America’s separation of powers

**Legislative Power** Chapter I Constitution or s 1 **ENACTS/AMENDS/REPEALS LAWS**
- Vested in a Federal Parliament (the Queen, Senate and House of Representatives)
- Power to make laws in s 51 and s 52
- General rules → applicable to everyone
- 2 houses of parliament in commonwealth and every state (except QLD)
- House of Representatives = lower house, at least 5 people from every state
- Senate = upper house, equal number of people from every state
- SA upper house = whole state votes. Lower house = voted in electorate

**Executive Power** Chapter II Constitution or s 61 **ADMINSTERS THE LAW**
- Power vested in the Queen, exercised by Governor-General (Queen’s representative) – Quentin Bryce
- **CABINET**: chosen by Governor-General from advice of Prime Minister not mentioned in constitution
  1. Confidentiality – secret what is discussed
  2. Solidarity – once decision is made, every member agrees and supports the decision
- Federal Executive Council (FEC) = advises the Governor-General
- Governor-General appoints officers to administer departments. They become part of FEC
- Tribunals: Administrative Appeals Tribunal, MRT, RRT, Social Security Appeals Tribunal
- Executive Responsible to parliament, **responsible government**
- **SOURCE OF POWER**: constitution, statute, common law prerogatives, reserve powers

**CONSTITUTION**
- Express powers = s 5 appoint times for holding sessions of parliament, s 32 order general elections, s 68 command of naval/military forces of commonwealth, s 72 appoint and remove Chapter III judges
- Implied powers = nationhood- can make powers for the good of Australia

**LEGISLATION** powers given by parliament, must come from legislation

**COMMON LAW PEROGATIVES** powers king used to have, 1. Declare war 2. International law 3. Immunity from prosecution

**RESERVE POWERS** convention, , exercised by Governor-General eg. Hung parliament – no input from PM eg. Whitlam Government 1975 – Kerr dismissed Whitlam/appointed Fraser “Nothing will save the Governor-G”

**DELEGATION OF LEGISLATIVE POWER (REGULATIONS)** made by Governor-General
- statute may require complexity that would take too much time or provisions that need expertise of exec

**INCIDENTAL POWER** s 51 (xxxi) make laws for the execution of power vested by constitution.
JUDICIAL POWER Chapter III Constitution or s 71

- Federal Courts created by parliament / vested with fed jurisdiction EXERCISE JUDICIAL POWER
- Federal Court of Australia, Federal Magistrates Court, Family Court of Australia.
- State Courts vested with federal jurisdiction by parliament s 77 (iii). No fed criminal court ➔ states exercise fed judicial power
- Chapter III Courts s 72 = judges retire when they turn 70, have tenure, appointed by executive.

BOILERMAKERS CASE

- FIRST LIMB = S71 vests judicial power only in Chapter III courts
- SECOND LIMB = Chapter III courts can only exercise judicial power
- Court must be kept pure beyond influence
- Court settles disputes between commonwealth and states

INDICIA (indicators)

1. **Sovereign authority** – power given by law e.g. Chapter III courts
2. **Must be controversy about legal rights (a matter)** – resolve disputes about concrete legal rights
3. **Inter partes** – between parties, both sides heard by the court as opposed to **Ex parte** = some parties not there
4. **Binding decision** – a judicial decision is binding and authoritative
5. **Called upon to take action** – wait for dispute to be brought to the court = NO ACTIVE RESOLUTION, wait for things to come to them.
6. **Determine law as it is**
7. **Determine facts as they are** R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries (1970)
8. **Judicial manner** (level of judicial discretion/ accordance w judicial process) follow judicial process: impartiality/seen to be impartial, hear from both parties before making decision, fair trial Nicholas v The Queen (98)

A matter: An immediate right, duty or liability to be established by the determination of the Court

Judicial discretion
- Judicial power= controlled: based on authoritative legal materials; rules/ principles/standards of existing law
- Judges don’t have much discretion. **Discretion = freedom, choice, free will**
- Parliament sets the objective standard ➔ creates the law
- Discretion must not be arbitrary. It must be governed by determinable tests/standards ➔ R v Spicer; Ex Parte Waterside Workers’ Federation of Australia (1957)
- Legal principle will tell us what is just and equitable (examples of discretion)
  - Making decisions based on what is just and equitable and necessary Cominos v Cominos (1972)
  - Common law discretion: reasonable – e.g. standard of care in negligence, ‘what a reasonable man would do’

Thomas v Mowbray (2007) Thomas lost, it was found valid. Discretion was not too broad.
- Trained w Al Qaeda ➔ restrains on liberty as a result, report to police, couldn’t leave country w/o permission
- Majority = commonly used standard, involves familiar terms of judicial discourse

**JUDICIAL DISCRETION THROUGH COMMON LAW METHOD**
- judicial precedents/principles as guide for applying standard, Leslie Zines, The High Court and the Constitution (97)

**JUDICIAL PROCESS** Deciding on the balance of probabilities is a judicial activity, followed indicia (evidence, hearing)
Chameleon Powers

- Some powers are only judicial – only conferred by commonwealth on Chapter III courts
- OTHERS: can be conferred on courts/tribunals as parliament chooses Re Dingjan; Ex parte Wagner (1995)
- Some powers are neither exclusively judicial nor exclusively non-judicial Thomas v Mowbray (2007)
- CHAMELEON POWERS = dispute, finding a fact, interpreting law, application of law to fact, decision

→ JUDICIAL: judicial process followed, rules of evidence, binding/enforceable decision
→ EXECUTIVE (TRIBUNAL): flexible procedure, non-binding rules, subject to judicial review
- Federal Commissioner of Taxation v Munro (1926): administrative power, not judicial, because not binding
- De novo hearing: start fresh, new hearing, anything prior to that = non judicial
- A-G v Breckler (1999) superannuation complaints tribunal = valid because NON JUDICIAL POWER: not sovereign authority, not binding/enforceable outcome. Tribunal’s determinations open to judicial review

EXCEPTIONS TO BOILERMAKERS

LEGISLATIVE USURPATION (taking a position of power illegally)

- Declaration of guilt (Bills of Attainder & Bills of Pains and Penalties)
  → directed at individuals, punishment without judicial trial. Parliament tried to exercise judicial
  Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992)
  → bill infringes separation of judicial/legislative power. Only Chapter III court can judge guilt. BREACH OF 1ST LIMB
  - Liyanage v The Queen [1967]
  Privy Council – aimed laws at particular individuals, redefined crimes, increased penalties, removed right to trial by jury, altered rules of evidence. Laws were changed after the coup(revolution)
  If act valid, judicial power absorbed by legislature → if you let parliament have judicial power – they’ll do it again
  War Crimes leg 1980’s criminalised actions in Europe during WWII → before, hadn’t been crime to murder overseas
  Majority of 3 held it valid: what is rule of criminal law + has person breached law, parliament can make the law but doesn’t say ‘he is guilty’. It was left to judges to determine if law was breached
  - DETENTION
  Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992): detaining someone is an exclusive judicial function. No visa → detained
  EXCEPTIONS:
  - Cases of mental illness/ infectious diseases = protecting community
  - Person committed to prison is admitted to bail while awaiting trial
  - Parliament to punish for contempt → only been exercised once since federation
  - Military tribunals to punish for breach of discipline → exercise power outside Ch III courts, like civilian courts
- Detain for non-punitive purposes (punishing) to investigate application of visa → can either admit or deport
  Kruger v Commonwealth (Stolen Generations Case) (1997)
  Executive cannot detain for punitive before found guilty before court. Can detain for non-punitive
  Characterised as punitive depends if activities are necessary for non-punitive purposes
  → Purpose was for protection, benefit and welfare of children, not for punishment.
  → Aboriginals Ordinance 1918 (NT) Held to be not punitive