A question of integrity: The role of judges in counter-terrorism questioning and detention by ASIO

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This article considers the constitutional issues arising from the involvement of serving judges in the Australian Security Intelligence Organisation’s counter-terrorism questioning and detention warrant regime. It deals first with the role of “issuing authority” conferred on federal judges in their personal capacity (as personae designata), and secondly with the role of “prescribed authority” – overseer of interrogation and detention – conferred on State judges, again in their personal capacity. It is concluded that these roles would be likely to survive constitutional challenge based on Ch III of the Constitution. However, the recognition that judicial process is central to judicial power, and that this scheme is at odds with judicial process, indicates that the involvement of judges in the scheme is incompatible with judicial independence, even if the roles are in keeping with current constitutional doctrine. Unfortunately, it is likely that judges will be increasingly involved in politically controversial, rights-offensive regimes as a matter of policy; and this will continue to erode judicial independence.

INTRODUCTION

Since the momentous events of 11 September 2001, the Australian government has enacted some 44 pieces of counter-terrorism legislation, more than any other Western nation. One of the measures included in the government’s initial counter-terrorism legislative package amended the Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act) to endow the Australian Security Intelligence Organisation (ASIO) with “Special Powers Relating to Terrorism Offences”. These “Special Powers” provisions enable ASIO to seek two warrants for the purpose of collecting intelligence in relation to a terrorism offence. The first is a “questioning warrant”, allowing ASIO to question adult non-suspects for up to a total of 24 hours (over the course of up to 28 days) and require the production of records or other things. Children aged between 16 and 18 years may also be subject to a questioning warrant if they are suspected of involvement in a terrorism offence. The second is a “questioning & detention warrant”. This warrant is identical to a questioning warrant, with the additional allowance that the person may be detained for up to seven days: a substantially greater maximum period than the 24-hours applying to persons arrested for a terrorism offence, or the 12-hours applying to suspects or to persons arrested for other serious offences. During questioning,

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3 A “terrorism offence” is defined to be an offence against Subdiv A of Div 72 of the Criminal Code (Cth) or against Pt 5.3 of the Criminal Code: Australian Security Intelligence Organisation Act 1979 (Cth), s 4.


5 Australian Security Intelligence Organisation Act 1979 (Cth), ss 34D and 34E.

6 Australian Security Intelligence Organisation Act 1979 (Cth), s 34ZE.

the person has no right to silence, no privilege against self-incrimination and may be subjected to body
and strip searches. The person’s rights to contact third parties, including legal representatives, are
severely circumscribed. A number of disclosure and non-compliance offences punishable by
imprisonment attach to the provisions. To adopt former High Court Chief Justice, Sir Gerard Brennan’s summary of the Special Powers regime: “a person may be detained in custody, virtually
incommunicado without even being accused of involvement in terrorist activity, on grounds which are
kept secret and without effective opportunity to challenge the basis of his or her detention”. At June
2009, a total of 15 questioning warrants and no questioning & detention warrants had been requested
by the Director-General of ASIO. No request for a warrant has yet been denied.

Serving members of the State and federal judiciaries play a significant role in the Special Powers
regime. Special Powers warrants are issued by federal judges. Once the warrant has been issued, the
person is immediately brought before a prescribed authority who oversees and supervises all exercises
of power under the warrant. The prescribed authority may be a serving State or Territory judge.

Australia lacks national codified or entrenched rights protection. The independent and impartial
judiciary, together with a representative and responsible government, therefore serves as a “vital
constitutional safeguard”, protecting the rights and liberties of the citizens and States of Australia.
Likewise, the maintenance of the rule of law in Australia rests, at least in part, on the independence
and impartiality of a federal judiciary able to hold the other branches of government to account. The
focus of this article is on the effect of the involvement of serving judges in the Special Powers regime,
as issuing or prescribed authorities, on the independence of the judiciary.

The article first discusses the role and functions of the issuing authority and the constitutional
principles relating to federal judges as personae designata (“designated persons” assigned tasks in their
personal, not professional, capacity). Next, the article considers the role of the prescribed authority
and how the Constitution may restrict persona designata appointments of State and Territory judges. It
is concluded that, based on current constitutional doctrine, the provisions would be likely to survive
constitutional challenge. The article then puts doctrine to one side and considers whether the
involvement of serving judges in the Special Powers regime actually compromises judicial
independence. The simple recognition that a degree of judicial process is central to judicial power, and
that the Special Powers regime is at odds with judicial process, indicates that the involvement of

13 Australian Security Intelligence Organisation Act 1979 (Cth), s 34AB.
14 Australian Security Intelligence Organisation Act 1979 (Cth), ss 34H and 34J(3).
15 Australian Security Intelligence Organisation Act 1979 (Cth), s 34B.
16 Attorney-General (Cth) v The Queen (1957) 95 CLR 529 at 540-541 (Viscount Simmons).
judges in this regime is incompatible with the separation of judicial powers, even if the roles are in keeping with current constitutional doctrine. Unfortunately, considering the current state of constitutional understandings in this area, it is likely that judges will be increasingly involved in politically controversial, rights-offensive regimes as a matter of policy, and that this will incrementally erode the very independence that makes judicial involvement in such regimes so attractive. On one view, this represents one of a number of ways that the exceptional and novel aspects of counter-terrorism measures are becoming normalised in the Australian legal system to the detriment of the constitutional arrangement.

THE ISSUING AUTHORITY

The role of issuing authority

The issuing authority is responsible for issuing Special Powers warrants on request of the Director-General. The role of issuing authority may be filled by a consenting federal magistrate or judge appointed by the Attorney-General. Insofar as the role confers functions that are neither judicial nor incidental to judicial power, the function is bestowed on the issuing authority as a persona designata. Once presented with the Director-General’s request for a warrant, an issuing authority may issue the warrant when satisfied, first, that there are reasonable grounds to believe the questioning will “substantially assist the collection of intelligence that is important in relation to a terrorism offence” (the Questioning Threshold) and, secondly, that the Attorney-General has consented to the request. The issuing authority’s determination of the Questioning Threshold will be made on the basis of information provided by the Director-General. The Special Powers provisions describe a number of necessary inclusions for warrants. The issuing authority has no power to vary the terms of the warrant contained in the Director-General’s request. He or she may only accept or reject the warrant request based on a determination of the Questioning Threshold and may, impliedly, suggest terms that he or she would be prepared to issue a warrant on based on the information presented.

Before the warrant request is made to the issuing authority, the Attorney-General will have certified that the warrant satisfies the Questioning Threshold. Further to this, if the request is for a questioning & detention warrant, the Attorney-General will have certified that there are reasonable grounds to believe that if the person is not immediately detained he or she may alert someone involved in a terrorism offence that the offence is being investigated, may not appear for questioning or may destroy or damage evidence (the Detention Threshold). The Attorney-General will also certify two additional factors before consenting to the request being lodged with the issuing authority: first, that relying on other methods of collecting that intelligence would be ineffective (this factor establishes the warrant system as a measure of last resort); and secondly, that a written statement of procedures to be followed in the exercise of authority under the warrant is in force.
Federal judges: Personae designata and the incompatibility rule

Development

The independence of the federal judiciary stands upon two constitutional principles. The first, uncontroversial, principle holds that as a consequence of the three-armed structure of the Constitution and the positive vesting of the “judicial power of the Commonwealth” in federal courts, “judicial power” is vested exclusively in those courts. The second principle has proved far more problematic, but remains authoritative nonetheless. This rule, first given authority in the 1956 case of R v Kirby; Ex parte Boilermakers’ Society of Australia, elevates the negative implication of s 71: that federal courts may not exercise any power other than the “judicial power of the Commonwealth” and non-judicial powers incidental to it.

At first blush, the ruling in Boilermakers’ is extreme. The nebulous nature and considerable breadth afforded to the concept of “judicial power” has, however, lent the ruling significant practical flexibility. Indeed, it is accepted that the concept of judicial power defies, or “transcends”, abstract conceptual analysis; and that exclusive, exhaustive definition of even the core of judicial power is neither possible nor desirable. The classic definition of judicial power was provided in 1908 by Griffith CJ as:

[T]he power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

This definition identifies a number of characteristics subsequently harnessed by the High Court to distinguish judicial from non-judicial powers, weighing the present indicia against absent and contrary indicia in an unpredictable balancing exercise. The key or “core” characteristic of judicial power is the resolution of a controversy about existing rights or duties, although even this characteristic may be ignored when an analogy can be drawn between the function and one traditionally exercised by courts. For present purposes, it is sufficient to understand that the ruling in Boilermakers’ remains authoritative, despite – or perhaps because of – the considerable interpretive flexibility involved in delineating between “judicial” and “non-judicial” functions.

An important and long-standing exception to the Boilermakers’ rule restricting judges to exercising judicial tasks is the persona designata doctrine. This doctrine is based on the assertion that the separation of powers does not bind federal judges in their personal capacity, and so enables non-judicial functions and titles to be conferred on judges individually. By the 1980s, the doctrine was...

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27 Waterside Workers’ Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434 at 442 (Griffith CJ); R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254 at 270 (Boilermakers’).
32 Huddart, Parker & Co Pty Ltd v Moorhead (1909) 8 CLR 330 at 357.
supported by extensive practice which, sometimes controversially, had seen serving judges appointed to administrative positions such as Ambassador and Royal Commissioner. The distinction between a judge as a judge and a judge as a qualified individual is therefore of supreme importance; but it is also inescapably superficial. As observed by Mason and Deane JJ:

To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as “distinctions without differences” it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.

It is clear that, without limit, the persona designata doctrine has the potential to overwhelm the Boilermakers’ rule. In the 1995 case of Grollo v Palmer – an unsuccessful challenge to provisions enabling telecommunication interception warrants to be issued by personae designata – the High Court established such a limit, namely, that “no function can be conferred that is incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power”.

The incompatibility condition was applied for the first time the following year in Wilson v Minister for Aboriginal and Torres Strait Islander Affairs. In Wilson, the appointment of Justice Jane Mathews as “reporter” to the Minister on whether certain areas should be classified as Aboriginal heritage sites was invalidated on the basis that it involved functions so entwined with the executive as to diminish public confidence in the judicial institution as a whole. Since Wilson, the incompatibility rule has not been applied to invalidate a persona designata appointment of a federal judge, despite its invocation on a number of occasions.

What is incompatible?

As the non-judicial nature of a function does not automatically render it incompatible with judicial office, some particular quality of the function must exist to prevent the function from being conferred on a persona designata. In Grollo, the High Court described three ways in which incompatibility may arise. First, incompatibility may arise when the actual performance of the judge’s judicial functions are significantly compromised as a result of a non-judicial function. Secondly, the personal integrity of the judge may be compromised or impaired by the non-judicial function. Neither of these first two bases of incompatibility have been applied in the cases to date, despite the judge in question in Grollo being required to excuse himself from the trial of Mr Grollo without being able to give reasons to the parties on the basis of his actions as a persona designata (a majority of the High Court was satisfied that this apparent conflict did not indicate incompatibility as it could have been simply avoided by “the adoption of an appropriate practice”). The third way in which incompatibility may arise is where a non-judicial function is so repugnant to the judge’s judicial office that it diminishes public confidence.

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40 For example, in the case of Thomas (2007) 233 CLR 307 the issuing of counter-terrorism interim control orders by a Ch III court was confirmed to be an exercise of judicial power (and therefore not “incompatible”) on the basis that it involved an independent adjudication of sufficiently definite legal standards. The case of Nicholas (1998) 193 CLR 173 involved another unsuccessful attempt to invoke the incompatibility rule, the High Court finding that legislative removal of a factor from the court’s consideration when exercising its discretion to admit evidence of an offence did not affect judicial function.
confidence in the judicial institution as a whole ("public confidence incompatibility"). It is this form of incompatibility that has arisen in the key challenges.

In Wilson, a majority of the High Court suggested a three-stage process to assist a determination of public confidence incompatibility. First, incompatible functions will be “an integral part of, or closely connected with, the functions of the legislative or executive government”. In addition to this characteristic, incompatible functions will be indicated by either: reliance upon non-judicial instruction, advice or wish, or the exercise of discretion on political grounds (that is, on grounds not expressly or impliedly confined by law).

In Wilson, the role of reporter was found to be “firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections in a position equivalent to that of a ministerial adviser”. This strong connection to the executive underpinned an assumption in the majority reasoning that Justice Mathews would not act independently of executive advice or exercise her discretion on legal grounds because there was no requirement for her to do so. An opposite assumption underpinned the majority decision in Grollo.

The justices of the majority found that the independence (rather than integration) of the adjudicative function preserved the appointee’s capacity to act as a check on executive power rather than as an adviser or spokesperson. Hence, the differing degrees of connection accounted for different presumptions within the reasoning.

The focus on “public confidence” adopted in Wilson must be considered in light of the High Court’s later judgments in Nicholas v The Queen, in which Brennan CJ (with whom Hayne J agreed on this point) said:

To hold that a court’s opinion as to the effect of a law on the public perception of the court is a criterion on the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court’s opinion about its own repute to the level of a constitutional imperative.

The remaining three justices (two of whom were in dissent) opined that the court’s power to protect its own processes and maintain public confidence in the administration of justice was central to the constitutional conception of judicial power. Wendy Lacey suggests that the division in the High Court on this point indicates that courts bear a power to protect their processes only, rather than to protect their reputation. The developments in Nicholas indicate that public confidence incompatibility does not look to actual public perception, but for an inappropriate overlap in the functions of the judicial and non-judicial arms of government – which is clearly distinct from the considerations of “repute” feared by Brennan CJ. When the incompatibility rule is applied to courts, public confidence incompatibility equates to an impermissible infringement on, or usurpation of, judicial power. When the rule is applied to personae designata, the central focus must be on the independence of the function and “whether a particular extrajudicial assignment undermines the integrity of the judicial branch”. Thus, the indicia outlined in Wilson relate to public confidence in name alone; the real inquiry

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48 Nicholas (1998) 193 CLR 173 at 197 (Brennan CJ), 275 (Hayne J).
49 Nicholas (1998) 193 CLR 173 at 209 (Gaudron J), 224, 226 (McHugh J), 258 (Kirby J).
concerns whether institutional independence is being compromised by integration with a non-judicial arm of government or inappropriate reliance on non-judicial guidance.

In addition to the guidance described above, a number of general principles have developed to assist a determination of what is incompatible with judicial function. The separation of powers doctrine is a purposive rule and it follows that the incompatibility rule has developed to introduce an express consideration of the values underpinning the separation of judicial power into the interpretive equation. Thus, a substantive, purposive approach is both sensible and desirable. The purposive approach also commands a clear distinction between the validity of a persona designata appointment and “the desirability or wisdom of a person who is a judge accepting such an appointment.” The importance of this distinction has been emphasised repeatedly by the High Court, despite its tendency to comment on the desirability of an appointment in obiter.

Despite comments by members of the High Court suggesting that certain aspects of due process are central to judicial power, characteristics of a function or its exercise that may create a “non-judicial flavour” have proved unpersuasive of incompatibility, or even that the function is non-judicial. The fact that a function is performed ex parte, without notice to the affected person, on the basis of information solely provided by executive applicants and not disclosed to the person, having a significant effect on personal and/or property rights of an innocent individual and following a certification by a minister of the same questions put before the judge, will not indicate that the function is incompatible with judicial power.

Validity

The role of issuing authority is conferred on judges not on courts. The issuing authority’s functions are non-judicial; the procedure for obtaining a warrant “does not resemble standard judicial procedure”; and the function does not involve the determination of a question of law, a conflict between parties or identification or the enforcement of rights in accordance with legal principles. Accordingly, the issuing authority’s functions are conferred on the appointee in his or her personal capacity and are valid unless the function is incompatible with the appointee’s judicial office.

The identity of the issuing authority is not disclosed and the issuing of Special Powers warrants could not conceivably result in “so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable.” Any practical conflict between the two roles would be analogous to that considered in Grollo, and the adoption of “appropriate practices” to avoid such a conflict would be equally applicable in this circumstance. The form of incompatibility potentially relevant to the issuing authority is therefore public confidence incompatibility.

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54 Wilson (1996) 189 CLR 1 at 46 (Kirby J).
58 Brennan, n 11.
59 Brennan, n 11, citing Huddart, Parker & Co Pty Ltd v Moorhead (1909) 8 CLR 330 at 357; Queen Victoria Memorial Hospital v Thornton (1953) 87 CLR 144; R v Gallagher, Ex parte Abersare Collieries Pty Ltd (1963) 37 ALJR 40 at 43.
Warrant request, issue and implementation are executive actions fulfilling an executive purpose. The issuing of warrants involves the consideration and assessment of matters traditionally within the realm of the executive: the potential “importance” of intelligence to an investigation. This is underscored, though not proven, by the fact that the issuing authority’s key function is also undertaken by the Attorney-General. Despite the executive nature of the issuing authority’s role, it is not integrated into the investigation but independent from it. The issuing authority’s consideration of the request is performed without interference and the decision is reached on the objective criteria of reasonable belief, which counterbalances the potential subjectivity of other factors in the Questioning Threshold (that the questioning will substantially assist the collection of intelligence that is important). This suggests that the issuing authority retains significant independence, analogous to the independence of the issuing judges in Grollo, as opposed to the more integrated, advisory role of the “reporter” in Wilson. The cases, thus, suggest that the proper approach to considering the functions of the issuing authority is to assume the appointee will act in a judicial manner.

The issuing authority is entirely reliant on executive advice in determining whether the Questioning Threshold is met. The issuing authority’s determination is in fact a reconsideration of one of many factors that the Attorney-General has already certified with the advantage of more information (including from portfolio agencies and interdepartmental sources). The Director-General has significantly more experience and knowledge of terrorism investigations and intelligence than the issuing authority, placing the Director-General in a far better position to assess whether questioning the person will substantially assist a terrorism investigation. The Director-General also is in a uniquely knowledgeable position in respect of the terrorism investigation and the person’s importance to it. The determination that the questioning will substantially assist the collection of important intelligence is, arguably, beyond question by the issuing authority and places the issuing authority in a position of heavy reliance on executive instruction.

There are, however, many examples of ministers or other executive officers making their own adjudication – with the benefit of experience and a broader knowledge base – before consenting to a formal application for an order being lodged with a judge. The control order regime upheld in Thomas v Mowbray was one such process, in which the Attorney-General’s opinion that the bases for issuing the order were met, was a requirement for the Australian Federal Police to apply to the court for an interim order. This process was found not to limit the judge’s independent decision-making, but to enable the judge to act as a check on executive decision-making (in a manner bearing some similarities to the work of personae designata in the Administrative Appeals Tribunal). Thus, the issuing authority is reliant on executive instruction, but is undertaking an independent review of that information for the purpose of reaching an objective decision. This conclusion is supported by the considerable discretion inherent in the issuing authority’s role, including the ultimate discretion to issue the warrant regardless of the criteria in the legislation.

The third factor that Wilson proposes for consideration is the manner in which the issuing authority exercises his or her discretion. Despite the presumption that the issuing authority will exercise his or her discretion in a judicial manner, if the issuing authority’s function was limited to deciding whether the questioning would substantially assist the collection of important intelligence, incompatibility could be argued on the basis that these criteria lack objectivity and precision, and require the issuing authority to either solely rely on the Director-General’s advice or make a political decision. Central to the issuing authority’s function, however, is an adjudication of whether the information provided supports a “reasonable belief”. The criterion of “reasonable belief” is analogous

61 Australian Security Intelligence Organisation Act 1979 (Cth), ss 34D, 34E and 34F.
64 Similar criticisms were made of the telephone tapping warrant provisions by McHugh J in his dissent in Grollo (1995) 184 CLR 348 at 379.
to the familiar legal standards of “reasonable necessity” and “reasonably appropriate and adapted”.  

Thus, the issuing authority exercises his or her discretion in a judicial manner, based on legal standards.

The characteristics of the warrant regime that give the provisions a “non-judicial flavour”, such as the warrant’s severe interference with the personal and property rights of an innocent citizen, are also not determinative of incompatibility. The validity of the issuing authority’s functions finds considerable support in the High Court decisions upholding the issuing of interim control orders in Thomas and telephone-tapping warrants in Grollo. However, unlike either of those scenarios, Special Powers warrants are issued absent any consideration of whether the infringement on individual rights is proportionate to the warrant’s investigative and/or preventative purpose and the issuing authority may not vary the terms of the warrant. As the issuing authority retains an ultimate discretion whether to issue the warrant, and exercises his or her functions to an objective standard free from interference, it is highly unlikely that these distinctions would negate the role’s independence and render the function incompatible with judicial function. Against the precedent on incompatibility, the functions of the issuing authority would withstand constitutional challenge. An opposite conclusion would represent a departure from aspects of the majority decisions in Grollo and Thomas.

**THE PRESCRIBED AUTHORITY**

**The role of prescribed authority**

Once the warrant is issued, a federal or State police officer will bring the person into custody and immediately before a prescribed authority for questioning. The prescribed authority is appointed by the Attorney-General to the role and is usually a retired judge. The appointment of a retired judge to the position of prescribed authority would be, generally, uncontroversial and is certainly the preferable option. Only if the Attorney-General is of the view that there is an insufficient number of consenting retired judges available for appointment may a consenting serving judge of a State or Territory Supreme or District Court be appointed. If the Attorney-General considers that there is still an insufficient number of potential appointees, a consenting President or Deputy President of the Administrative Appeals Tribunal who has been enrolled as a legal practitioner of a Federal or Supreme Court for at least five years may be appointed. Insofar as the role confers functions on a serving judge that are neither judicial nor incidental to judicial power, the function is bestowed on the judge as a persona designata.

There is no other role in Australia similar to that of the prescribed authority. The functions of the prescribed authority are loosely described in s 34J(3) of the ASIO Act to include “supervising the questioning … and … giving appropriate directions under s 34K in relation to the person”. The prescribed authority supervises, witnesses and directs the entire questioning process and arrangements

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65 Thomas (2007) 233 CLR 307 at 331-333 (Gleeson CJ). The standard of “reasonable belief” can be found in, for example, the defence of “mistake of fact” to strict liability offences: Criminal Code (Cth), s 9.2; the defence of a reasonable belief that certain conduct was condoned by law: Criminal Code, s 313.2; the due diligence defence in relation to prospectuses: Corporations Act 2001 (Cth), s 731; and the considerations of the court in relation to unconscionable conduct in business transactions: Australian Investments and Securities Act 2001 (Cth), s 12CC(2)(h); former Trade Practices Act 1974 (Cth), s 51AC.

66 Hussain v Minister for Foreign Affairs (2008) 169 FCR 241 at [102].

67 Though it may be expected that the issuing authority may suggest a possible variation of terms following a decision to reject a warrant application.

68 Australian Security Intelligence Organisation Act 1979 (Cth), ss 34E(2), 34H.

69 Australian Security Intelligence Organisation Act 1979 (Cth), s 34B. In the early stages of the Bill’s debate in 2002, Minister for Justice Chris Ellison said that serving judges would be used because there were “not enough” retired judges, estimating the figure at 22. Labor Minister and Senate Leader John Faulkner countered this with the Labor Party’s inquiries to State and Territory governments producing a figure of 150-plus retired judges: Australia, Senate, Parliamentary Debates (12 December 2002) (John Faulkner), quoted in “ASIO: What the Parties Said Before Politics Went Crazy”, The Sydney Morning Herald (13 December 2002).

70 Australian Security Intelligence Organisation Act 1979 (Cth), s 34B.

71 Australian Security Intelligence Organisation Act 1979 (Cth), s 34ZM(2).
for the person’s detention without being actively involved in, or guiding, the interrogation itself. The prescribed authority is thus a kind of “master of ceremonies” for the interrogation.

The first function of the prescribed authority is to inform the person who is the subject of the warrant of a number of facts including the nature of the warrant, the person’s rights (including his or her right to make a formal complaint and to seek a remedy from the Federal Court relating to the warrant or his or her treatment).72 As the interrogation progresses, the prescribed authority oversees the interrogation and makes intermittent directions based on the progress of the warrant and/or submissions from involved parties. The prescribed authority may make directions within the scope of the warrant relating to: any arrangements for the person’s detention including commencement, continuation and release; breaks in questioning; continuation of questioning; contact with third parties including family members, legal representation and interpreters; and disclosure of information to third parties.73 A direction may also be outside the scope of the warrant, provided it has received the Attorney-General’s consent, or the direction is for the purpose of addressing a concern of the Inspector-General of Intelligence and Security (IGIS).74 The prescribed authority may direct that the person be detained (or further detained) if satisfied of the Detention Threshold.75 Such a direction will not necessarily be at odds with the terms of a questioning warrant.76

At the end of eight and 16 total hours of questioning, accumulating over the course of the warrant’s duration, the interrogation may only continue with the permission of the prescribed authority. The prescribed authority’s permission will be given if he or she is satisfied, first, of the Questioning Threshold and, secondly, that authority under the warrant has been exercised without delay.77 The prescribed authority’s directions will be based on his or her own observations and submissions from executive officers. The person is prohibited from knowing anything about the case and the person’s legal representative is prohibited from making submissions and responses to the prescribed authority.78

Protections for the independence of State judges

The Boilermakers’ principle applies only to federal courts. Thus, at first blush, there is no constitutional restriction on the appointment on State judges to non-judicial roles. However, State courts are vested with limited federal jurisdiction and, to that extent, their independence and integrity is entitled to constitutional protection.79 Similarly, State courts form part of an integrated national court system, which further justifies their entitlement to a degree of constitutional protection.80 Gleeson CJ summarised the principle as follows:81

[S]ince the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.

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72 Australian Security Intelligence Organisation Act 1979 (Cth), s 34J(1)(f).
73 Australian Security Intelligence Organisation Act 1979 (Cth), s 34K(1).
74 Australian Security Intelligence Organisation Act 1979 (Cth), s 34Q(1)-(3). A concern may be, eg that the IGIS was not present during a particular part of the questioning.
75 Australian Security Intelligence Organisation Act 1979 (Cth), s 34K.
76 Australian Security Intelligence Organisation Act 1979 (Cth), s 34K(3).
77 Australian Security Intelligence Organisation Act 1979 (Cth), s 34R.
78 Australian Security Intelligence Organisation Act 1979 (Cth), ss 34U(2A), 34HB(1)-(2) and 34R(3).
79 Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 103 (Toohey J), 82 (Dawson J).
81 Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at [15].
The extent to which the Commonwealth Constitution limits the legislatures’ ability to confer non-judicial functions on courts is necessarily limited. Determining incompatibility at the State level is an “evaluative process” ultimately considering whether the function is seriously repugnant to the institutional independence and integrity of the court, and thus infringes the “minimum requirement” that a State or Territory court be independent and impartial. Recent High Court decisions such as *International Finance Trust Co Ltd v New South Wales Crime Commission* and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* turned on whether the challenged provisions enabled the executive to dictate or compel an essential attribute of the court’s function in a manner the court was unable to efficiently remedy or avoid. It seems for incompatibility to exist in respect of State and Territory courts there must be a serious direction or limitation on the exercise of the court’s power, unavoidable by the court, amounting to a usurpation of judicial power or the integration of the administrative function into the judicial function to such a degree that the judiciary becomes an instrument of the executive.

No case has yet considered the validity of functions bestowed on a State or Territory judge as a persona designata. It is established constitutional understanding that actions undertaken by judges in their personal capacities affect judicial integrity and independence to a significantly lesser degree than the actions of courts, therefore functions that may not be bestowed on State or Territory courts may be conferred on State or Territory judges as personae designata. It follows that, even a function rendering a judge the instrument of the executive will not necessarily be invalid if it is bestowed on that judge in his or her personal capacity. McHugh J has suggested that an invalid conferral of non-judicial power on a State or Territory persona designata would be rare, but offered the example of the appointment of a Chief Justice to Cabinet. Many examples of valid State or Territory persona designata appointments have been suggested or confirmed in the caselaw, including: Lieutenant-Governor, electoral commission member, Chairperson of the Parole Board, and tribunal member. It seems that only functions that present an extreme offence to judicial independence, such as those involving a clear conflict of interest or perhaps those completely dictated by the executive, may not be validly conferred on State or Territory personae designata.

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87 See *South Australia v Totani* (2010) 85 ALJR 19 at [132] (Gummow J).


91 *Kotzmann v Adult Parole Board (Vic)* (2008) 221 FLR 134.

92 Including as members of the Australian Competition Tribunal, the Copyright Tribunal, the Defence Force Discipline Appeal Tribunal, the Court of Arbitration for Sport and the Australian Law Reform Commission: *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at [151] and [154]. See also *French*, n 17; *Brown*, n 35.
Validity

The role of the prescribed authority is unique. The prescribed authority’s functions are not as defined and therefore not so simply analysed as the functions that were the subject of the key cases discussed above. Like the role of reporter considered in Wilson, the prescribed authority has a reasonably broad discretion as to the performance of his or her functions. Justice Mathews’ role as reporter, however, was constrained to the completion of a single, focused task.

The decisions made by the prescribed authority vary from whether a break in questioning is needed, to how to best address the IGIS’s concern, to determinations of the Questioning and Detention Thresholds as appropriate. These decisions are reached independently on information provided by executive officers and by personal observations. The prescribed authority retains a broad discretion and is subject to few minor obligations. The exercise of the functions of the prescribed authority is not directed or dictated by executive will. Presuming the prescribed authority will act judicially in the conduct of his or her functions, this independence will enable the prescribed authority to fulfil his or her functions in an objective manner, maintaining the integrity of the judicial institution.

The prescribed authority does not interrogate or actually detain the person held under the warrant, but he or she does play a key role in administering the interrogation and detention. At the prescribed authority’s discretion, legal representatives and third parties become involved, questioning and detention commences, is deferred and ceases, and any other arrangements for the person’s detention are altered. The prescribed authority plays an authoritative role throughout the interrogation but is ultimately fulfilling an executive role the conduct of which is at times dependent upon the consent of the Attorney-General, the concerns of the IGIS and submissions made by ASIO. The prescribed authority thus occupies a position in the Special Powers regime both authoritative over and submissive to the executive officers involved; both supervisory and responsive.

The presence and involvement of a judge as the “master of ceremonies” within the interrogation room conveys that all three arms of government are simultaneously authorising the course of interrogation and detention under a Special Powers warrant. The integrated involvement of the prescribed authority in the Special Powers regime submerges the judge in the executive investigation process. Consistent involvement of executive officers in the exercise of the prescribed authority’s functions dresses the persona designata in the uniform of the intelligence services, and borrows the persona designata’s reputation for objectivity to condone and authorise executive will throughout the process.

In light of the albeit vague guidance on what distinguishes an invalid conferral of non-judicial functions on a State or Territory persona designata, the absence of clear executive direction and limitation on the general exercise of the prescribed authority’s functions is likely to be sufficient to maintain “compatibility” with the integrity of the State and Territory judiciaries as repositories of federal judicial power. There is no conflict between the functions of a judge and the functions of the prescribed authority as the investigation is not necessarily linked to any present or future criminal proceedings. A finding of invalidity would represent a substantial extension of the law in this area.

TESTS ASIDE: SPECIAL POWERS WARRANTS AND JUDICIAL INTEGRITY

The provisions of the ASIO Act conferring the role of issuing authority on federal judges or prescribed authority on State or Territory judges would likely withstand constitutional challenge. By implication, these roles are not incompatible with the separation of judicial power or the maintenance of judicial integrity enshrined in the Commonwealth Constitution. But do the prevailing tests for incompatibility truly test whether persona designata appointments risk judicial integrity and independence, or has the

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94 See Wilson (1996) 189 CLR 1 at 10 (Gaudron J).

95 Australian Security Intelligence Organisation Act 1979 (Cth), s 34K(6).
persona designata doctrine provided the legislature with an effective means of circumventing the separation of judicial power? Do the Special Powers provisions of the ASIO Act actually compromise judicial independence?

The Special Powers regime is wholly executive and is neither part of nor ancillary to judicial proceedings. Accordingly, a person subject to a Special Powers warrant may be stripped of many of his or her process rights, including: the right to legal representation, the right to know the case against you (which in these circumstances would amount to the reason for the detention and interrogation) and the privilege against self-incrimination. Moreover, Special Powers warrants are issued and directions are made without any submissions from the person or consideration of the proportionality of the warrant’s provisions. The issuing authority and the prescribed authority are each responsible for ordering the questioning and/or detention of a person in a secretive, unreviewable manner absent any kind of balancing exercise or effective review. As observed by Greg Carne, “[t]he unprecedented detention of non-suspects for intelligence-gathering purposes traverses completely new ground”.

Likewise, the interrogation of non-suspects, while commonplace in, for example, Royal Commissions and executive committees, is unprecedented in the context of secrecy, non-representation and potential detention created by the ASIO Act.

The independence of a non-judicial function conferred on a judge is the key to determining its compatibility; however, it is equally important to recognise that for a function to be “compatible” with judicial power it must not be offensive to judicial power. If judges are involved in executive schemes that are divorced from or at odds with judicial power, the integrity of the judicial institution will be weakened. By confining a consideration of incompatibility to a technical analysis of the independence of specific functions, the greater scheme that the judge is involved in is overlooked and its effect on judicial integrity is subjugated. Grollo and Wilson are examples of the High Court engaging in this technical analysis and the strong dissents in each those cases demonstrate its weaknesses.

At the State and Territory level, the “more relaxed” approach to incompatibility “is open to the objection that it is inconsistent with the more rigorous standards expected of the federal judiciary”, a serious concern in an integrated court system.

It is true that the concept of judicial power is elusive and not apt for exhaustive definition. Accordingly, in determining whether a role is incompatible with judicial power “it is quite open to the High Court to take dramatically different views”. Certain qualities do, however, stand at the core of judicial power. These qualities include aspects of due process and an adherence to the rule of law. The court’s traditional processes – incorporating central tenants of due process such as equality before the law, impartiality and the appearance of impartiality, the right of a party to know and meet the case against him or her and a degree of judicial discretion to ensure due process and a fair trial are subject to periodic review, a high threshold for issuance and the provision of detailed reasons by the court.

96 Carne G, “Detaining Questions or Compromising Constitutionality?: The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)” (2004) 27 University of New South Wales Law Journal 524 at 530. Special powers warrants can be distinguished from the interim control order proceedings upheld in Thomas that were followed by a confirmation hearing at which the person’s interests were represented and considered in respect of the bases and proportionality of the order. Likewise, the issuing of telephone tapping warrants involves a weighing of factors – including the affected person’s right to privacy – and the judge could “specify conditions or restrictions relating to [telephone] interceptions” at his or her discretion: Grollo (1995) 184 CLR 348 at 356 and 358 (Brennan CJ, Deane, Dawson and Toohey JJ). The preventative detention orders upheld in Fardon were subject to periodic review, a high threshold for issuance and the provision of detailed reasons by the court.


98 McHugh J described the majority’s decision in Grollo as a triumph of form over substance: Grollo (1995) 184 CLR 348 at 384. The High Court’s reasoning to distinguish a “reporter” from a Royal Commissioner in Wilson has been described as “somewhat tortured”: Irving H, “Advisory Opinions, the Rule of Law, and the Separation of Powers” (2004) 4 Macquarie Law Journal 105 at 125. Kirby J has suggested that Hilton ought to be revisited: North Ganalanja Aboriginal Corporation v Queensland (1996) 185 CLR 595; Thorpe v Commonwealth (No 3) (1997) 144 CLR 677. And the resulting doctrine from these cases has been criticised as “incoherent” (French, n 17), “inconsistent” (Walker, n 46) and “confusing” (Brown, n 35 at 64).

99 Johnston and Hardcastle, n 88 at 230.

100 Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 357 (Grif fith CJ); R v Trade Practices Tribunal; Ex parte Tasmanian Breweries (1970) 123 CLR 361 at 374-375 (Kitto J), 394 (Windeyer J).

101 Brown, n 35 at 76.
maintained and that the administration of justice is not bought into disrepute – has been acknowledged by the High Court as central to judicial power.102 This precedent suggests that an understanding should be adopted of the court’s inherent jurisdiction, and of judicial power, that lends significant weight to process considerations.103 The purposive nature of the separation of powers doctrine, which demands a substantive consideration of the challenged provisions,104 also warrants a broader understanding of incompatibility, looking for compatibility with the qualities of judicial power, including the fundamental conditions of judicial process, as much as independence of functions.

Likewise at the State and Territory level, independence remains the key to compatibility; however, findings of incompatibility have resulted from a demonstrated usurpation of judicial power. The recognition that judicial process is a central aspect of judicial power may lead to the conclusion that the involvement of judges in regimes divorced from judicial process is tantamount to an impermissible usurpation.

The involvement of Ch III judges in the Special Powers regime – albeit as a “safeguard”, supervisor or authorising officer – presents a more severe risk to the integrity of the judiciary than their involvement in regimes that embody the qualities of proportionality, rights protection, openness and proper process (such as in administrative tribunals or even Royal Commissions of Inquiry). The appointment of judges as issuing authorities or prescribed authorities associates the judiciary with covert, rights-offensive intelligence-gathering executive actions. Taking these factors as a whole reveals that the Special Powers provisions as they stand pose a significant risk to judicial integrity. Therefore, the conclusion that the Special Powers provisions would likely withstand constitutional challenge demonstrates that the constitutional doctrine is in fact not coextensive with good policy regarding the continued separation of judicial power in Australia. As it stands, therefore, the persona designata doctrine provides the legislature with an effective means of circumventing the separation of judicial power.

The course of the Special Powers provisions, and the counter-terrorism laws more generally, demonstrate that legislative drafters tend toward a policy position of involving judges in controversial executive regimes.105 The legislature has heralded its use of judges and/or judicial process in the most controversial and rights-offensive legislative regimes, touting this involvement as an inbuilt “safeguard” from improper use of executive power.106 This approach makes political sense. It quells fears and controversies that arise within and outside Parliament with respect to the legislation’s harsher aspects, without compromising the extent of executive power created. This political tactic gained ground in the counter-terrorism context, where the government drastically increased executive

103 Lacey, n 50.
105 The involvement of serving judges in the Special Powers scheme was discussed in parliamentary committee reports and debated in Parliament. The constitutional issues were flagged by the committees and in submissions: see, eg the following submissions to the Senate Legal and Constitutional References Committee, Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters: Carne G, Submissions No 24, 24A and 24B (4 November 2002); Williams G, Submission No 22 (30 April 2002); Law Council of Australia, Submission No 299 (29 April 2002). However, politicians regularly referred to the involvement of judges as a “safeguard” or drew attention to this involvement to counter criticisms of the rights implications of the provisions: see n 109. This trend has continued throughout the enactment of Australia’s counter-terrorism laws, such as the control order and preventative detention order regimes (Divs 104 and 105 of the Criminal Code (Cth) respectively) which utilise judges and in the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) which manipulates court proceedings.
106 See, eg Jull D, “ASIO Counter Terrorism Legislation: Report” (Media Release, 5 June 2002); Williams D, “The War Against Terrorism, National Security and the Constitution: A Response to Dr Renwick” (Speech delivered at the Annual Dinner of the Constitutional Law Section of the NSW Bar Association, NSW Supreme Court, Sydney, 3 October 2002); Australia, House of Representatives, Parliamentary Debates (28 November 2005) p 109 (Jason Wood).
powers to support the strong stance against terrorism. The Special Powers regime, the issuing of control orders and preventative detention orders, and the withholding of evidence from defendants on the basis of national security are examples of the implementation of a policy of utilising judges and judicial process to quell controversy around contentious counter-terrorism measures. This political tactic is also evident outside the counter-terrorism context: Wilson concerned the Hindmarsh Island Bridge and Grollo involved telephone-tapping, each a highly controversial political scenario in which the legislature involved judges in an integral respect.

In the absence of a stronger limit on the use of judges for non-judicial functions, it is likely that judges will be increasingly involved in rights-offensive, controversial regimes to fulfil an executive policy of providing internal “safeguards” to these regimes. This is at odds with the basic constitutional precept that the judiciary provides the best safeguard against improper exercises of power by being segregated from the exercise of those powers. It is by isolation from, not fusion into, non-judicial regimes that the judicial arm of government maintains its impartiality and non-partisanship107 that “may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action”.108 As observed by Denise Meyerson: “In the long run, the use of the courts to restrict the liberty of individuals for the purpose of protecting the public may therefore kill the goose that lays the golden egg.”109

CONCLUSION

This article considered the validity of judicial involvement in the Special Powers regime under the ASIO Act and concluded that the appointment of federal judges as issuing authorities and State judges as prescribed authorities would be likely to stand up to a constitutional challenge on the basis of incompatibility. Although the incompatibility rule has developed to put considerations of judicial process to one side, precedent supports the assertion that judicial process is central to judicial power. As observed by Deane J:

To ignore the significance of the [separation of powers] doctrine or to discount the importance of safeguarding the true independence of the judicature upon which the doctrine is predicated is to run the risk of undermining, or even subverting, the Constitution’s only general guarantee of due process.110

Accordingly, a recognition that the Special Powers regime is at odds with judicial process indicates that the involvement of judges in this regime is incompatible with their constitutionally protected integrity and impartiality. Unfortunately, in the absence of a re-evaluation of the incompatibility rule by the High Court, it is likely that judges will be increasingly involved in politically controversial regimes as a matter of policy – despite the existence of appropriate alternatives such as the employment of retired judges in these roles – and this will compromise judicial integrity. The utilisation of serving judges to issue and oversee covert, rights-offensive interrogation and detention of innocent persons may not be unconstitutional; but it does give weight to the notion that the persona designata doctrine is an effective “charade” to circumvent protections for judicial integrity and independence, and ultimately cause damage to the rule of law and those rights that are protected by the independence of the judiciary.

109 Meyerson, n 107 at 228.
110 Re Tracey; Ex Parte Ryan (1989) 166 CLR 518 at 580 (Deane J).