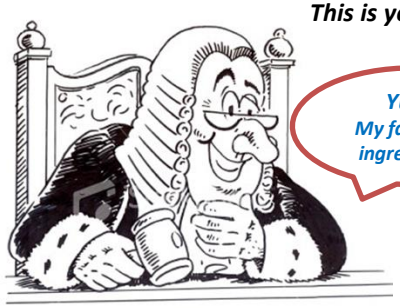
Judicial Power Cake

Rebecca Ananian-Welsh, TC Beirne School of Law UQ, rebecca.aw@law.uq.edu.au

Mystified by the many rules and exceptions to Ch III and the separation of powers?

This is your guide to teaching the federal separation of judicial power, through cake and food intolerance metaphors.



Rule 1: Everyone is allergic to judicial power cake, except courts.

(judicial power must be conferred on properly constituted courts: *Constitution* s 71; *Alexanders' Case* 1918)

Rule 2: Courts are allergic to every kind of cake, except judicial power cake

(though some non-judicial ingredients will be ok if they're really needed, eg eggs, flour, making findings of fact, case management roles…)

(courts may only exercise judicial powers and ancillary or incidental non-judicial powers: *Constitution* s 71; *Boilermakers' Case* 1956)

CH III BRAND
JUDICIAL POWER CAKE
INGREDIENTS:
BINDING&AUTHORITATIVEDECISION/
RESOLVINGACONTROVERSY/ABOUT
EXISTINGRIGHTS/ACCORDINGTOLAW
/INAJUDICIALMANNER

DOESNOTCONTAIN: LAWMAKING/
VASTDISCRETION/LAW
ENFORCEMENT

Judicial power cake!

How do you know what kind of cake it is?
Look at the ingredients!

(The classic indicia of judicial power: *Huddart Parker & Co v Moorhead* (Griffith CJ); *Tasmanian Breweries* (Kitto J))

What if it has some ingredients but not others?
That can be tricky – is it mostly judicial with just non-judicial icing? Will those non-judicial raisins spark a serious allergy?
It's a bit of a balancing act rather than an exact science.

(defining judicial power is a balancing exercise, the concept transcends abstract conceptual analysis: *Tasmanian Breweries* 1970, *Precision Data Holdings v Willis* 1991)

Got it? So, what kind of cake (power) do you have? If its judicial it has to go to judges, if it isn't judicial it can't go to judges. Check the ingredients and make a call. It's that simple.

But wait, there are Exceptions!

Exception 1: Judges can eat whatever they like in front of the TV at home (unless it reeeeally disagrees with them or makes them look really silly – like the guy to the left)

The ***persona designata* exception**: *Grollo v Palmer* (1995), *Wilson* (1996). A judge may exercise non-judicial powers in his/her personal capacity UNLESS the power is incompatible with judicial independence or institutional integrity, eg by damaging public confidence in the independent and impartial judicature. But judges personae designatae may NOT exercise judicial power as they are not courts *per se*.

Nom nom!
We love all cake! Except that gross judicial power cake, yuck.

Exception 2: Over time institutions can build up a specific tolerance to judicial/non-judicial cake

Eg, military courts martial may exercise judicial power (*White v Director of Military Prosecutions* 2007, *Lane v Morrison* 2009), courts may issue bankruptcy notices (*R v Davison* 1954) make their own rules of procedure, parliament may commit for contempt (*R v Richards*; *Ex parte Fitzpatrick and Brown* 1955) - because they always have (but only to the extent that they always have, and no more).

Afterall, it's not quick or easy to build up a tolerance to something you're allergic to!

Anything-but-judicial-power Cake!