JUDICIAL POWER AND ADMINISTRATIVE TRIBUNALS: THE DECISION IN *BRANDY v HREOC*

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Part 1: Introduction

The decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*[1] ("*Brandy*") brought into focus the longstanding tension between the limitations in the Commonwealth constitution regarding the bodies that may exercise judicial power and the administrative necessity to have executive tribunals exercising supervisory jurisdiction over government decision-making. Chapter III, section 71 of the constitution vests the judicial power of the Commonwealth "in the High Court of Australia, such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction". Since the High Court decision in the *Boilermakers'* case in 1956,[2] it has been settled law that the constitution precludes judicial power being vested in a body other than a court established in accordance with chapter III.

In *Brandy*, the High Court found that a statutory scheme which made determinations by the Human Rights and Equal Opportunity Commission ("HREOC") enforceable, in the absence of judicial review, invalidly conferred judicial power upon a body not established under chapter III of the constitution. The immediate effect of the decision was to preclude determinations of the HREOC from being enforced unless the Federal Court also found the relevant action to be contrary to the relevant human rights legislation.[3] Enforcement of such determinations can now only be effected through the judicial process. The broader effect of the Court's decision was to remind administrative tribunals of their limited authority and status in administrative review.

Administrative tribunals and government

The Commonwealth constitution distinguishes the powers of the executive, legislative and judicial arms of government. One of the most litigated constitutional matters in relation to the issue of the separation of powers is the division of power between the executive and judicial branches of government. The High Court in *Brandy* found that the uncertain boundary between judicial and executive power had been breached by the legislative scheme in question. Prior to this decision, however, the plethora of federal administrative tribunals had been able to edge closer to the roles played by courts due to the difficulties in determining the limits of judicial power. The exponential growth of legislation (at least in the volume of Acts, if not their number[4]) in the past two decades has created an imperative for administrative review due to the increase in decision-making pursuant to statutory criteria. In addition, one of the aims of the administrative law package was to ensure that individuals subject to administrative decisions had an

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expeditious and inexpensive right of appeal or review. Courts are generally acknowledged as being unable, or unable fully, to meet these requirements.[5] It is against this background that administrative tribunals emerged to fill the need for review without immediate recourse to the courts. Administrative tribunals are generally viewed as providing an informal or unintimidating avenue of redress for individuals who feel aggrieved by government action[6] and have become an entrenched part of the administrative landscape at the federal level of government.

The legislative schemes incorporating review by federal administrative tribunals are numerous. Aside from the broad jurisdiction currently exercised by the Administrative Appeals Tribunal ("AAT")[7], since federation many legislative schemes have included reference to specialist tribunals such as in the areas of taxation, broadcasting, corporations and securities, immigration, industrial relations, public sector employment, social security and veterans' affairs.[8] Early indications of the tension between judicial power and the power of administrative tribunals emerged in the fields of taxation in the *BIO* cases[9] and industrial relations in the *Boilermakers'* case.[10] In both cases, the Court's approach led to significant alterations to the structure of the tribunals in question. For example, the Taxation Board of Appeal was changed to the Board of Review with different powers and the Court of Conciliation and Arbitration was abolished and replaced by two separate bodies, namely the Conciliation and Arbitration Commission and the Commonwealth Industrial Court. The history of the High Court's approach to the powers of administrative tribunals is discussed in detail later in this paper and at this point it is sufficient to acknowledge that the Court's early views were largely restrictive of the powers of tribunals. Despite this early evidence of judicial antagonism toward administrative tribunals, tribunals continued to multiply in number to the extent that the administration of complex legislative schemes has now been structured around them. Judicial review has been relegated to the 'last resort' for aggrieved individuals.[11]

With this trend of conferring jurisdiction upon administrative tribunals has developed the need to give them the indicia of authority. Powers to award costs, issue summons, take evidence on oath and to conduct formal, court-like hearings have gradually been adopted by various tribunals to shore-up their status in the hierarchy of review. It is therefore not surprising to note the gradual increase in the powers conferred upon tribunals with a view to making their determinations the final step for aggrieved individuals. For example, sections 27 and 30 of the *Administrative Appeals Tribunal Act 1975* ("the AAT Act") grant the AAT the power to determine matters upon application by persons "whose interests are affected" by an administrative decision within the jurisdiction of the AAT. Section 31 of the AAT Act then provides that if the Tribunal decides that the interests of a person are affected by a decision, the decision of the Tribunal is conclusive. Such conclusive powers of determination were previously considered the traditional preserve of the courts and yet the perceived need for certainty and authority in relation to tribunals has led to significant developments and increases in their powers.

Adjudication of human rights issues by tribunals

The area of human rights regulation in Australia exemplifies the evolution of the powers of executive tribunals. Statutory regulation and the creation of a human rights tribunal form the core of the Australian response to the need for the elimination of discrimination and recognition of human rights. This approach commenced with the enactment of the *Racial Discrimination Act 1975*

which focused on conciliation and mediation by the Race Discrimination Commissioner as the primary steps in addressing racial discrimination. Court proceedings could be instituted where conciliation and mediation failed to resolve the matter, with injunction or damages being the main avenues of judicial remedy in such cases.

In 1981, the Human Rights Commission was created pursuant to the *Human Rights Commission Act 1981* and it assumed the intermediate tribunal position between the conciliation process and resort to the courts. The Commission had the power to determine whether an unlawful act had been committed and made recommendations to the minister.[12] As the opinions of the Commission were not "binding" on the parties, there could be no issue of the Commission straying into the field of judicial power.

The Commission was succeeded by the HREOC which was created by the *Human Rights and Equal Opportunity Commission Act 1986*.[13] The HREOC currently comprises a President, Human Rights Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Sex Discrimination Commissioner, Privacy Commissioner and Disability Discrimination Commissioner.[14] Initially, the powers of the HREOC were restricted to the making of declarations that the actions in question were unlawful and that certain remedial action should follow. The determinations could only be legally enforced through a party/complainant instituting proceedings in the Federal Court.[15] The Federal Court would then hear the matter *de novo* and reach its own views in relation to the original complaint.

The limited powers of the HREOC were emphasised by the Federal Court in *Aldridge v Booth*[16] and *Maynard v Neilson*.[17] In *Aldridge v Booth*, Spender J found that despite the investigation of a complaint by the HREOC, subsection 82(1) of the *Sex Discrimination Act 1984* required the Court to satisfy itself that as a matter of law and fact the actions in question were unlawful.[18] The following comments of Spender J demonstrate the lack of authority accorded to HREOC determinations once the matter reached the Court:

> [T]he court is bound to proceed only on evidence properly admitted before it in accordance with the rules of evidence, a stricture that does not necessarily apply to the Commission. Independently of that consideration, the evidence before the court will frequently not be the same as that before the Commission. It seems to me, having regard to the terms of s. 81(2), that any findings by the Commission can be of no assistance in the performance of the task entrusted to the Federal Court by s 82(2). That is not to say that what occurred before the Commission is irrelevant; by way of example only it frequently will happen that, in matters of credibility, the consistency of accounts will have significant evidentiary consequences; but the court has to exercise its own mind on material properly before it.[19]

This approach meant that a complaint was investigated afresh by the Federal Court and therefore a determination by the HREOC was without effect if challenged or not complied with. In *Hall v A & A Sheiban Pty Ltd*,[20] Lockhart J put the powers of the HREOC into a constitutional context:

> Plainly the reason for the legislature's enactment of s 81 [of the *Sex Discrimination Act 1984*] in its present form, which invests the Commission with the power to make declarations that of themselves have no force, effect or operation and which provides that the Commission's findings do not bind the parties, is to make clear that the Commission does not exercise the judicial power of the Commonwealth, which is exercised only when a matter comes before the Federal Court under sec.82.[21]

Despite the constitutional reason for the limited powers of the HREOC, concerns

emerged regarding the expense of instituting proceedings in the Federal Court and the uncertainty inherent in the duplication of investigation. For example, in *Maynard v Neilson*,[22] Wilcox J commented that the unenforceability of HREOC determinations could cause even greater hardship to a complainant if the respondent did not comply with the determination. His Honour concluded that in these circumstances it would be better to dispense with the inquiry procedure of the HREOC and amend the legislation to provide an immediate right of action in the Federal Court if a matter could not be resolved through conciliation. Criticism such as this led to the powers of the HREOC being investigated by a Senate committee with a view to finding ways in which to give determinations of the HREOC some "teeth".

In November 1992, the Senate Standing Committee on Legal and Constitutional Affairs released its report *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner*. In the report, the majority of the Committee recommended that the various legislation conferring jurisdiction on the HREOC be amended to allow determinations to be registered with the Federal Court and take effect as an order of the Court if not challenged through the commencement of judicial proceedings within a prescribed time. The effect of this proposal was to permit HREOC determinations to be enforceable by virtue of registration rather than through judicial review. However, where an objection was lodged within the prescribed period, the Federal Court would review the determination. Where judicial review was pursued, the introduction of "new evidence" (evidence which was not before the HREOC) could only proceed with the leave of the Court. This would ensure that the evidence considered by the Court and the HREOC would be similar which in turn could increase the possibility of the same determination being reached. The recommendation of the Committee was accepted by the Government and enacted through the *Sex Discrimination and Other Legislation Amendment Act 1992*. That Act established the scheme reviewed by the High Court in the *Brandy* decision.[23]

It is important not to overlook the importance of the amendments which gave rise to the decision in *Brandy*. Essentially, the high level of dissatisfaction with the previous scheme based on judicial enforcement brought about an innovative approach to defining tribunal powers. It was no longer politically acceptable to require complainants to go to the effort and expense of Federal Court review to enforce a determination in their favour and concurrently run the risk of receiving an adverse determination by the Court. Judicial review was considered to be a more appropriate course of action for the party dissatisfied with a HREOC determination, rather than a complainant who has achieved his or her desired outcome.

The new scheme was supported by the Attorney-General's Department. In an opinion dated 12 November 1991, the Chief General Counsel of the Attorney-General's Department, Mr Dennis Rose, expressed the view that removing the requirement for judicial review in order to enforce a determination by the HREOC did not contravene the constitutional allocation of judicial power. In Mr Rose's view the new scheme was analogous to the law concerning default judgments in that registration of the determination with the Court gave the respondent to the proceedings the "originating process" to contest the claim and where this was not availed of within the prescribed period, the determination should be enforceable.[24] On this approach, there was no conferral of judicial power on the HREOC, rather, the failure to pursue Court proceedings precipitated an order of the Court by "default".

Administrative necessity versus constitutional limitations

The development of administrative review in the area of human rights is instructive of the growing reliance and importance placed on tribunals by the federal government. As shown above, regulation of this area started from a purely conciliatory or mediation role played by the tribunal, developed through various levels of determinative powers which were only enforceable through judicial action involving a hearing *de novo*, to a relatively self-contained scheme including the potential for enforcement without judicial hearing. Prior to the decision in *Brandy*, independent action by the Court was no longer a prerequisite for enforcement of a HREOC determination.

The continued reliance upon tribunals in the area of human rights in Australia demonstrates that an administrative solution to dealing with human rights issues has been considered successful. It may be that society views judicial proceedings as inappropriate and less sensitive to the needs of parties in this area. Whatever the reason for the general reliance on administrative tribunals in Australian government, the fact remains that tribunals have grown not only in number but also in terms of their functions and powers. Is this development at odds with the stricture of section 71 of the constitution? If so, how can the legal and administrative requirements be reconciled to reduce the possibility of challenge to the powers of tribunals and the consequent diminution of their effectiveness and efficiency?

The aim of this paper is to examine the decision of the High Court in *Brandy* in the context of the Court's previous views regarding judicial power and administrative tribunals. One issue to be addressed is whether the decision in *Brandy* is a logical development in the Court's approach, an unexpected departure, or a distinguishable aberration. The implications of the decision are considered in the context of the difficulties for structuring federal administrative schemes arising from the limitations on the exercise of judicial power in the Commonwealth constitution. The decision in *Brandy* demonstrates the problems which section 71 of the constitution raises for developing schemes of review which meet the complex needs of modern government. As will become apparent, this issue is further exacerbated by the uncertain definition of judicial power utilised by the Court. If the uncrossable "line" set by section 71 is always shifting or obscured, the issue of conferring powers upon administrative tribunals will continue to be problematic. Finally, this paper will consider the possibility of developing a new approach to judicial power which would allow for the needs of modern government. Such an approach could redefine the parameters of judicial power in relation to administrative tribunals by accepting the broader, public law interest served in having tribunals with extensive powers.

Part 2: Brandy v Human Rights and Equal Opportunity Commission

Introduction

As discussed above, the scheme under review in the *Brandy* decision resulted from a widespread view that enforcement of human rights required a scheme which was not dependent upon judicial review. Despite the judicial comment, Senate Committee report and the view of the Attorney-General's Department which led to the scheme, on 23 February 1995 the High Court found key aspects of the scheme constitutionally invalid.

The publicity which followed the Court's decision in *Brandy* was extraordinary in its extent and concern about the implications of the case.[25] Other legislation incorporating similar enforcement schemes was thrown into doubt[26] and there was public concern that there would

be a return to a situation where human rights law in Australia was impeded by the cost and delay of judicial review.[27] The level of public reaction to the High Court decision reflected the concern which led to the creation of the scheme and the sudden public awareness of the limited powers of administrative tribunals. The Court had, it seemed, suddenly reasserted its role in the determination of human rights and rejected the more "user-friendly" scheme developed with widespread support. If nothing else, the High Court decision in *Brandy* is significant because of the way in which it focused public attention on the difference between courts and administrative tribunals in public administration. The decision is also significant due to the resolute manner in which the High Court rejected a model of administrative necessity in favour of strict constitutional requirements.

Facts of the case

The High Court decision in *Brandy v Human Rights and Equal Opportunity Commission*[28] ("*Brandy*") arose out of a complaint to the Human Rights and Equal Opportunity Commission ("HREOC') pursuant to section 22 of the *Racial Discrimination Act 1975* (Cth) ("the Act"). The complaint was lodged by John Bell, an officer of the Department of Aboriginal Affairs which later became the Aboriginal and Torres Strait Islander Commission ("ATSIC"), against fellow officer Harry Brandy. The complaint alleged verbal abuse and threatening behaviour by Mr Brandy and included a complaint regarding the inadequacy of the response of ATSIC and its Chief Executive Officer. The complaint alleged breaches of sections 9 and 15 of the Act which make racial discrimination unlawful generally and specifically in the context of employment.

The HREOC, as constituted by Mr Castan QC, investigated the complaint and found it to be substantiated. On 22 December 1993, Mr Castan declared, *inter alia*, that Mr Brandy and ATSIC respectively should pay $2,500 and $10,000 to Mr Bell by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by Mr Bell. In accordance with s25ZAA of the Act (discussed below), this determination was lodged by the HREOC for registration with the Federal Court on 23 December 1993.

On 20 January 1994, Mr Brandy applied to the Federal Court pursuant to subsection 25ZAB(5) of the Act for review of the determination. He also commenced proceedings in the High Court claiming that the sections of the Act which provided for the registration and review of a determination were invalid by reason of the requirements of chapter III of the Commonwealth constitution.

In its unanimous decision, the High Court found that the relevant registration and enforcement provisions of the Act were invalid. The decision of the Court was handed down with two sets of reasons, firstly, the joint judgment of Mason CJ, Brennan and Toohey JJ and secondly, the joint judgment of Deane, Dawson, Gaudron and McHugh JJ. In essence, there is little variation between the two sets of reasons. Both examined the statutory scheme for registration and enforcement in the Act and the case law relating to the nature of judicial power and found that one of the critical elements of judicial power, namely the ability to enforce a decision, was conferred upon an administrative or executive body in this case. On this basis, the relevant provisions amounted to the unconstitutional conferral of judicial power upon an administrative tribunal not constituted under chapter III of the constitution.

The legislative scheme

At issue in *Brandy* were provisions of the Act which allowed for a determination of the HREOC to be registered with the

Federal Court and subsequently enforced as a decision of the Court in circumstances where the determination was not the subject of an application for review by the Court. Given the unusual nature of the scheme, the relevant provisions warrant examination.

Section 25Z of the Act authorised the HREOC to inquire into a complaint and make a determination in the form of a declaration of the lawfulness of the conduct complained of and specifying action that should flow as a consequence. One of the declarations authorised by the legislation was the payment of compensation for any loss or damage suffered by reason of the conduct of the respondent. Subsection 25Z(2), nevertheless, provided that a determination "is not binding or conclusive between any of the parties to the determination".

Subsection 25ZAA(2) of the Act required the HREOC, as soon as practicable after the determination was made, to "lodge the determination in a Registry of the Federal Court". Lodgement for registration was a mandatory requirement. Subsection 25ZAA(3) imposed an obligation upon the Registrar of the Federal Court to register the determination. Section 25ZAA had no application where the respondent was a Commonwealth agency or the principal executive of a Commonwealth agency (discussed below). Pursuant to subsection 25ZAB(1), a determination registered by the Federal Court had effect as if it were an order made by the Court. However, no action to enforce the determination could be taken before the end of the application and review period (28 days) during which the respondent alone could apply to the Federal Court for review of the determination (subsections 25ZAB(3),(4),(5),(6) and (11)). Subsection 25ZAB(7) limited the power of the Court to grant an extension of time for applications to "exceptional circumstances".

The decision of the High Court

The reasons of the High Court were relatively brief considering the vast body of case law on the issue of judicial power. As the challenge in *Brandy* dealt exclusively with the registration/ enforcement provisions, the Court concentrated on a few leading judgments which dealt with the power of enforcement as one of the characteristics of judicial power.

The joint judgment of Mason CJ, Brennan and Toohey JJ

The joint judgment of Mason CJ, Brennan and Toohey JJ referred to the decisions in *Huddart, Parker & Co Proprietary Ltd v. Moorehead*,[29] *Rola Co (Australia) Pty Ltd v. The Commonwealth*,[30] and *Reg v. Davison*[31] for the proposition that a common, though not exclusive, characteristic of judicial power is a tribunal's ability to make binding and enforceable decisions. Whilst the Court in *Davison* found that it was possible for a tribunal to exercise judicial power without having the power to enforce its decisions, Mason CJ, Brennan and Toohey JJ in *Brandy* appeared satisfied that enforcement was a strong indicator of an exercise of judicial power.[32]

In this judgment, their Honours briefly canvassed other common aspects of judicial power such as the power to determine the existing rights of parties (as opposed to the non-judicial function of determining future legal rights, discussed below), the power to punish for criminal offences and to try actions for breach of contract. However, Mason CJ, Brennan and Toohey JJ did not consider in any detail the range of indicia of judicial power due to the fact that the *Brandy* challenge was limited to reviewing the constitutionality of the registration and enforcement provisions. In addition, subsection 25Z(2) of the Act unequivocally provided that determinations were "not binding or conclusive between any of the

parties to the determination". Their Honours had regard to the decision in *Aldridge v Booth*[33] and concluded that subsection 25Z(2) meant that the holding of an inquiry and the making of a determination under the Act could not of itself be seen as an exercise of judicial power.[34]

The following comment in this joint judgment compares previously recognised exercises of judicial power with the present legislative scheme:

> [W]hen A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards "supposed already to exist". And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question. Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch.III of the constitution.
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> In the present case, the determinations by the Commission for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss 9 and 15 of the Act. Accordingly, the only distinction between the determination supposed in the last sentence of the preceding paragraph and the determinations by the Commission in the present case is that the Commission's determinations only become binding on the parties and enforceable after registration of the determinations in the Federal Court.[35]

This passage indicates that while the powers of determination vested in a court or tribunal may be the same in terms of applying pre-existing principles and standards, the inability of the tribunal to enforce its determinations weighs against the latter exercising judicial power. In this case, their Honours found that the relevant provisions of the Act included a scheme of enforcement based on the powers of the Federal Court without a determination by the Court. Their Honours therefore concluded that the provisions were invalid:

> [W]hatever might be the enforceability of a declaration that the plaintiff "do apologise", a declaration that the plaintiff "do pay the sum of $2500" to the third defendant, once registered, attracts the operation of s53 of the Federal Court of Australia Act 1976 (Cth). By that section, a person in whose favour a judgment is given is entitled to the same remedies for enforcement, by execution or otherwise, as are allowed by the laws of the State or Territory applicable.[36]

The registration of a determination created a debt enforceable at law. Together with the provision in section 25ZAB that a registered determination has effect "as if it were an order by the Federal Court", the legislative scheme clearly intended to confer legal enforceability upon the determinations. It was therefore found that section 25ZAB purported to prescribe what the constitution does not permit.[37]

The joint judgment of Deane, Dawson, Gaudron and McHugh JJ

As indicated above, there is little to distinguish the approach adopted in the two judgments. The judgment of Deane, Dawson, Gaudron and McHugh JJ also acknowledged the difficulty in defining judicial power[38] and recognised that "there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not."[39] In a brief summary of the debate surrounding the definition of judicial power, their Honours made the following comments:

> However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion. Thus Kitto J in *R v Gallagher; Ex parte Abcrdarc Collieries Pty Ltd* said that judicial power consists of the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct". But again, as was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*, the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations.[40]

The above comments bring into sharp focus the indeterminate and equivocal nature of most of the recognised indicia of judicial power. No sooner is a characteristic of the power determined, but an exception emerges. It is therefore not surprising that their Honours did not venture further into the mire of defining judicial power. Having examined previous cases regarding the enforceability of decisions and found that this attribute, whilst not determinative, "may serve to characterise a function as judicial when it is otherwise equivocal"[41], their Honours canvassed no further attributes of the power. The capacity of a body to give a decision enforceable by execution was one way in which the concept of judicial power was manifested.[42]

In this joint judgment, their Honours canvassed similarities between acknowledged attributes of judicial power and the HREOC's powers, particularly in relation to deciding controversies between parties by determining rights and duties based upon existing facts and law and the remedies that the HREOC could award, including damages and declaratory or injunctive relief. It was then held:

> However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because, under s 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions.
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> Under s 25ZAA registration of a determination is compulsory and under s 25ZAB the automatic effect of registration is, subject to review, to make the determination binding upon the parties and enforceable as an order of the Federal Court. Nothing that the Federal Court does gives a determination the effect of an order..... It is the determination of the Commission which is enforceable and it is not significant that the mechanism for enforcement is provided by the Federal Court.[43]

As with the first joint judgment, no further comment was made regarding the nature of the determinative powers of the HREOC due to the express legislative provision that determinations were not binding or conclusive. This follows the classic approach of the High Court in *Huddart, Parker & Co Proprietary Ltd v Moorehead*[44] in which Griffith CJ stated that:

> [t]he exercise of [judicial] 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.[45]

In *Brandy*, their Honours adopted the view that the absence of a power to make binding or conclusive determinations (leaving aside the registration provisions) would have precluded a finding that the scheme contravened chapter III of the constitution.

Right of review and default judgments

One area in which the two sets of reasoning were virtually identical was in relation to the argument that the provisions relating to review by the Federal Court could save the legislative scheme from invalidity. Section 25ZAB of the Act provided that within 28 days of the registration of a HREOC determination, a respondent could apply to the Federal Court for review of the determination. Under section 25ZAC, the Federal Court had power to review all issues of fact and law, but a party could not adduce "new evidence" without the leave of the Court.

In an effort to defend the legislative scheme, the Commonwealth intervened in the *Brandy* case and argued that registration of the determination was simply part of the judicial review process by the Federal Court. In other words, registration could be viewed as the originating process for judicial review. Enforcement would therefore arise out of these new "proceedings" rather than the HREOC determination since it was the failure to proceed with judicial review that led to the enforceability of the determination by way of a "default judgment". The Commonwealth also argued that the nature and existence of the scheme of judicial review saved the registration and enforcement provisions from invalidity. The scheme was represented as establishing judicial review by way of the original jurisdiction of the Federal Court (that is, fresh proceedings) and not by way of appeal.[46] The implication of the latter argument was that judicial power was not being exercised by the HREOC since there was a fresh hearing procedure vested in the Court. Where a respondent applied for review, the determination would become enforceable (if at all) due to a decision of the Court and not any action of the HREOC.[47] Both joint judgments summarily dismissed these arguments.

In relation to the argument regarding the nature and existence of the review mechanism, the joint judgment of Mason CJ, Brennan and Toohey JJ succinctly rejected the Commonwealth's argument:

> The argument is without substance for the simple reason that the determination is registered and becomes enforceable in circumstances where the review procedure [of the Court] is not invoked.[48]

The High Court, nevertheless, considered the nature of the review that could be conducted by the Federal Court and noted that the Federal Court was not required to conduct a hearing *de novo*. The review proceeded by way of re-examining a determination of the HREOC[49] or rehearing[50] rather than by way of fresh proceedings (where the complainant would have to make out his or her case and call witnesses). It will be recalled that this was a key policy intention behind the development of the scheme. In an attempt to limit the extent of any duplication in the consideration of a matter, the scheme granted the Federal Court the discretion whether to review all issues of fact and law and there were limitations upon the introduction of 'new evidence' (although the meaning of this phrase was not clear to the High Court).[51] There was no requirement that the Court review all matters leading to the determination and the extent of the review would be largely determined by the arguments presented as to why the determination should not stand.[52] Where judicial review was invoked, it could therefore proceed on a more limited basis than the matters considered by the HREOC. In any case, the nature of the review process of itself could not save the scheme since there was no judicial review in the situation where a determination became enforceable.

Similarly, both joint judgments rejected any comparison between the present system of registration and a default judgment. It had been argued before the High Court that registration of a

determination with the Federal Court was the originating process and that in the absence of a "defence" being filed in the form of an application for review, the determination should take effect as a decision of the Federal Court by default. The Court did not accept this argument. In the view of Deane, Dawson, Gaudron and McHugh JJ:

> A judgment entered by default is nonetheless a judgment of the court whose rules provide for such a course. The circumstances in which judgment may be entered are prescribed by the court itself and the process is one which is commenced and brought to a conclusion in accordance with those rules.[53]

In the present case, however, the legislative scheme and not the Federal Court Rules gave force to the determination and therefore it could not be said that there was a default judgment by the Court.[54]

Individual rights

It is important to note that the obligation imposed by section 25ZAA to register a determination of the HREOC did not apply where the Commonwealth was a respondent. In the context of *Brandy*, this meant that ATSIC could not challenge the constitutionality of the relevant provisions as the determination in respect of ATSIC was not registered and therefore not subject to the enforcement provisions. In the view of Mason CJ, Brennan and Toohey JJ, parliament apparently assumed that where a Commonwealth agency or its principal executive was the respondent, the determination would be met without the need for registration. The legislation, nevertheless, made provision for an application to the Federal Court for an order requiring compliance by the Commonwealth.

The Court made no further comment in relation to the fact that the registration scheme only applied to disputes between individuals. Nevertheless, inferences may be drawn that the Court was concerned to ensure that its traditional role in the protection and determination of individual rights was not interfered with by legislation.[55] Most administrative tribunals involve the determination of disputes between individuals and government agencies whereas the power of the HREOC extended beyond the normal domain of administrative review. That is, the HREOC could determine disputes between individuals. It is possible that this transgression beyond reviewing the actions of government led the Court to take a particularly restrictive view of the scheme. It is not possible to determine if this did in fact influence the Court, but it may serve as a means of distinguishing the case at a later time.

Response to the Brandy decision

The Federal Government's response to the Court's finding that the registration and enforcement provisions were invalid was twofold.[56] Firstly, urgent amendments were introduced into parliament to restore the relevant human rights legislative schemes[57] to the situation which existed prior to the enactment of the relevant provisions. The amendments were given effect in the *Human Rights Legislation Amendment Act 1995* (assented to 28 June 1995) and removed the registration provisions from the relevant legislation and allowed for a review *de novo* by the Federal Court. Similar amendments were proposed in relation to the *Native Title Act 1993*.[58] The second part of the Government's response to the *Brandy* decision was to refer the issue of developing a new and permanent enforcement mechanism to an existing Review Committee comprising representatives from the Attorney-General's Department, the HREOC, the Department of Finance and relevant experts in the area.

As discussed earlier, the public response to the Court's decision was extraordinary. All major newspapers ran articles

expressing concern about the implications of the Court's rejection of a scheme which had been expeditious and relatively inexpensive compared with court proceedings.[59] Concerns were also expressed about the implications for compensation payments previously made pursuant to the invalid scheme and whether the payments were required to be repaid.[60]

An often repeated concern in the media was the implications of the decision for the controversial native title scheme[61] which had emerged out of the *Mabo* decision.[62] Prior to the decision in *Brandy*, where the parties agreed to a determination by the National Native Title Tribunal, the determination was registered with the Federal Court and was enforceable after a prescribed period. The highly sensitive area of native title was seen as particularly vulnerable if there was no certainty of enforcement where the parties consented to a determination. The possibility of later Federal Court challenges to such determinations by disgruntled parties was seen as raising considerable instability in the scheme.[63]

Speculation and discussion also emerged in the media as to alternatives to the need for judicial enforcement of determinations. Among the proposals were the creation of a federal magistrates' court to hear disputes involving HREOC determinations.[64] Another suggestion was to remove the determination power of HREOC and vest it in a human rights court.[65] Such proposals were intended to avoid the particularly costly route of Federal Court review.

Implications of the Brandy decision

What are the implications of the decision of the High Court in *Brandy*? In the immediate aftermath, the enforcement of human rights will return to a situation where determinations of the HREOC have marginal effect, that is, morally persuasive but legally unenforceable. An effective and efficient means of structuring administrative review in relation to sensitive subject matter had to be abandoned in favour of a more costly, time-consuming and formal scheme of enforcement. Chapter III of the constitution operated to limit an effective administrative response to human rights issues.

Is the effect of the decision limited to the operation of enforcement provisions or is there a broader issue arising from the judgments? The findings in relation to the enforcement procedure appear unremarkable given the stark way in which the scheme mixed the powers of the HREOC with those of the Federal Court. However, there is also the question of whether the Court was influenced by the fact that the parties to the HREOC proceedings were individuals. Would the scheme have failed on such a strict application of chapter III of the constitution but for the effect on individual rights? In order to assess the implications of the decision, it is necessary to understand where the decision sits in the historical development of the Court's views on judicial power and administrative tribunals. Critical in this analysis is the issue of whether the decision is part of a general development in the Court's views or whether it signals a point of departure.

Part 3: Judicial power

Introduction

In *Brandy*, the High Court found that judicial power was being exercised where an administrative tribunal had the power to make enforceable determinations. The Court also alluded to two other indicia of judicial power. The first was where a tribunal has the power to make determinations as to existing rights as opposed to determining rights for the future. It was suggested that another indicia of judicial power was the power to make binding and conclusive determinations. The Court's comments on

the characteristics of judicial power reflect previous decisions in relation to the tension between the powers of courts and administrative tribunals. This section examines the major cases that considered judicial power in relation to administrative tribunals prior to the decision in *Brandy*. From this examination it emerges that in recent years the Court has been largely accommodating of the needs of modern government by upholding the validity of powers conferred on tribunals. In considering whether any of the indicia of judicial power are present in a given scheme, the Court has demonstrated flexibility in interpreting either the nature of the power being exercised or the limits of the judicial power of the Commonwealth.

Why, then, was the Court so immutable about the invalidity of the scheme in *Brandy*? Why was the flexibility exhibited in previous cases not present in the decision in *Brandy*? It may be that the nature of the scheme in *Brandy* was so unusual or unprecedented that it could not be accommodated by the Court. Schemes previously considered by the Court did not involve the express "combining" of the powers of a tribunal with the powers of a court. On this basis, *Brandy* was distinguishable. However, in terms of the broad approach to defining judicial power. was *Brandy* different from the earlier cases? Given that the Court in *Brandy* applied the previously developed indicia of judicial power, it would appear not. Previously, the Court had been flexible in characterising tribunal powers, but nevertheless proceeded on the assumption that there were limits to the powers which could be conferred on tribunals. The divide between judicial power and administrative tribunals was consistently acknowledged, with the Court being flexible as to the practical application of the division.

This raises the issue of whether the Court's views on judicial power and administrative tribunals are functional given that these views have the potential to raise obstacles to effective government. Despite the Court's flexibility in relation to particular circumstances, there remains the potential for an administratively effective scheme to be found invalid, such as in *Brandy*. It has been suggested by Allan Hall, former Deputy President of the Administrative Appeals Tribunal, that the Court has failed to consider the "public law dimension" of administrative tribunals. His concern is that the separation of judicial power from the other branches of government should be distinguished in relation to administrative tribunals since there is more than an individual interest at stake in determining statutory rights. It may be that this broader role of tribunals should be accommodated within the Court's approach to judicial power.

The separation of powers and judicial power

The concept of judicial power is a product of the separation of powers doctrine. The High Court recognised the separation and inviolability of powers embodied in chapters I, II and III of the Commonwealth constitution in cases such as *Huddart Parker v Moorehead*[66], *State of New South Wales v The Commonwealth (The Wheat case)*[67] and *Waterside Workers' Federation of Australia v J W Alexander Ltd*[68]. In the high-watermark case, *Boilermakers*[69], the High Court held that the judicial power of the Commonwealth could not be vested in a body other than a court established under chapter III of the constitution and that non-judicial power could not be vested in a court:

> Notwithstanding the presumptive force which has been given to these matters in the consideration of the present case, it has been found impossible to escape the conviction that Chap. III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organised as a court and in a manner which might otherwise satisfy ss.71 and 72, and that Chap. III does not allow a combination with judicial power of

> functions which are not ancillary or incidental to its exercise but are foreign to it.[70]

The rationale for restricting the exercise of judicial power to the courts is based on the premise that in order to rule authoritatively in relation to disputes, there needs to be an independent judiciary. In the words of a former judge of the Supreme Court of Victoria:

> The case for independence of the judicial arm is incontrovertible. Judges must be free from pressure by, and their office not dependent on approval by, the other arms of government. Otherwise justice cannot be impartial.[71]

Section 72 of the constitution ensures this independence through removal of judges (by the Governor-General in Council on address from both Houses of Parliament) only in the extreme circumstances of misbehaviour or incapacity, thereby denying the executive or the legislature undue influence over the courts. The corollary of this is that if administrative tribunals were allowed to exercise judicial power, the independence of their determinations could not be ensured, particularly since the terms of members of tribunals are generally limited and renewable at the discretion of the executive. In any event, it is generally recognised that at the federal level of government, the separation of powers doctrine is an essential feature of the rule of law.[72]

Incidental or ancillary powers

While section 71 of the constitution requires the judicial power of the Commonwealth to be exercised by the courts, it does not prevent the courts from exercising non-judicial powers that are incidental or ancillary to the exercise of judicial power.[73] Similarly, the executive or legislature could exercise powers incidental or ancillary to their areas of power. This means that one form of governmental power can be added to the exercise of another form of governmental power, provided that the additional power is introduced only as an ancillary facility to effectuate the exercise of the main power.[74] The additional power in this context is neither distinctly judicial nor non-judicial in character.[75] For example, in *Cominos v Cominos*[76], the High Court considered whether the power of state supreme courts to alter property rights under the *Matrimonial Causes Act 1959 (Cth)* involved the conferral of non-judicial power. The High Court held that the powers in question were incidental to, or incidents of, the exercise of judicial power and therefore validly conferred on the courts. While the characterisation of a power as being incidental to the constitutionally conferred power may not be clear in specific cases, it has nevertheless been utilised as a means of making the separation of powers doctrine functional.[77]

Initial attempts at defining judicial power of the Commonwealth

It is perhaps surprising that the courts have eschewed numerous opportunities to lay down a comprehensive definition of judicial power; surprising, in that judicial power is the core of the courts' function. For example, in *R v Davison* it was said that "it has never been found possible to frame a definition [of judicial power] that is at once exclusive and exhaustive".[78] The parameters of judicial power remain ill-defined despite the need for a guide against which to measure the constitutionality of powers exercised by executive tribunals. As discussed in *Brandy*, an early attempt at characterising judicial power was by the High Court in *Huddart Parker* where it was found that:

> ....the words "judicial power" as used in s71 of the constitution mean the 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.[79]

The emphasis on the conclusive and enforceable nature of the exercise of such power was also emphasised by Griffith CJ in the *Alexander* case:

> Without attempting an exhaustive definition of the term "judicial power", it may be said that it includes the power to compel the appearance of persons before the tribunal in which it is vested, to adjudicate between adverse parties as to legal claims, rights and obligations, whatever their origin, and to order right to be done in the matter.[80]

An early example of the difference between a tribunal exercising judicial power and one that was not arose in the *BIO* cases.[81] In the first of these cases, the Taxation Board of Appeal had the power to determine an appeal against an income tax assessment made by the Commissioner of Taxation. The members of the Board were appointed for seven years, subject to removal or suspension. The Board could make determinations of fact and law and any order it viewed appropriate, including reducing or increasing the assessment of taxable income. Decisions of the Board in relation to facts were 'final and conclusive' and there was a right of appeal to the High Court in its appellate jurisdiction on matters of law. The High Court found that the Board, a non-judicial body, had been invalidly vested with judicial power. The exercise of judicial power was said to be evident from the fact that the determinations of the Board did not "create a standard of liability, but ...ascertain and authoritatively pronounced upon the standard already created."[82] The jurisdiction or authority of the Board was therefore to ascertain and declare the liability of a taxpayer to the tax imposed by the legislation.[83] As this power was being exercised by members not holding office consistent with the provisions of section 72 of the constitution, the conferral of such powers was invalid.

By the time of the second *BIO* case, the statutory powers of the Board had been amended. The Board now had all the powers and functions of the Commissioner of Taxation in making assessments and decisions of the Board were deemed to be decisions of the Commissioner. Appeals to the High Court were no longer in its appellate jurisdiction and the provision that decisions of the Board were final and conclusive had been repealed. The powers conferred on the Board in this case were found to be valid and not the conferral of judicial power. The provisions equating the Board with the Commissioner appeared to the High Court to save the Board in this case. In other words, having the powers of the Commissioner meant that the Board could not be exercising judicial power. On appeal to the Privy Council the validity of the Board's powers was upheld, with the Board's inability to make final and conclusive determinations being the primary reason for this finding.[84]

Binding and conclusive determinations

Whilst far from being a clear example of what does and does not constitute judicial power[85], the facts of the *BIO* cases cast light on some of the characteristics of judicial power. One of these characteristics, the power to determine an existing liability, is discussed below. Another key element of judicial power is the making of final and conclusive determinations. In *Brandy*, a legislative provision that determinations of the HREOC were not binding and conclusive ensured that the making of determinations did not involve an exercise of judicial power. This raises the issue of what "binding and conclusive" means and how it operates in light of a right of appeal. Enid Campbell has made the following comments in this regard:

> A determination is binding and conclusive if it is not open to recall or rectification by the person or body which made it, and, more importantly, is not open to challenge in collateral

> proceedings before a court of law, for example, in enforcement proceedings. A determination is binding and conclusive even if it is appealable. Equally it may be binding and conclusive even though subject to judicial review in a supervisory jurisdiction. It could not, for example, be said that decisions of a federal court are not judicial because they may be impeached in proceedings before the High Court under s.75(v) of the constitution for alleged excesses of jurisdiction or error of law on the face of the record.[86]

In summary, the quality of finality subject to appeal attaches to the term "binding and conclusive". This can be related to the quality of immediate enforceability (found to be invalid in *Brandy*) as indicated by the Court in *Huddart Parker*. Where a finding can be reviewed in the course of enforcement proceedings or reviewed *de novo*, there is a strong inference that the tribunal is *not* exercising judicial power.

An example of a power that could fall within the prohibition on tribunals having binding and conclusive powers is section 31 of the *Administrative Appeals Tribunal Act 1975* which allows the Administrative Appeals Tribunal (AAT) to make a conclusive decision as to whether the interests of a person are affected by a decision. Similarly, section 44 of the same Act essentially makes AAT determinations on issues of fact conclusive and not subject to appeal to the Federal Court. Neither power has been the subject of judicial determination, although in *TNT Skypak International Pty Ltd v Federal Commissioner of Taxation*[87] Gummow J expressed concern as to the extent of the validity of section 44. It is interesting to note that the central tribunal in administrative appeals could have powers which constitute judicial power.[88]

Determinations as to existing rights

Courts have repeatedly distinguished the power to determine existing rights from the power to create rules or standards for the future, with the result that only the former amounts to an exercise of judicial power. For example, in *R v Davison*, the High Court found that:

> The truth is that the ascertainment of *existing rights* by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss.71 and 72 of the constitution.... [89] [Emphasis added].

Similarly, Brennan J in *Harris v Caladine*[90] found that the power to decide controversies with respect to existing rights and liabilities lies at the heart of judicial power.[91] The reference to "existing rights" has become another touchstone for determining whether a body is exercising judicial power. The basis for this appears to be that while the creation of rights and duties is a legislative function, the declaration and enforcement of existing rights and duties is a judicial function.[92]

The distinction between existing and future rights has received repeated endorsement by the High Court in recent years. In *Precision Data Holdings Ltd v Wills*[93], the plaintiffs argued that the Corporations and Securities Panel exercised judicial power in declaring that an acquisition or conduct was "unacceptable" under the *Corporations Law of Victoria*. The Panel could then make any order that it viewed necessary to protect the rights or interests of any person affected by the acquisition or conduct. The High Court, in an unanimous decision, held that the Panel was not exercising judicial power. The Court found that although the Panel made declarations about past events or conduct, the object of the Panel's inquiry and determination was to create a new set of rights and obligations which did not exist antecedently and independently of the making of the orders.[94] In addition, the presence of criteria requiring the Panel to take into account certain policy considerations and the absence of any binding effect of the orders were influential in reaching this result. The reasoning leading to this conclusion, however,

endeavoured to take a flexible approach to the definition of judicial power and in doing so left the issue of determining an exercise of judicial power without a great deal of certainty:

> Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.....
>
> It follows that functions may be classified as either judicial or administrative according to the way in which they are to be exercised. So, if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power. That is not to suggest that considerations of policy do not play a role, sometimes a decisive role, in the shaping of legal principles.[95]

The equivocation in this reasoning is symptomatic of the case law in the area of judicial power. While "guidelines" such as the distinction between existing and future rights purport to render some certainty in ascertaining an exercise of judicial power, they are undermined by the perceived need to retain flexibility. In addition, the difference between existing and future rights may not be readily apparent from the particular facts of a case and such distinctions may appear arbitrary. For example, industrial arbitration or arbitral power is often stated to be non-judicial. The comments of Isaacs and Rich JJ in *Alexander* set out the perceived difference:

> But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the functions of the arbitral power in relation to industrial disputes is to ascertain and declare, but not to enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[96]

However, as indicated in the joint judgment of Deane, Dawson, Gaudron and McHugh JJ in *Brandy*, "exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations".[97] Why would the power to determine a dispute about the application of an industrial award relate to future rights when it may also impact on an existing liability? The fine line between existing and future rights is evident in comments such as those of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*:

> .....a judicial power involves, as a general rule, a decision *settling for the future*, as between defined persons or classes of persons, *a question as to the existence of a right or obligation*, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons.[98] [Emphasis added].

The shifting nature of the distinction made between judicial and administrative power on the basis of existing and future rights serves only to contribute to the uncertainty in identifying judicial power. The distinction may be more apparent than real. In this regard, it may be that the functional approach adopted by the Court to protect the work of arbitral bodies such as the Industrial Relations Commission is based more on the reality of their existence than on a satisfactory legal rationale.

Body exercising the power

The flexibility of interpretation with regard to judicial power is further demonstrated by the decision in *R v Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation*.[99] Paragraph 143(1)(h) of the

Conciliation and Arbitration Act provided that any organisation or person may apply to the Commonwealth Industrial Court for an order directing the cancellation of the registration of an organisation on the ground that the conduct of the organisation had prevented or hindered the achievement of an object of the Act. The High Court held that empowering the Industrial Court to direct the cancellation of registration was not an attempt to vest the Court with non-judicial functions. The fact that the Industrial Court was vested with a discretion in the matter did not make the power non-judicial. In the view of Barwick CJ, the power "clearly partakes of the judicial function: weighing the gravity of ascertained facts and decision upon the claims of justice".[100] McTiernan J found that the power to make an order directing cancellation was judicial while the actual cancellation by the registrar was an executive act.[101]

The decision of the High Court in *Joske* has been criticised as being too eager to find the conferral of power lawful.[102] The reasoning of Barwick CJ could equally have been used to justify a finding that the power in question was executive in character due to the discretion involved. Similarly, the approach of McTiernan J appears to be based on a subtle, if not arbitrary, distinction between ordering the cancellation and carrying out such an order. The case again leaves the area constitutionally uncertain and yet reveals an emerging trend in the accommodating attitude of the Court. The nature or inherent character of the power in question appears less important in determining the constitutionality of its conferral than the nature of the body exercising the power. This point is also exemplified in the case of *R v Quinn; ex parte Consolidated Foods Corporation*[103] in which the High Court held that a statutory provision conferring on the Registrar of Trade Marks the power to order a trade mark be removed from the register, did not confer judicial power. The Court found that registration did not confer a legal right and therefore registration and removal were administrative acts.[104] In the words of one commentator:

> ...one would have thought that the determination of a controversy affecting rights...the adjudication between adverse parties as to legal claims and the ordering of right to be done...the giving of a definite and binding decision—all indicated an exercise of judicial power by the non-judicial Registrar of Trade Marks. But in the new climate the High Court found that Federal Parliament had merely assigned statutory rights under the *Trade Marks Act* through a Commonwealth agency, the Registrar of Trade Marks, and had continued or terminated those statutory rights through the same agency—without calling for an exercise of the judicial power of the Commonwealth.
>
> Putting this law on the Trade Practices Tribunal and the Registrar of Trade Marks on a general basis, one may now allow a federal non-judicial body to give a binding and conclusive decision (say, on the existence of an agreement or a practice described in a federal law) as long as this decision is not given specifically for the purpose of determining rights....
>
> In the upshot, the strictures on the separation of judicial and non-judicial powers inculcated by *Boilermakers* are being watered down.[105]

This 'watering down' appears to have been achieved through taking the view that a power is characterised by the status of the performer of the function and not by the function itself.[106] This would assist in understanding the approach of the High Court in finding most conferrals of power constitutional. In addition, this approach appears to be greatly influenced by the view that many powers are not exclusively judicial or non-judicial. The approach was directly acknowledged by Mason J in *Hegarty*:

> It is recognized that there are functions which may be classified as either judicial or administrative, according to the way in which they are to be exercised. A function may take its character from that of the tribunal in which it is reposed.

> Thus, if a function is entrusted to a court, it may be inferred that it is to be exercised judicially; it is otherwise if the function be given to a non-judicial tribunal, for then there is ground for the inference that no exercise of judicial power is involved.[107]

This determination of the character of a power is based on the function of the body exercising the power. That this should be the case demonstrates the practical difficulty in adhering to the *Boilermakers* strict separation of powers. In order to acknowledge the now accepted role of administrative tribunals, the Court has departed from a clearly defined evaluation of a power and resorted to a functional, if not intellectually rigorous, approach to determining judicial power. In the words of one commentator:

> One thing that can now be adduced from this development, however, is that if power is "coloured" by the status and purpose of the user of that power, then there cannot really be various kinds of power (as supposed by the doctrine of the separation of powers) — only one, which has a chameleon-like quality that allows it to change, as ordered, or as convenient to the user.[108]

While the Court is not prepared to overrule *Boilermakers*[109], it is apparently prepared to stretch its intended meaning by finding more and more exceptions to the separation of powers doctrine.

Essentially, the Court is faced with the need to reconcile the theoretical requirements of judicial power with the day-to-day administration and requirements of government decision-making and review. This dilemma was expressly raised by Murphy J in the following passage from *R v Hegarty; ex parte Salisbury City Corporation*:

> The courts vested with judicial power of the Commonwealth by and under Ch III are given directly by the constitution or by Parliament certain judicial functions. These include giving binding determinations of fact and law (and extend to review of determinations of fact and law by other adjudicative bodies, administrative as well as judicial). Subject to this, the exercise of the executive power of the Commonwealth requires the daily exercise of adjudicative functions, similar analytically to those performed by the courts exercising judicial power. It would be hairsplitting to distinguish the judicial functions of many federal administrative agencies from those carried out by courts. Administrative determinations made by these agencies are not binding on the courts, but in practice and unless set aside by courts are operative and constitute the cement which binds the whole administrative process. The judicial and executive powers thus overlap, but of course far from completely.[110]

This "overlap" in the powers exercised by the executive and judiciary contributes to the difficulty in characterising and identifying judicial power. What may in one context appear to be a judicial function, may in another appear to be essentially administrative. This in turn leads to the situation where some functions may be conferred either on a court or on an administrator, and such functions may be judicial power when vested in a court, but administrative or quasi-judicial and not judicial power when vested in an administrator.[111] The flexibility inherent in this approach makes it difficult to predict the Court's approach to specific facts. It also raises serious questions about the strict application of the separation of powers doctrine in the Australian federal system. If the certainty sought to be achieved through the *Boilermakers* approach is consistently undermined in order to accommodate the practical needs of government, does this mean that the separation or distinctiveness of judicial power is a myth?

A new approach to judicial power in public law?

In an extensive article on judicial power and the AAT, former Deputy President of the AAT, Allan Hall raises an important issue about the approach to characterising the powers of administrative tribunals.[112] Hall argues

that the concept of judicial power has developed out of the common law approach to determining individual rights and fails to accommodate modern public law arrangements for review of decisions:

> The description enunciated by Griffith CJ in *Huddart Parker* embodies the essence of the common law concept of judicial power. It is founded upon the rich tradition of the common law in upholding the Rule of Law and in protecting and enforcing the basic rights of the individual in society. The function of this primary, or private law, aspect of judicial power is the resolution of controversies over such basic rights, whether they relate to the life, liberty, property or, it may be added, the legal status of the individual, by bringing to bear the unique characteristics of judicial power in order to quell the controversy between the parties....
>
> By elevating this primary aspect of judicial power to "definitional" status, however, what has tended to be obscured, in the writer's respectful view, is that judicial power, in its secondary or public law aspect, presents quite different characteristics. As exercised through the traditional supervisory jurisdiction of the courts, the public law function of judicial power, so far as presently relevant, is to contain excess or abuse of executive power. In marked contrast to the primary aspect of judicial power, the exercise of the supervisory jurisdiction of the court does not normally quell the real controversy between the individual and the executive arm of government; it does not enable the court itself to exercise the statutory power or discretion, the lawful limits or purpose of which it is called upon authoritatively to define.[113]

Hall's contention is that the reality of administrative tribunals ought to be recognized in the theory underpinning judicial power. He argues that there needs to be a different and less restrictive concept of judicial power when assessing the activities of administrative tribunals. Such tribunals generally are not dealing with common law or "basic rights" (with the notable exception of the HREOC where both parties may be individuals) but rather public law rights, privileges and liabilities arising out of statute.[114] Hall argues that these tribunals operate in that area where functions may be classified as either judicial or administrative, that is, where there is a 'duality of functions'. As discussed above, the High Court has apparently sought to address this area of uncertainty through finding that the function normally takes its character from that of the body exercising the power. Nevertheless, in Hall's view, there needs to be a formal recognition that once parliament vests the function of reviewing administrative decisions on the merits to a tribunal, the power subsequently exercised by the tribunal should not be open to attack as being in contravention of chapter III of the constitution. He supports this by reference to the practical advantages of administrative tribunals over resort to the courts:

> But experience has shown that even in matters falling within the duality principle, there are many cases (particularly in respect of veterans' and social welfare pensions, public service retirement benefits and the like) which are probably better dealt with by way of administrative review than by bringing to bear the full weight of the judicial power of the Commonwealth. The experience of ... administrative review in busy jurisdictions .....has shown that many disputes over such rights are capable of being settled in an informal non-adversarial context, which the judicial system may find much more difficult to provide.[115]

In Hall's view, therefore, the practical advantages of administrative tribunals should be recognized in the theory of judicial power and should give rise to a new approach in analysing the powers of tribunals.

Whether a change in the theory of judicial power would have altered the outcome in *Brandy* is uncertain. The fact that the HREOC was determining matters between individuals would appear to take it outside of the situation envisaged by Hall. That is, allowing tribunals greater powers on the basis of the "government" or "public law"

dimension of a dispute does not apply where individuals are parties. At another level of analysis, however, it could be argued that human rights determinations are a matter of public interest regardless of the parties. Certainly the rights determined by HREOC are conferred by statute in a similar manner to other rights and entitlements determined by tribunals. It could therefore be justifiable to have tribunals vested with extensive powers of determination so as to resolve such issues expeditiously and informally without the need for recourse to the formal and rigid processes of the courts.

The difficulties arising from the Court's approach to identifying exercises of judicial power make Hall's thesis compelling. In applying the "test" of whether a body is determining existing or future rights, difficult and apparently arbitrary distinctions have emerged in order to accommodate administrative reality. Similarly, the power to make binding and conclusive or enforceable determinations requires a detailed examination of the legislative scheme conferring the power and the relationship between the tribunal and judicial review. There is a strong case for the concept of judicial power and its theoretical underpinnings to develop and evolve to meet the modern requirements of public law and government. There is a need for the courts to recognise the different nature of judicial power in the context of public law and the fact that the strict protections afforded by chapter III may be unnecessary and even counterproductive in this context. The Hall argument could be used to provide a theoretical basis for the pragmatic approach adopted by the Court and to explain the historical development of the Court's flexible approach to judicial power.

Part 4: Conclusion

From the foregoing discussion of the High Court's approach to the issue of judicial power and administrative tribunals it can be seen that a flexible approach has developed over time in order to accommodate the needs of modern government. Nevertheless, the limits imposed by chapter III of the constitution remain and occasionally result in the Court stepping away from recognising administrative necessity, such as in *Brandy*. The cases indicate a number of characteristics of judicial power, including:

(i) the power to make binding and conclusive decisions;

(ii) the power to make enforceable decisions; and

(iii) making determinations as to existing rights but not future rights.

Do these characteristics of judicial power in some way restrict the aims and functions of administrative tribunals? The first two characteristics deprive tribunal determinations of the quality of finality, certainty and enforceability. They restrict the efficacy of tribunals to situations where parties consent to abide by the determinations of tribunals, such as where the Commonwealth is a party. The third characteristic of judicial power, the power to make determinations as to existing rights, has been shown to be difficult and arbitrary when applied. In *Brandy*, the effect of applying the characteristics of judicial power to a tribunal was to remove certainty, efficiency and effectiveness from the determination of human rights issues by the HREOC.

Where does the decision in *Brandy* stand in relation to the High Court's previous approach to judicial power and administrative tribunals? Was the legislative scheme in *Brandy* an exception or aberration, or was the Court's decision indicative of a broader issue involving judicial power? With such a consistent line of decisions since *Boilermakers'* favouring the view that the power is characterised by reference to the body exercising it, how

was it that the Court found the human rights scheme invalid?

The answers to the questions regarding the implications of the High Court's decision in *Brandy* arise at a number of levels. At one level, the peculiar nature of the legislative scheme in *Brandy* makes it distinguishable. The scheme expressly mixed the powers of the HREOC with those of the Federal Court in a manner which appears to be unprecedented. It conferred upon the determinations of one body the status of determinations made by the other body. Assuming that determinations and decisions of the Federal Court arise from an exercise of judicial power, it is difficult to see how the scheme could not have ultimately involved a conferral of judicial power upon the HREOC by conferring upon determinations of the HREOC the status of Federal Court decisions for the purposes of enforceability.

Another distinguishable feature of the decision in *Brandy* is that the matter arose out of a dispute between individuals and did not involve a Commonwealth agency. Most administrative tribunals determine matters between individuals and the federal government whereas the HREOC also had the capacity to determine individual rights. This unusual situation may have resulted in the High Court applying the concept of judicial power more rigorously than in previous cases since the determination of individual rights is traditionally viewed as within the province of the courts alone. While the absence of comment by the Court in *Brandy* on this aspect of the case makes it difficult to determine whether this was in fact a matter underpinning the decision, it nevertheless remains a distinguishable feature of the case.

At a broader level of analysis, however, it may be that the decision in *Brandy* is not an aberration. The case demonstrates the need for a doctrine or approach which can reconcile chapter III of the constitution with the complex needs of government administration. The legislative scheme in *Brandy* was devised in response to the need for the HREOC to have "effective" powers. The scheme sought to address serious issues including the duplication of hearings between the tribunal and the Federal Court, cost and certainty for parties. It was not devised in the abstract; the scheme in its previous form (and post-*Brandy* form) had not satisfied the needs of human rights enforcement.

The approach of the High Court to determining the nature of judicial power has developed over time. The Court was initially strict in its views as to the powers that could be exercised by administrative tribunals but became more flexible as the number of tribunals increased and the administrative reality of the need for tribunals became inescapable. This flexibility arguably resulted in the concept of judicial power being stretched beyond any recognisable or definable form. The Court's approach of not interfering with the development of administrative tribunals gave rise to difficult distinctions and a curious body of case law. At times the Court appeared to accept that if Parliament conferred powers upon a tribunal, such powers were unlikely to comprise judicial power. The acceptance of powers exercised by tribunals was essentially pragmatic rather than the result of applying a definition of judicial power. Overall, there is an absence of a strong body of legal theory in the Court's approach to judicial power in this regard.

As discussed in the previous chapter, Hall has suggested that, rather than trying to fit current administrative practice into traditional concepts of judicial power, it would be preferable to develop a new body of theory in public law. Hall argues for a different approach to judicial power when considering the powers of administrative tribunals. Instead of applying vague standards, which can at times be flexible enough to meet the needs of modern government and yet at others be applied strictly to undermine

effective schemes of administration, a new approach is needed. This new approach would recognise that the protections afforded by chapter III are unnecessary where the issue involves public law rights as opposed to private rights. The aim of administrative tribunals is to relieve the courts as much as possible of the role of determining rights and benefits conferred under statutes. Why not give these tribunals the authority to make binding and conclusive determinations (subject only to appeal to a court) which are immediately enforceable? Individuals who apply to such tribunals rarely understand that if they are successful and the other party does not abide by the determination, the substantive arguments, at least in part, have to be redetermined by a court. The crucial element of certainty would be gained if the concept of judicial power were redefined in its application to public law matters.

Without a new approach to judicial power in relation to administrative tribunals, the current uncertainty about determining the limits of tribunal powers will continue. Similarly, the tension between judicial power and administrative tribunals will continue to threaten the development of effective administrative schemes.

Endnotes

1 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

2 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

3 The HREOC administers and makes determinations in relation to matters arising under the *Racial Discrimination Act 1975* (s 25Y), *Sex Discrimination Act 1984* (ss 80 and 81), the *Disability Discrimination Act 1992* (ss102 and 103) and the *Privacy Act 1988* (s 52).

4 See McHugh, M H, "The Growth of Legislation and Litigation" (1995) 69 ALJ 37 at 37-8.

5 See for example, McHugh, M H, "The Growth of Legislation and Litigation" (1995) 69 ALJ 37 at 45; and comments of Davies J in *Bragg v Department of Employment Education & Training* (1995) 38 ALD 251 at 253.

6 See Allars, M, *Introduction To Australian Administrative Law* (Sydney: Butterworths, 1990) at 329-330.

7 Section 25 of the *Administrative Appeals Tribunal Act 1975*.

8 Examples of specialist tribunals in these areas include the Taxation Board of Appeal (and Board of Review - see the discussion of the *BIO* cases in chapter III of this paper), the Australian Broadcasting Tribunal, the Companies and Securities Panel (see the discussion of the *Precision Data* case in chapter III of this paper), the Immigration Review Tribunal and the Refugee Review Tribunal, the Conciliation and Arbitration Commission (now the Industrial Relations Commission), Disciplinary Appeal Committees, Promotion Appeal Committees and Redeployment and Retirement Committees (in relation to public sector employment), the Social Security Appeals Tribunal and the Veteran's Review Board.

9 *British Imperial Oil v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro; British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the Privy Council in *Shell Co. of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530.

10 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

11 See, for example, the approach of Davies J in *Bragg v Department of Employment Education & Training* (1995) 38 ALD 251 at 253, in which the Court dismissed an application for review of a decision regarding disciplinary action under the *Public Service Act 1922* in the exercise of the court's discretion pursuant to s10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act 1977*. The Court found that the *Public Service Act 1922* made provision for appeal to a Disciplinary Appeal Committee (an administrative tribunal) and that this was an adequate right of review in the first instance. His Honour noted that the Court was "too busy and its processes too costly for it generally to be appropriate for an applicant to come to the Court when there is an informal and expeditious administrative tribunal established to resolve the dispute".

12 Sections 9 and 10 of the *Human Rights Commission Act 1981*.

13 For a discussion of the historical development of the Human Rights Commission and the HREOC, see Bailey, P, *Human Rights: Australia In An International Context* (Sydney: Butterworths, 1990) at 106-149.

14 Subsection 8(1) of the *Human Rights and Equal Opportunity Commission Act 1986*.

15 See, for example, s 27ZA of the *Racial Discrimination Act 1975* and s 82 of the *Sex Discrimination Act 1984* as originally enacted.

16 (1988) 80 ALR 1.
17 [1988] EOC 92-226.
18 (1988) 80 ALR 1 at 7.
19 (1988) 80 ALR 1 at 8.
20 (1989) 85 ALR 503.
21 Ibid at 527-8.
22 [1988] EOC 92-226.
23 The legislative scheme is discussed below.
24 See extract of Mr Rose's opinion in Morris, A J H, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation" (1994) 68 ALJ 193 at 198 (fn 30).
25 See for example Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Jurman, E, "Bias ruling rocks Govt" in *The Sydney Morning Herald*, 24 February 1995, p1; Campbell, R, "Race, sex laws put in doubt" in *The Canberra Times*, 24 February 1995, p1; Farouque, F, "Rights rulings under a cloud" in *The Age*, 24 February 1995, p1.
26 The registration and enforcement provisions of the *Racial Discrimination Act 1975* (reviewed in *Brandy*) were mirrored in the *Native Title Act 1993*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Privacy Act 1988*.
27 Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Editorial, *The Canberra Times*, 24 February 1995, p8; Taylor, M, and Burgess, V, "Impact being assessed" in *The Canberra Times*, 24 February 1995, p4; Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
28 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.
29 (1909) 8 CLR 330.
30 (1944) 69 CLR 185.
31 (1954) 90 CLR 353.
32 (1995) 127 CLR 1 at 8.
33 (1988) 80 ALR 1.
34 (1995) 127 CLR 1 at 8.
35 Ibid at 9-10.
36 Ibid at 10.
37 Ibid at 10.
38 Ibid at 16.
39 Ibid at 16.
40 Ibid at 17.
41 Ibid at 17.
42 Ibid at 17-18.
43 Ibid at 18-19.
44 (1909) 8 CLR 330.
45 Ibid at 357.
46 (1995) 127 ALR 1 at 19.
47 Ibid at 11 and 19.
48 Ibid at 12 and 19-20.
49 Ibid at 14.
50 Ibid at 20.
51 Ibid at 11-13 and 19-20.
52 Ibid at 14.
53 Ibid at 10.
54 For a discussion of the "default judgment" argument in support of the scheme, see Morris, A J H, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation", (1994) 68 ALJ 193 at 198-9; see also Power, S, "Constitutional Validity of Enforcement Procedures under Commonwealth Anti-discrimination Legislation — Response to Article by Anthony J H Morris QC", (1994) 68 ALJ 434. The debate between Morris and Power closely follows the arguments presented to the Court.
55 In recent years, the High Court has emphasised the importance of implying individual rights from the constitution. For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the Court held that there was an implied freedom of communication in relation to political matters. The majority in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 followed the same approach. In both cases, legislative provisions viewed as being in conflict with the implied individual rights were found to be invalid. The implied freedom of political discussion was reaffirmed in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 although in that case the Court had to weigh the implied freedom against the individual right protected by the law of defamation (the majority gave priority to the freedom of political discussion).
56 See Attorney-General's Department, "The Brandy Decision and Judicial Power" (Legal Practice Note, no.1, 19 April 1995).
57 *Racial Discrimination Act 1977*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Privacy Act 1988*.
58 See Bachelard, M, "Government forced to change Native Title Act" in *The Canberra Times*, 2 September 1995, p.3.
59 See for example Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Jurman, E, "Bias ruling rocks Govt" in *The Sydney Morning Herald*, 24 February 1995, p1; Campbell, R, "Race, sex laws put in doubt" in *The Canberra Times*, 24 February 1995, p1; Farouque, F, "Rights rulings under a cloud" in *The Age*, 24 February 1995, p1.
60 See, for example, Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Horin, A, "Sacked pregnant worker prepared to fight" in *The Sydney Morning Herald*, 25 February 1995, p7.

61 *Native Title Act 1993.*
62 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.
63 See Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
64 See comments by Alan Rose, President of the Australian Law Reform Commission, in Glascott, K. and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2.
65 See comments by Elizabeth Hastings, Disability Discrimination Commissioner, in Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
66 (1909) 8 CLR 330.
67 (1915) 20 CLR 54.
68 (1918) 25 CLR 434.
69 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
70 (1956) 94 CLR 254 at 296 (per Dixon CJ, McTiernan, Fullagar and Kitto JJ); affirmed on appeal by the Privy Council in *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529. The importance of the separation of the judicial power was reaffirmed by Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70.
71 Marks, K, "Judicial Independence" (1994) 68 ALJ 173 at 174.
72 Constitutional Commission, *Final Report of the Constitutional Commission - Volume 1* (Canberra: AGPS, 1988) at 391. See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (Canberra: AGPS, 1987) at 65-6.
73 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
74 Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532 at 535. See also *R v Davison* (1954) 90 CLR 353 at 368.
75 See Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532 at 539; and Campbell, E, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *F L Rev* 24 at 27 & 58.
76 (1972) 127 CLR 588.
77 cf de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 119.
78 (1954) 90 CLR 353 at 366 (per Dixon CJ and McTiernan J).
79 (1909) 8 CLR 330 at 357
80 (1918) 25 CLR 434 at 442.
81 *British Imperial Oil v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro; British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the *Privy Council in Shell Co. of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530.
82 (1925) 35 CLR 422 at 439 (per Isaacs J).
83 (1925) 35 CLR 422 at 445 (per Starke J).
84 (1930) 44 CLR 530 at 543.
85 For a commentary on the cases see Zines, L, *The High Court and the Constitution* (3rd ed), (Sydney: Butterworths, 1992) at 155-8.
86 Campbell, E, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *F L Rev* 24 at 34; and see Renfree, H E, *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) at 79-80.
87 (1988) 82 ALR 175.
88 See Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532; and Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13.
89 (1954) 90 CLR 353 at 369.
90 (1991) 172 CLR 84.
91 Ibid at 107.
92 See Zines, L, *The High Court and the Constitution* (3rd ed) (Butterworths: Sydney, 1992) at 153.
93 (1991) 173 CLR 167.
94 Ibid at 190.
95 (1991) 173 CLR 167 at 189. The decision in *Precision Data* was cited with approval in *Re Dingjan; Ex parte Wagner* (1995) 128 ALR 81 at 107.
96 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 (per Isaacs and Rich JJ).
97 (1995) 127 ALR 1 at 17.
98 (1970) 123 CLR 361 at 374.
99 (1974) 130 CLR 87.
100 Ibid at 94.
101 Ibid at 96.
102 See de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 114-116.
103 (1977) 138 CLR 1.
104 Ibid at 12 (per Jacobs J).
105 Lane, P H, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 *ALJ* 6 at 12.
106 de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 118.
107 (1981) 36 ALR 275 at 281.
108 de Meyrick, J, "Whatever Happened to Boilermakers? Part II" (1995) 69 ALJ 189 at 192.
109 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70 (per Deane and Toohey JJ). Note, however, comments

critical of the doctrine in the *Joske* cases: *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90; and *R v Joske; Ex parte Shop Distributive Allied Employees' Association* (1976) 135 CLR 194 at 201 and 222.

110 (1981) 36 ALR 275 at 284.

111 Renfree, H E, *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) at 43.

112 Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13.

113 Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13 at 53.

114 Ibid at 54.

115 Ibid at 55.