# Darkness on the Edge of Town: The High Court and Human Rights in the Brandy Case[1]

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## Introduction

In *Brandy v Human Rights and Equal Opportunity Commission*[3], the High Court declared invalid amendments to the *Racial Discrimination Act* 1975 (Cth) (RDA) by the *Sex Discrimination and other Legislation Act* 1992 (Cth) and the *Law and Justice Legislation Amendment Act* 1994 (Cth). Amendments brought about by the latter Acts related to the process of determining allegations of racial and other discrimination by the Human Rights and Equal Opportunity Commission (HREOC),[4] and the enforcement of the findings of the Commission. Under these new amendments, a "determination" by HREOC was to be registered at the Federal Court Registry, and after the expiration of a fixed period during which a *review* of a "determination" might or might not be taken up before the Federal Court, the "determination" took effect "as if it was an order of the Federal Court". In *Brandy*, it was this enforcement mechanism of a HREOC "determination" that the High Court found invalid as being contrary to the principle of the separation of judicial power.

## Facts, Legislation and the HREOC Determination in Brandy

John Bell complained to HREOC under s 22 of the RDA, alleging unlawful discrimination pursuant to ss 9 and 15 of the RDA. The complaint was against Harry Brandy, an Aboriginal employee of the Aboriginal and Torres Strait Islander Commission (ATSIC) and his employer, ATSIC. Bell, who was not of Aboriginal descent, alleged that Brandy had racially abused him, and following an inquiry by HREOC which found the complaint to be substantiated, HREOC's determination provided for Brandy to pay Bell damages. Also, ASTIC was required to pay damages to Bell, and directed to take disciplinary action against Brandy. In addition to pecuniary damages and disciplinary action, the HREOC determination required Brandy and ATSIC to apologise to Bell.

In accordance with the RDA, the HREOC determination was registered in the Federal Court Registry.[5] Initially, Brandy applied to the Federal Court for a review of the HREOC's determination, but later challenged, in the High Court, the validity

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1 Cf Tushnet M, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory" (1980) 89 *Yale Law Journal* 1037.

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3 (1995) 127 ALR 1.

4 Constituted under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

5 *Racial Discrimination Act* 1975 (Cth), s 25ZAA(2).

of the RDA provisions under which the determination was to become enforceable through the Federal Court procedure. The High Court petition was based on the argument that the RDA provisions for enforceability of the HREOC's determination through registration in the Federal Court permitted the HREOC to exercise federal judicial power. In *Brandy*, the High Court agreed that the operation of relevant RDA provisions amounted to an impermissible exercise of judicial power by HREOC.

The inquiry into these allegations, which led to the determination, [6] was made by HREOC acting through an appointed member who was legally qualified.[7] The legality of the inquiry proceedings or the resulting determination was not questioned in *Brandy*. What was challenged were the steps subsequent to the determination, since a HREOC determination was not "binding or conclusive between any of the parties ...".[8]

Prior to 1992, the procedure for enforcement of a HREOC determination was different.[9] Section 25ZA of the RDA[10] read:

> (1) The Commission or complainant may institute a proceeding in the Federal Court for an order to enforce a determination made pursuant to sub-section 25Y(1) or 25Z(1).
>
> (2) Where the Federal Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Federal Court may make such orders (including a declaration of right) as the Federal Court thinks fit.
>
> (3) Orders made by the Federal Court under sub-section (2) may give effect to a determination of the Commission.

The new procedure was enacted by the *Sex Discrimination and other Legislation Act* 1992 (Cth) and the *Law and Justice Legislation Amendment Act* 1994 (Cth). In place of the previous process of initiating separate proceedings in the Federal Court by HREOC or the complianant for enforcing a determination, the amended procedure involved the Federal Court as a matter of routine. Sub-sections (2) and (3) of s 25ZAA read:

> (2) As soon as practicable after the determination is made, the Commission must lodge the determination in a registry of the Federal Court.

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6 *Ibid*, s 25Z.
7 *Ibid*, ss 24F and 25B.
8 *Ibid*, s 25Z(2).
9 For a discussion of this process see *Aldridge v Booth* (1988) 80 ALR 1.
10 Inserted into the RDA by the *Human Rights and Equal Opportunity (Transitional Provisions and Consequential Amendments) Act* 1986 (Cth).

> (3) Upon lodgement of the determination, a registrar must register the determination...

This registration process purported to invest the HREOC determination with the trappings of a judicial order. Section 25ZAB(1) provided:

> Upon registration of a determination under section 25ZAA, the determination has effect *as if it were an order made by the Federal Court* ... .[11]

This consequence was made subject to the optional right of the respondent to a HREOC determination to apply to the Federal Court for a review of that determination during a 28 day period.[12] During this specified time for filing a review petition, the HREOC determination could not be enforced.[13] Upon an application for review, the Federal Court could make "such orders as it thinks fit" after reviewing "all issues of facts and law", including "new evidence" by leave of the Court, in respect of a HREOC determination.[14] An order of the Federal Court in review proceedings could entail a "declaration of right".[15]

## High Court's Grounds for Invalidating the Enforcement Mechanism of a HREOC Determination

In concluding that enforcement of a HREOC determination, via the Federal Court, amounted to an exercise of 'judicial power', the High Court observed:

> [Section 25ZAB of the *Racial Discrimination Act* 1975 (Cth)] goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect "as if it were an order made by the Federal Court". A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s 25ZAB purports to prescribe what the [Commonwealth] Constitution does not permit.[16]

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11 Emphasis added.
12 *Racial Discrimination Act* 1975 (Cth), s 25ZAB(5)-(10).
13 *Ibid*, s 25ZAB(3)-(4).
14 *Ibid*, s 25ZAC(4)-(6).
15 *Ibid*, s 25ZAC(6).
16 (1995) 127 ALR 1 at 10 per Mason CJ, Brennan and Toohey JJ. See also the observations of Deane, Dawson, Gaudron and McHugh JJ at 18-19.

Having characterized the operation of s 25ZAB as an impermissable attempt by HREOC to exercise 'judicial power', the High Court had to consider the nature of the optional review process in s 25ZAC. This was necessary because a Federal Court review of a HREOC determination might invest the determination with the trappings of a judicial order. After examining the nature of the review process, the High Court determined that since review proceedings before the Federal Court were optional, its conclusion on the usurpation of judicial power by HREOC remained valid.[17]

## Nature of Judicial Power and Issues of Its Inalienability

Generally, judicial power is the power to adjudicate on controversies relating to the law. It is a different, and a more general concept than the judicial power of the Commonwealth. The judicial power of the Commonwealth is granted by the Commonwealth Constitution to the High Court and such other courts as are invested with federal jurisdiction, by the joint operation of ss 71 and 77(iii) of the Commonwealth Constitution and the *Judiciary Act* 1903 (Cth). Security of tenure of High Court and Federal Court justices,[18] and the resulting independence and impartiality of the judiciary is one of the primary reasons for reposing the Commonwealth judicial power in these courts. The more important reason for this constitutional requirement, that the Commonwealth judicial power be exercised only by those courts, is to give effect to the separation of the judicial power rule.

### Separation of judicial power

At the Commonwealth level, the separation of powers doctrine does not prevent delegation of legislative powers to the executive.[19] The judicial power of the Commonwealth, however, is considered a distinct category, and a strict demarcation is attempted to be drawn by the High Court between it and other Commonwealth powers. This strict separation of the Commonwealth judicial power is best illustrated in the High Court's *Boilermakers'* decision.[20] But, there have been practical problems in abiding with this strict separation doctrine. Part of the problem has arisen in the context of powers of federal administrative tribunals. It is accepted that agencies such as the Administrative Appeals Tribunal, Trade Practices Commission, or Registrar of Trade Marks sometimes exercise a function similar in nature to the Commonwealth judicial power. On the other hand, a Federal Court judge may, in certain instances, exercise a 'non-judicial' power.

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17 *Ibid* at 12 per Mason CJ, Brennan and Toohey JJ. See also the observations of Deane, Dawson, Gaudron and McHugh JJ at 19.

18 Section 72 of the *Constitution*.

19 See generally, *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Wishart v Fraser* (1941) 64 CLR 470; *Giris Pty Ltd v Commisssioner of Taxation* (1969) 19 CLR 365.

20 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

To overcome these kinds of deviations from the *Boilermakers'* rule, the High Court has on occasion developed ingenious techniques of characterization and interpretation. In *Hilton v Wells*,[21] for example, a majority justified the exercise of a non-judicial function by a Federal Court judge by characterizing the judge's role as being personna designata. More generally, attempts to overcome the rigidity of the *Boilermakers'* rule have resulted in laying down exceptions. A few selective examples highlight the unsatisfactory way in which the High Court has endeavoured to articulate exceptions, and uphold a general thesis of the separation of the Commonwealth judicial power.

## Judicial power and determination of 'rights'

In *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd*,[22] the nature of the High Court's power to hear an "appeal" in connection with the registration of a trade mark, by the Registrar, under the *Trade Marks Act* 1905 (Cth) was questioned. Under the Act, opposition to an application for registration of a trade mark included an "appeal" to a Commonwealth Law Officer, and a further "appeal" to a single High Court justice.[23] It was argued that, in the scheme of the Act, the High Court was exercising 'administrative' and not 'judicial' power. In this regard, it was contended firstly that the "appeal" to the High Court was of the same nature as the 'administrative' "appeal" before the Law Officer and that, therefore, the High Court was exercising an administrative function. Secondly, it was argued that since the legal rights surrounding registration or non-registration of a trade mark were decided conclusively by the Registrar, the High Court "appeal" did not involve a ruling on those rights.

In deciding *Farbenfabriken*, the High Court chose to transcend the barriers of textual descriptions. It found the word "appeal" in the *Trade Marks Act* to be of "little or no importance", and that the matters comprehended within the scheme of "appeals" could be treated as matters within the Court's original jurisdiction. *Farbenfabriken* was, therefore, instrumental in permitting the exercise, by the High Court, of a power in the nature of a administrative power. This was done by characterizing that power as partaking the nature of judicial power which involved a conclusive finding on the rights of parties. On the other hand, in *R v Quinn; Ex parte Consolidated Foods Corporation*,[24] the question was whether an administrative agency could exercise a power in the nature of a judicial power.

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21 (1985) 157 CLR 57.

22 (1959) 101 CLR 652.

23 *Trade Marks Act* 1905 (Cth) ss 42-45. An appeal could also be taken directly to the single justice of the High Court sitting as an Appeal Tribunal.

24 (1977) 138 CLR 1.

### Administrative power and determination of 'rights'

As in *Farbenfabriken*, the issues in *Quinn* arose in connection with the registration of a trade mark. The contentious issue in *Farbenfabriken* centered around the argument that the High Court may be exercising 'administrative power'. However, *Quinn* was concerned with whether an administrative agency was exercising 'judicial power'. The *Trade Mark Act* 1955 (Cth) provided for the removal of a trade mark from the register, by the Registrar, on the application of an "aggrevied" person on the ground that the trade mark was not registered "in good faith". It was argued in *Quinn* that although there was the provision of an "appeal" to a single High Court justice sitting as an "Appeal Tribunal", a determination by the Registrar to remove a trade mark from the register was an act of exercising a 'judicial power'. In *Quinn*, the majority decided that, although the removal of a trade mark from the register involved a determination which might afffect the legal rights of a party, the Registrar was not exercising 'judicial power'.[25]

### Delegation of judicial power

In *Harris v Caladine*,[26] the High Court had to determine issues of the separation of judicial power that went beyond the judicial/administrative dichotomy. The principal question was whether Commonwealth judicial power, as exercised by judges of the Family Court of Australia, could be delegated to a Family Court Registrar under the provisions of the *Family Court Act* 1975 (Cth) and Rules. In a majority decision, the High Court decided such delegation was permissible as long as "judges continue to bear the major responsibility for the exercise of judicial power", and that a non-judicial officer's decision is "subject to review or appeal by a judge".[27]

## Boilermakers' Rule and the Prevailing Jurisprudence on Separation of Judicial Power

*Farbenfabriken*, *Quinn*, and *Harris v Caladine* illustrate that the High Court has been prepared to introduce a significant degree of flexibility into the rigid separation of Commonwealth judicial power doctrine enunciated in the *Boilermakers'* case. The High Court's technique in introducing departures from this rigidity has, however, not been consistent. A satisfactory guide in distinguishing between the nature and scope of judicial and administrative powers has, therefore, not evolved from the High Court's decisions. It appears that the High Court still continues to be significantly influenced by the *Boilermakers'* rule.[28]

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25 *Ibid* at 10, 11 per Jacobs J. On this issue see also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

26 (1991) 172 CLR 84.

27 *Ibid* at 90 per Mason CJ and Deane J; see also Dawson J at 122-123, Gaudron J at 153-154, McHugh J at 164-165. Brennan and Toohey JJ dissented.

28 See, for example, Lane P, "The Decline of the *Boilermakers* Separation of Powers Doctrine"

The *Boilermakers'* principle was questioned in a number of cases, but the decision has not been overruled. In *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*,[29] for example, Barwick CJ observed:

> The decision [in the *Boilermakers'* case] leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit.[30]

Nevertheless, the Chief Justice felt that *Boilermakers'* should continue to be operative subject to limitations.

> [N]othwithstanding the unprofitable inconveniences ... [that the *Boilermakers'* case] entails it may be proper that it should continue to be followed.[31]

## Brandy, Human Rights Enforcement, and the Separation of Judicial Power

As noted, in *Brandy*, the High Court characterized the mechanism for enforcement of a HREOC determination, through the medium of the Federal Court, as involving an impermissable exercise of judicial power. The High Court justified this ruling by focussing on the fortuitous words, in s 25ZAB of the RDA, "as if it were an order of the Federal Court". In holding this mechanism invalid, the High Court expressed its awareness of the ineffectiveness of the earlier process of enforcing a HREOC determination through independent proceedings in the Federal Court, and the policy considerations for the change to this new procedure.[32] The High Court, however, chose to insist on the technical grounds for the separation of administrative (or as the Court called it "executive") and judicial powers, without due consideration to the human rights issues that were involved in the process.

### Human rights, administrative process and judicial power

Section 25ZAB(1) of the RDA was enacted by the *Sex Discrimination and other Legislation Act* 1992 (Cth). The latter Act also introduced similar provisions into the *Sex Discrimination Act* 1984 (Cth)[33] and *Disability Discrimination Act* 1992

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28—*Continued*
(1981) 55 ALJ 6.

29 (1974) 130 CLR 87.

30 *Ibid* at 90.

31 *Ibid*.

32 (1995) 127 ALR 1, at 13-14, per Mason CJ, Brennan and Toohey JJ. Those considerations were the considerable costs and procedural difficulties in separate proceedings in the Federal Court for enforcing 'determinations' of the HREOC.

33 Section 82B(1).

(Cth).[34] The objective was to provide an efficacious mechanism for the operation of procedural rights to non-discrimination, by overcoming the previous framework's shortcomings.[35]

In deciding *Brandy*, the High Court appeared not to have been influenced by those important issues. It can be conceded that part of the High Court's difficulty, in not being able to reach a different conclusion, may well have been the way in which s 25ZAB(1), with the phrase "as if it were an order made by the Federal Court", was drafted. For the High Court, this scheme enabled an 'executive power' of HREOC, combined with an 'administrative function' of the Federal Court Registrar, to create an outcome indicative of an exercise of Commonwealth 'judicial power'. However, it was possible for the High Court to have construed s 25ZAB(1) in the following way:

> Upon registration of a determination [in a Registry of the Federal Court] under section 25ZAA, the determination ... [shall take] effect.

In that case, the nature of the HREOC determination would have to be resolved. It is true that HREOC's findings, relevant to its determination, primarily involves an administrative, or 'executive' process. Notwithstanding this, in reaching a determination, HREOC follows steps some of which partake the nature of a judicial process. Such steps include the hearing of both parties, examining evidence, and the power to call witnesses and making of interim determinations.[36] These aspects of HREOC's work were not fully appreciated by the High Court. The non-recognition, in *Brandy*, of those HREOC procedures which could be identified as 'judicial' in character was in conformity with the Court's fairly consistent effort to segregate functions of bodies into 'judicial' and 'non-judicial'. This may be an erroneous premise. For example, it has been pointed out that:

> [t]he error ... is to regard all forms of adjudication that are not "judicial" as either legislative or executive.[37]

Had it been recognized that a HREOC determination included elements in the nature of a 'judicial determination', its registration in the Federal Court to make it operative would have been legitimate. Then s 25ZAB(1) of the RDA could have been interpretated as conferring jurisdiction on the Federal Court to make a HREOC determination binding. It may be true that in exercising its jurisdiction in this regard, the Federal Court would not be substantially involved in impacting on the merits of the HREOC determination. Such an instrumental consequence has, however, been sanctioned in *Farbenfabriken*. The registration of a HREOC determination by the Registrar of the Federal Court, within this scheme of interpretation,

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34 Section 104B(1).

35 *op cit*, n 32.

36 *Racial Discrimination Act* 1975 (Cth), ss 25A - 25Y.

37 Zines L, *The High Court and the Constitution* (3rd ed, Butterworths, Sydney, 1992) p 181.

would not pose a problem either because, under *Harris v Caladine*, delegation of Commonwealth judicial power to court officers is permissible under certain circumstances. This alternate framework for interpreting s 25ZAB(1) of the RDA could have enabled the High Court, in *Brandy*, to take into account and help implement the Act's important policy objectives for guaranteeing individual rights against discrimination. The High Court, however, chose to pursue a technique of statutory interpretation which was predicated on a texual inquiry of the words of s 25ZAB. The same technique is evidenced in the High Court's inquiry into other issues in *Brandy* relating to the judicial power.

## Review, appeal and the judicial power

Sections 25ZAB and 25ZAC of the RDA established a process of review of a HREOC determination by the Federal Court. According to these sections, the respondent to a HREOC determination might apply to the Federal Court for a review of the determination. Also, s 25ZAC provided that in undertaking a review, the Federal Court "may review all issues of fact and law" relating to the HREOC determination, may grant leave to "adduce new evidence", and "may make such orders as it thinks fit". These Federal Court orders may "confirm" a registered HREOC determination or "dismiss" an application for review. Implicit was the re-iteration of the legislative intention[38] to make a HREOC determination conclusive and binding only through the Federal Court's intervention.

Enacting these provisions in ss 25ZAB and 25ZAC was important because, under the separation of the judicial power doctrine, a final and conclusive determination, relating to rights and obligations, is identified as an attribute of judicial power. The High Court's approach to this issue has been manifested in several decisions, including *Farbenfabriken* and *Quinn*. In *Brandy*, however, the Court was unduly technical in interpreting the rule of conclusiveness in the context of review provisions enacted by the RDA. Examination of the review procedure was initiated by the following comments relating to a contextual approach:

> [W]hat emerges from the judicial decisions and, for that matter, from statutes is that "review" has no settled pre-determined meaning; it takes its meaning from the context in which it appears.[39]

In the end, however, the High Court ruled that the review mechanism, through which a Federal Court was enabled to scrutinize a HREOC determination, did not permit an unfettered exercise of judicial power by that Court. Reasons cited by the High Court included the following. First, in the absence of review, a HREOC determination took effect upon registration in the Federal Court. Secondly, although new evidence could be introduced by leave, the Federal Court was obliged to

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38 Section 25Z(2) of the Act declared the non-binding and non-conclusive nature of a HREOC determination.

39 (1995) 127 ALR 1 at 12 per Mason CJ, Brennan and Toohey JJ.

commence the review with materials already considered by the HREOC. Thirdly, the expression "new evidence" was unclear. Fourthly, the Act did not contain a recital as to the "satisfaction" of the Federal Court in the review process. Finally, the absence of provisions in the Act relating to a fresh hearing by the Federal Court was problematic.[40]

According to the High Court, these shortcomings entailed two impermissible consequences. These were, the possibility of the exercise of judicial power by the HREOC through suterfuge, and the unsatisfactory context in which the Federal Court was to exercise judicial power.

In articulating the reasons for the unacceptable mechanism for review, the High Court accorded undue weight to the bare language of the relevant RDA provisions. It has been pointed out that in *Farbenfabriken*, the High Court did not confine itself to the technical descriptions of court proceedings. There, the High Court found the inappropriate use of the word "appeal" in proceedings under the *Trade Marks Act* 1905 (Cth) to be of "little or no importance". In *Brandy*, the High Court referred to *Farbenfabriken*, but gave no reason why a approach similar to that in *Farbenfabriken* could not be taken in interpretating the expression "review". The mode of inquiry into the nature of review of a HREOC determination was, therefore, texual. This textual inquiry is also evidenced by the Court's finding of the absence of particular expressions like "satisfaction", the absence of particular provisions relating to a "fresh inquiry", and the presence of "unusual" expressions like "new evidence".

The High Court's conclusions, in *Brandy*, regarding the imperfections of the review process of a HREOC determination and, consequently, its invalidity, was predicated on a inappropriate technique of statutory interpretation. It was possible for the High Court to surmount these perceived imperfections of language and style by interpretating the disputed statutory provisions in context, with due regard to policy issues. In the next section, the High Court's technique of interpretation in *Brandy* is identified as a formal style of interpretation which is deficient in addressing the concerns of human rights such as those presented in that case.

## Formalism and Anti-formalism in the High Court

As a technique of interpretation, formalism focuses close attention on the words of the relevant statute read in the light of maxims of statutory interpretation which emphasize semantic and syntactical considerations. At a more conceptual level, formalism has been identified with a rule-based approach to interpretation, with little or no regard to social, political or economic considerations.[41] If one were to

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40 See the observations in regard to these issues in (1995) 127 ALR 1 at 12-13 per Mason CJ, Brennan and Toohey JJ.

41 See, for example, Schauer F, "Formalism" (1988) 97 *Yale Law Journal* 509 at 510. In his essay, Schauer, however, points out the widely divergent uses of the term 'formalism'. In "Future Directions in Australian Law" (1987) 13 Mon LR 149, Sir Anthony Mason critically discusses this

adopt this characterization of formalism, it is obvious that the High Court's decision-making process in *Brandy* was significantly influenced by this technique.

Until the 1970s, the dominant interpretive style of the High Court has been that of formalism.[42]There has, however, been a change. Now, in many areas, the High Court takes policy considerations into account, and balances individual, social and national interests. This change has been designated as a "reaction against formalism".[43] In the context of human rights, this shift is reflected in, for example, *Street v Queensland Bar Association*, [44] *Cheatle v R*,[45] *Australian Capital Television v Commonwealth*,[46] *Nationwide News Pty Ltd v Wills*,[47] Leeth v Commonwealth,[48] and *Dietrich v R*.[49] In most of these decisions, the High Court went much further than merely reacting against formalism. It articulated a framework of implied human rights. *Brandy*, however, appears to have relapsed into formalism.

## Conclusion: Darkness on the Edge of Town

In the absence of a constitutional or statutory charter of rights in Australia, legislation such as the *Racial Discrimination Act* 1975 (Cth) and the *Sex Discrimination Act* 1984 (Cth) have been enacted to provide some basic procedural safeguards against unlawful discrimination. The legislation sought to overcome the barriers of undue legal technicalities and attendant costs by providing administrative processes of inquiry, conciliation and determination followed by an optional review through judicial process. In *Brandy*, the High Court found this legislative scheme invalid because of how the Court construed the constitutional requirement of the separation of judicial power. Of course, this separation is directed to the protection of individual liberty. However, insistence on a rigid notion of separation may work to the detriment of the operation of procedural guarantees of rights. This appears to have been the consequence in *Brandy*.

The High Court has been prepared to take recourse to principles and standards based on political, social and moral considerations. In *Leeth* and *Dietrich*, for example, an implied individual right to equality and an implied individual right to a fair trial respectively were upheld. In the *Australian Capital Television* case, on the other

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technique which he identifies as 'legalism'.

42 See for example, Evans G, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in Hambly D and Goldring J (eds), *Australian Lawyers and Social Change* (Law Book Co, Sydney, 1976) pp 13-117, at 38-42.

43 See the discussion in this regard in Zines L, *The High Court and the Constitution* (3rd ed, Butterworths, Sydney, 1992), pp 359-362.

44 (1989) 168 CLR 461.

45 (1993) 116 ALR 1.

46 (1992) 108 ALR 577.

47 (1992) 108 ALR 681.

48 (1992) 174 CLR 455.

49 (1992) 109 ALR 385.

hand, the immediate beneficiaries of the implied right to freedom of communication were private television broadcasting companies. Judged in this context, the High Court invalidation, in *Brandy*, of the enforcement mechanism, of an individual's procedural right to non-discrimination, by a formalist style of inquiry, devoid of social and political considerations, is disconcerting.