Comments and Notes

Trials, Tribunals and Tribulations: *Brandy v Human Rights and Equal Opportunities Commission*

1. *Introduction*

The recent High Court decision *of Brandy v Human Rights and Equal Opportunities Commission and Ors*[1] made headline news. The media and community reactions were indicative of the practical effect this decision will have on anti-discrimination law in the Federal sphere. From a constitutional law perspective the decision has consolidated the separation of powers principles established in *Boilermakers.*[2] Since that decision the distinction between judicial and non-judicial powers has been somewhat eroded. Despite this, the High Court is clearly not prepared to depart from the *Boilermakers* doctrine.

2. *Facts*

In 1993 the Federal Government passed the *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth).[3] The amendments introduced new procedures for the enforcement of determinations made by the Human Rights and Equal Opportunity Commission under the *Sex Discrimination Act* 1984 (Cth), the *Disability Discrimination Act* 1992 (Cth) and the *Racial Discrimination Act* 1975 (Cth).

Following the amendments, section 25ZAA of the *Racial Discrimination Act* 1975 (Cth)[4] required the Commission to lodge a determination in the Federal Court registry for registration. The Commission was also required to notify both parties that the determination had been registered. Section 25ZAB stated that, once registered, the determination had effect as if it were an order made by the Federal Court although no action to enforce the determination could be taken until after 28 days — the application and review period. During this period the respondent (but not the complainant) was entitled to apply to the Federal Court for a review of the determination. Section 25ZAC provided that the Court could review all issues of fact and law but precluded any party from introducing new evidence without leave of the Court. Following a review the Court was empowered to make an order as it saw fit, including a confirmation of the original determination. Section 25ZC provided that parties could apply to the Attorney-General for financial assistance.

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1 (1995) 69 ALJR 191.

2 *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529 (Privy Council); *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court).

3 Hereafter known as the amendments.

4 Hereafter known as the Act.

The Commission recommended that the plaintiff, Brandy, and his employer, Aboriginal and Torres Strait Islander Commission (ATSIC) pay compensation and apologise to a fellow employee for the pain, humiliation, distress and loss of personal dignity he suffered as a result of racist comments made by Brandy. Following registration of the determination, Brandy appealed to the High Court challenging the validity of the registration and review procedures.

3. *The Decision*

The court unanimously held that sections 25ZAB, 25ZAC and 25ZC of the Act were invalid under Chapter III of the Constitution. Deane, Dawson, Gaudron and McHugh JJ, in a joint judgment, also found section 25ZAA to be invalid. However, Mason CJ, Brennan and Toohey JJ, also in a joint judgment, made no direct mention of the constitutional validity of section 25ZAA. Despite this slight difference in outcome, the reasoning in both judgments was substantively similar.

A. Deane, Dawson, Gaudron and McHugh JJ

The judges began with a brief review of the facts of the case and the legislative history of the Act. They then turned to the meaning of judicial power beginning with the definition proposed in *Huddart Parker.*[5] In that case Griffith CJ spoke of judicial power as being present when a tribunal capable of making a binding and authoritative decision regarding controversies between subjects, or between subjects and the Crown, is called upon to take action.[6] The judges noted, however, that a legislative or administrative decision may also meet that description. They commented that a judicial decision has been described as one which determines existing rights and duties according to a pre-existing standard. However, they acknowledged that such a process may also be exercised in a non-judicial context even if only as a basis for assigning future rights and obligations.[7]

They described enforceability as "one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal".[8] They noted that in *Rola Co*, Latham CJ stated that "all the attributes of judicial power are plainly present"[9] when a tribunal is both able to give a binding and authoritative decision and able to take action to enforce that decision.

Turning to the facts of the case the judges noted that many functions of the Commission point to the exercise of judicial power — deciding controversies between subjects, determining rights and duties based on existing facts and law and awarding remedies and damages. They concluded that the Commission would be found to exercise judicial power if not for section 25Z(2) of the Act which states that a determination of the Commission is not binding and conclusive and therefore the Commission has no power to enforce its own decisions.[10]

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5 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
6 Id at 357.
7 Above n1 at 203.
8 Ibid.
9 *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 199.
10 Above n1 at 203–4.

However, they found that this situation is effectively "reversed" by the registration proceedings. They concluded that

> 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. That is done by legislation operating upon registration ... 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. [11]

The defendants had argued that registration merely marks the commencement of proceedings and that a determination is only enforceable upon adjudication by the Federal Court, either through a review of the determination or by a procedure analogous to a default judgment. The judges did not accept this argument, noting that a registered determination is only subject to review if the respondent requests it. They also rejected the default judgment analogy. They reasoned that a default judgment is a judgment of the court as prescribed by its rules. Conversely, registration is a process prescribed by the Act and which the Federal Court is precluded from considering in the absence of a request by the respondent for review. [12]

The judges held that, at most, the review process constituted an appeal by rehearing, not an exercise of the Court's original jurisdiction. The Commission does not constitute a court under the requirements of Chapter III of the Constitution and therefore the judges found that sections 25ZAA, 25ZAB, 25ZAC and 25ZC invalidly invested judicial power in the Commission.

B. Mason CJ, Brennan and Toohey JJ

In reviewing the nature of judicial power Mason CJ, Brennan and Toohey JJ also began with the well-known definition given in *Huddart Parker*. They commented that the "exercise of power by a tribunal to enforce its own orders has sometimes been seen as an essential element in the exercise of judicial power".[13] They noted that in *Rola Co* it was the absence of power to enforce decisions which had led the High Court to conclude that there was no exercise of judicial power.

In addition, they referred to the *Shell* case.[14] In that case it was held that a tribunal does not necessarily exercise judicial power merely because it gives a final decision, because it decides between contending parties, because its decisions affect peoples' rights, nor because matters are referred to it from another body. Following this reasoning they concluded that the Commission's power to hold an inquiry and make a determination is not in itself an exercise of judicial power.[15]

The judges stated that the fact that determinations of the Commission cannot be enforced by the Commission is "a strong factor weighing against the characterisation of its powers as judicial".[16] They cited *R v Davison* where it

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11 Id at 204.
12 Ibid.
13 Id at 196.
14 *Shell Co of Australia v Federal Commissioner of Taxation* [1931] AC 275.
15 Above n1 at 196.
16 Ibid.

was stated that "the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power".[17] They commented that

> [i]n that statement, the expression "judicial determination" means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts found.[18]

The judges held that the power of a tribunal to make such a judicial determination is an "exclusive and inalienable" exercise of judicial power and thus would be invalidly invested in an administrative tribunal.[19]

They then considered the registration proceedings of the Act, noting that upon registration a determination becomes binding as if it were an order of the Federal Court even though it cannot be enforced until after the review period. They also noted that a determination is automatically enforceable unless the respondent applies for a review within that period and that the complainant has no right to have a determination reviewed.[20]

They therefore concluded that section 25ZAB which outlines the registration procedures "purports to prescribe what the Constitution does not permit"[21] and stated that:

> 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.[22]

The defendants had submitted that a registered determination does not constitute an exercise of judicial power by the Commission. They had argued that the operation of the review provisions, as set out in section 25ZAC, constitutes an exercise of the Federal Court's original jurisdiction since the Court may review all issues of fact and law and may make an order as it sees fit. The judges rejected this argument, describing it as "without substance".[23] They noted that a registered determination also becomes enforceable in situations where the review procedure is not implemented. Furthermore, they dismissed the defendants' argument that those circumstances are analogous to a default judgment, describing this comparison as tenuous at best.[24]

The decision concluded with a general discussion of the review procedures. The judges contrasted the new procedures with the previous enforcement methods under the Act. They observed that, formerly, the Federal Court had to be "satisfied" that a respondent had engaged in unlawful behaviour under the Act, essentially requiring a hearing de novo. They noted that the new registration

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17 (1954) 90 CLR 353 at 368.
18 Above n1 at 197.
19 Ibid.
20 Id at 197–8.
21 Id at 198.
22 Ibid.
23 Id at 199.
24 Ibid.

and review procedures did not require that the parties start again, being precluded from introducing new evidence without leave of the Court.[25]

The judges concluded that the registration of a determination by the Commission and its enforcement as though it were a Federal Court order, constitutes an invalid exercise of judicial power by the Commission. They found that the power of the Federal Court to review a determination does not provide an adequate counterclaim to this conclusion. They held that sections 25ZAB, 25ZAC and 25ZC of the Act are invalid.

4. *The Separation of Powers Doctrine*

The decision in *Brandy*, being essentially an application of the principles espoused in *Boilermakers,*[26] consolidates the High Court's interpretation of Chapter III of the Constitution. In *Nationwide News* the separation of powers doctrine was described as one of "three main general doctrines of Government which underlie the Constitution and are implemented by its provisions".[27] Yet it has been acknowledged that this doctrine derives its strength not so much from the literal words of the Constitution but from the judicial interpretation of those words.[28] Indeed, the Constitution also provides for the separation of legislative and executive powers, yet there is no corresponding High Court doctrine against the merging of these two branches of government.[29] *Boilermakers* marked the height of this doctrine in Australian constitutional law, strongly affirming two principles — first, that a non-judicial tribunal cannot exercise the judicial power of the Commonwealth and second, that a Federal judicial tribunal cannot exercise non-judicial power.

There has been some dissatisfaction with the separation of powers doctrine as laid down in *Boilermakers*. It has been described as "inconvenient to the workings of a modern legal system"[30] and one which "does not always accommodate the demands of modern political and social expediency."[31] In the 1970s the decision even received some criticism from the High Court in the *Joske* cases.[32] Barwick CJ described the principal conclusion in *Boilermakers* as "unnecessary ... for the effective working of the Australian Constitution" leading to "excessive subtlety and technicality" and "unprofitable inconveniences".[33] He went on to suggest a possible departure from "some or all" of the principles. Mason J also commented that the Court needed to seriously consider which course it should take with respect to the conclusions in *Boiler-*

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25 Id at 200–1.

26 Above n2.

27 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69.

28 Lane, P H, *A Manual of Australian Constitutional Law* (5th edn, 1991) at 252–3; Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 150.

29 Zines, id at 136–42.

30 De Meyrick, J, "Whatever Happened to Boilermakers?: Part 1" (1995) 69 *ALJ* 106 at 112.

31 Morris, A J H, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation" (1994) 68 *ALJ* 193 at 194.

32 *R v Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87; *R v Joske; ex parte Shop Distributive Allied Employees' Association* (1976) 135 CLR 194.

33 (1974) 130 CLR 87 at 90.

makers.[34] Notably, however, the High Court did not overrule or reconsider *Boilermakers* in either of those cases, concluding that the issue did not arise.[35] Rather than overrule the doctrine, the High Court has gradually watered it down, such that the distinctions between judicial and non-judicial powers have become blurred.[36] de Meyrick has commented that

> we have a shining constitutional doctrine of time-honoured validity ... that no-one wants to challenge, and is perhaps unchallengeable, yet one that is gradually being disregarded and eroded in practice to the point of obsolescence.[37]

Nevertheless Lane has predicted that there is likely to be a limit to how much erosion of the doctrine will be tolerated and that certain functions will continue to be classified as exclusively judicial or non-judicial.[38] He has also commented that the power to impose penalties and to enforce federal law is purely judicial in nature and therefore can only be vested in the section 71 courts.[39]

Prior to the High Court's decision in *Brandy* there had been some debate as to the constitutional validity of the 1993 amendments.[40] Both sides of the debate acknowledged, however, that the power of a tribunal to make an enforceable decision is an exercise of judicial power and that such power cannot therefore be conferred on the Commission. The primary issue of the debate was not whether the power to enforce a decision is properly characterised as judicial power, but whether the amendments conferred that power on the Commission or the Federal Court.

Morris argued that the amendments effectively empowered the Commission to enforce its own decisions and thus conferred judicial power on a non-judicial body. He concluded that an exercise of judicial power must take place as part of the procedure by which a determination takes effect as if it were an order of the Federal Court.[41] He maintained that it is either the Commission or the Registrar which exercises this power and that neither is sanctioned to do so under section 71 of the Constitution. He discussed two arguments against this conclusion — first that the registration procedure is analogous to a default judgment and second that it is analogous to a delegation of judicial power. However, he maintained that these arguments were untenable.[42]

In response to Morris, Power maintained that the registration procedures did not confer judicial power on the Commission. She argued that, although provision is made for a decision of a non-judicial body to be given effect by a court, this does not mean that the decision itself involves an exercise of judicial power. As an example she noted section 33A of the *Judiciary Act* which

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34 Id at 102.
35 Zines, above n28 at 179.
36 Lane, above n28 at 254–5.
37 Above n30.
38 Lane, P H, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 *ALJ* 6.
39 Ibid at 14.
40 Above n31; Power, S, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation — Response to Article by Anthony JH Morris QC" (1994) 68 *ALJ* 434.
41 Above n31 at 197.
42 Id at 198–201.

allows the High Court to direct that an arbitration award "shall be a Rule of the High Court" where the arbitration concerns a matter over which the Court has jurisdiction.[43] In such cases the arbitration has not been held to be an exercise of judicial power. She also argued that the duties of the Registrar are incidental to the exercise of judicial power by the court.

It is perhaps not surprising that the Federal Government believed the High Court might be prepared to uphold the constitutional validity of the amendments. The enforcement provisions under consideration in *Brandy* did not *directly* convey a power to enforce determinations on the Commission. The question before the Court was not so much whether it was valid for a non-judicial body to enforce its own decisions, but rather what procedures constitute enforcement. The Court therefore had an opportunity to further water down the separation of powers doctrine. *Brandy* demonstrates, however, that the High Court is not prepared to depart from the *Boilermakers* doctrine to the point where the Federal Court would effectively "rubber stamp" Commission determinations.

5. *Implications for Anti-Discrimination Law*

Following the *Brandy* decision, the Human Rights and Equal Opportunity Commission released a statement in which it was stressed that media speculation that the High Court had stripped the Commission of its powers was exaggerated. The statement pointed out that the majority of complaints brought before the Commission were resolved by conciliation and never reached the hearing process. The Commission also carries out a number of administrative functions and offers advisory opinions. It may hold an inquiry of its own volition into acts or practices which may be discriminatory. It may also seek leave to intervene in court proceedings which involve human rights or equal opportunity issues. A large component of the Commission's functions have therefore remained unaffected by the decision. The Commission's power to make determinations is also intact although it has no power to enforce those determinations. At the moment a party must commence fresh proceedings in the Federal Court to have a determination enforced.

A. *Background to the 1993 Amendments*

The racial, sex and disability discrimination Acts were amended as a result of dissatisfaction with the pre 1993 enforcement procedures. Prior to the amendments it was necessary for a complainant to institute fresh proceedings in the Federal Court seeking an order to enforce a determination. As Spender J commented in *Aldridge v Booth*,[44] requesting a court to enforce a non-binding determination was problematic. The enforcement proceedings were not an appeal, but required the court to be "satisfied" as to the alleged unlawful conduct of the respondent. Effectively this required a hearing de novo, that the matter be heard afresh before the Court.[45]

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43 Power, above n40 at 436–7.

44 (1988) 80 ALR 1.

45 *Australian & New Zealand Equal Opportunity Law & Practice* (1993) CCH Australia Limited at 66, 732.

This duplication of proceedings attracted some criticism. One notable example was the criticism put forward by Wilcox J in the Federal Court case of *Maynard v Neilson*.[46] In that case Wilcox J described the situation as "far from satisfactory".[47] He maintained that if a respondent refuses to comply with a Commission determination then there are two probable consequences. First, the complainant is likely to take this as a further insult and perhaps feel even more aggrieved. Second, if no further steps are taken, the complainant is likely to feel that they have been dealt a further injustice. Moreover, the only solution is for the whole matter to be relitigated at considerable cost to the parties.[48]

Wilcox J also noted that there is a real risk that a party will not put forward all relevant evidence at the Commission inquiry since the hearing can only result in a non-binding determination. New evidence introduced in the Federal Court may ultimately change the final decision. Indeed that was what had happened in *Maynard v Neilson*. He noted that

> the standing of the Commission is not enhanced by a procedure which enables parties to disregard its determinations and to resist enforcement of those determinations by the presentation of evidence withheld from the Commission.[49]

The amendments were designed to deal with these problems by making the Commission's determinations enforceable by default in the absence of a request for review by the respondent. Moreover, under the amendments a respondent ran the risk of not being allowed to introduce new evidence at the Federal Court hearing. Effectively the amendments compelled respondents to take the Commission inquiry seriously. The procedure was also "established to save parties time and money and to avoid any possibility of unnecessary judicial proceedings".[50]

B. *The Possible Legislative Response — A Different Future for Anti-discrimination Law?*

Following *Brandy* the Federal Government took temporary steps to alleviate the situation by restoring the pre-1993 enforcement procedures. However, given the problems with this system, it is undesirable for these procedures to be retained permanently. A review committee has therefore been asked to recommend new enforcement options.[51]

Two proposals have so far been suggested.[52] One is to use state anti-discrimination tribunals to deal with complaints. The second is to establish a Federal Human Rights Court. Few details of this latter suggestion have yet

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46 Unreported 27 May 1988 Federal Court of Australia.
47 Id at 6.
48 Id at 6–7, 25.
49 Id at 77.
50 Alan Rose of the Law Reform Commission in Jurman, E, "Rights Options" *The Sydney Morning Herald* 24 February 1995 at 4.
51 *Australia & New Zealand Equal Opportunity Law and Practice Report* 71, 3 March 1995, CCH Australia; Statement by the Federal Attorney-General in Jurman, E, "Biased Ruling Rocks Govt" *The Sydney Morning Herald* 28 February 1995 at 4.
52 *The Sydney Morning Herald*, ibid.

been canvassed. However, a similar proposal was discussed by Wilcox J in *Maynard*. He commented that, if it is constitutionally impossible to make Commission determinations enforceable, then it may be best to dispense with the Commission inquiry procedure altogether and provide parties with an immediate right of action in the Federal Court should the Commissioner fail to resolve the complaint by conciliation.[53]

In the statement released after the *Brandy* decision the Commission listed four principles in human rights which they considered crucial in any consideration of future proceedings — equity in dealing with cases and in access to the Commission's processes; accessibility including keeping processes low-cost; the availability of specialist knowledge; and enforceability.

Clearly the policy so far has been that tribunals are the best forum for resolving discrimination complaints, at least in terms of satisfying the first three of these principles. There are a number of reasons for this. Courts, being adversarial in nature, are considered to be daunting and hostile. The rules and procedures of a courtroom can be alienating and intimidating to parties who are not experienced or familiar with the legal system. Parties require legal counsel and the costs are therefore great. This makes courts largely inaccessible to many potential litigants. Moreover, by the very nature of a discrimination complaint, a complainant is likely to be in a weaker bargaining position than a respondent. In most cases respondents are in a more powerful position by virtue of their status and their financial resources.[54] This is especially true in disputes between an employer and employee where the employer is likely to have the financial backing of their company or business. Thornton has expressed the view that:

> ... there is a general degree of dissatisfaction with modes of formal justice, perceived by litigants to be hostile and alienating. Women and minorities have remained at the periphery of the white, Anglo-Celtic, male matrix of legal values which are manifested in the courtroom, together with its often distressing style of cross-examination and oppressive discourse....Furthermore, the cost of litigation has removed it from the realm of possibility for most individuals, let alone the poor and oppressed ....[55]

The Federal Government's general approach is in line with a recognition of these perceived problems. In the recent Justice Statement[56] the Attorney General announced increased funding and resources for counselling and mediation services in an attempt to encourage a shift from litigation to mediation in dispute resolution. This strategy is designed to bring about the resolution of disputes before the need to pursue formal litigation arises. The statement also outlined the government's aim to improve community access to courts by encouraging them to cater more to the needs of the people who use them.

In theory, tribunals provide a more informal setting for dispute resolution. Under the current anti-discrimination legislation, parties require leave of the Commission to be allowed legal representation. Furthermore, before proceeding to the

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53 Above n46 at 7.

54 Astor, H and Chinkin, C M, *Dispute Resolution in Australia* (1992) at 30–41, 262.

55 Thornton, M, *The Liberal Promise* (1990) at 145.

56 *Overview of the Justice Statement*, press release by the Attorney General's Office 13 May 1995.

hearing and determination stage the Commission attempts to resolve disputes by conciliation. The majority of cases do not in fact proceed to a hearing.[57] Another advantage is that the Commission can consist of both legally qualified persons and lay people. Experts in the area of discrimination and human rights can therefore be appointed to the Commission even if they do not have formal legal training.

In reality, however, the Commission operates much like a court, at least in the course of conducting hearings and inquiries. Requests for legal representation by either party are not denied.[58] Consequently, conferring the functions of hearing complaints and making determinations onto a court is unlikely to greatly alter parties' experience of the hearing process.

6. *Conclusion*

Under these circumstances a Human Rights Court is unlikely to be more disadvantageous to parties seeking a hearing of a complaint. A system requiring duplicate hearings simply exacerbates the disadvantages of adversarial courtroom proceedings, especially given that the Commission's hearing process is not unlike formal litigation. The inequities resulting from costly litigation will be reduced if a complainant does not have to relitigate to have a decision enforced. Furthermore, a Human Rights Court would result in the development of firm precedents and principles, a defined standard as to what behaviour is considered acceptable and unacceptable in the area of discrimination law. This is a feature which less formal means of dispute resolution often lack.

The separation of powers doctrine also precludes a judicial body from exercising non-judicial power. Therefore many of the Commission's important roles, such as its investigatory, advisory and administrative functions, as well as the conciliation procedures it offers, could not be carried out by a court. Given the constitutional constraints outlined in *Brandy* it does not appear possible that a single body will be able to conduct all the functions desired of an anti-discrimination commission.

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57 Above n45 at 66, 522; Thornton, above n55 ch VI.

58 Thornton, id at 174.

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