

# Separation of judicial power: *Brandy v. Human Rights and Equal Opportunity Commission*

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## 1. Introduction

The recent High Court decision in *Brandy v. Human Rights and Equal Opportunity Commission* (*Brandy case*)<sup>1</sup> concerned the issue of separation of judicial power at the Commonwealth level. The system of responsible government in Australia does not envisage a separation of legislative and executive powers.<sup>2</sup> However, the High Court has insisted on a strict separation of judicial power from executive and legislative powers.<sup>3</sup> One important principle of this separation is that judicial functions may only be entrusted to the classes of courts listed in s. 71 of the *Commonwealth Constitution Act*.

Recent amendments to the *Racial Discrimination Act 1975* (Cwlth), (*RDA*)<sup>4</sup>, seemingly challenged the principle of separation of judicial power. The *Brandy case* was concerned with the validity of these amendments, with the High Court ultimately following the strict separation enunciated in the *Boilermakers' case*.

## 2. Facts and Legislation

This case involved a complaint made by John Bell against Harry Brandy, who was a fellow officer of the Aboriginal and Torres Strait Islander Commission (ATSIC). The complaint to the Human Rights and Equal Opportunity Commission (Commission) alleged verbal abuse and threatening behaviour<sup>5</sup> by Brandy against Bell. The Commission found Bell's submission substantiated and declared that Brandy and ATSIC should apologise and pay damages to Bell. ATSIC was further required to take disciplinary action against Brandy. Both determinations were made pursuant to s. 25Z of the *RDA*. Section 25ZAA of the *RDA* required that any determination made pursuant to s. 25Z should be lodged and registered in a Registry of the Federal Court. Upon

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1 (1995) 127 ALR 1.

2 *Commonwealth of Australia Constitution Act 1900* (UK), ss. 1 and 61.

3 The most categorical statement in this regard can be found in *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers' case*).

4 These amendments were introduced by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cwlth) and the *Law and Justice Legislation Amendment Act 1993* (Cwlth).

5 Such conduct was unlawful under ss. 9 and 15 of the *RDA*.

registration, the determination was to have effect as if it were an order made by the Federal Court.<sup>6</sup> The Federal Court also had the power, upon application, to review all issues of fact and law relating to a determination, and to make such orders as it thought fit.<sup>7</sup> The Commission's determination was duly lodged and registered in the Federal Court Registry.

Brandy initially applied for a review in the Federal Court, but later commenced proceedings in the High Court claiming that provisions of the *RDA*, providing for enforceability of the Commission's determination upon registration in the Federal Court Registry, were invalid. In particular, it was claimed that the relevant sections of the *RDA* amounted to an exercise of judicial power otherwise than in conformity with the provisions in Chapter III of the *Commonwealth Constitution*. This argument rested on the assertion that the Commission was not a court established pursuant to s. 71 and constituted in accordance with s. 72 of the Constitution.

Gaudron J stated a case and reserved the following question for the consideration of the Full Court:

In consequence of the amendments embodied in the *Sex Discrimination and other Legislation Amendment Act 1992* and/or the *Law and Justice Legislation Amendment Act 1993* as they affect the *Racial Discrimination Act 1975* are any, and if so which, of the provisions of Pt III of the *Racial Discrimination Act* invalid?

### 3. Decision of the Court

The High Court unanimously decided that ss. 25ZAB, 25ZAC and 25ZC of the *RDA* were all invalid. Likewise they agreed that the review provisions contained in the amended provisions of the *RDA* had no effect on this invalidity. The majority also declared s. 25ZAA to be invalid, the minority not considering this point. There were two concurring opinions delivered in the *Brandy* case.

Mason CJ, Brennan and Toohy JJ began their analysis of the plaintiff's case by first examining the meaning of judicial power. After a review of the cases it was determined that an exhaustive definition of the concept had never been laid down. However, one factor said to weigh against characterisation of these amendments as an exercise of judicial power was the fact that the Commission could not enforce its own determinations, though it was recognised that this was not an exhaustive test. In fact, some decision-making functions were described as exclusive and inalienable exercises of judicial power, for example,

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6 *RDA*, s. 25ZAB(1).

7 *Ibid*, s. 25ZAC.

the determination of existing rights by judicial determination of issues of fact or law.<sup>8</sup>

In the present case it was held that the determinations made by the Commission were made by reference to the application of pre-existing principles and standards, which were prescribed by ss. 9 and 15 of the *RDA*. However, the determination would not be enforceable until it was registered in the Federal Court, at which time it would take effect as if it was an order of the Federal Court. According to Mason CJ, Brennan and Toohey JJ, this was not possible because:

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.<sup>9</sup>

On the other hand, it was concluded that an order which takes effect as an exercise of judicial power could only be made after the making of a judicial determination. Therefore s. 25ZAB was invalid.

Mason CJ, Brennan and Toohey JJ next dealt with the Commonwealth's submission<sup>10</sup> that the review provisions prevented characterisation of the Commission's powers as judicial. The crux of this argument was that the review provisions operated as an exercise of original jurisdiction by the Federal Court. This argument was rejected for a number of reasons. The first was that new evidence was precluded from the review process, except by leave of the court. The procedure was then obviously not for a hearing *de novo*. Finally, the legislative history of the amendments indicated that a re-examination was intended by the Federal Court, rather than a fresh hearing.

In their concurring opinion, Deane, Dawson, Gaudron and McHugh JJ held that the Commission was not constituted as a court in accordance with Chapter III of the *Constitution*. This meant that the Commission could not then exercise the judicial power of the Commonwealth. The question then was whether the amendments to the *RDA* invested the Commission with judicial power.

A clear definition of the concept of judicial power was required, and their Honours recognised the difficulty in pinpointing any 'essential or constant characteristic'<sup>11</sup> inherent in this principle. After a review of the authorities, some basic guidelines were formulated to assist in such an analysis. These were:

- (i) whether the body decides controversies between parties;

8 *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1 at 9, citing *R v. Davison* (1954) 90 CLR 353 at 369.

9 (1995) 127 ALR 1 at 10.

10 The Commonwealth intervened in the matter to argue for the validity of the amendments to the *RDA*.

11 (1995) 127 ALR 1 at 16.

- (ii) whether the body decides any controversy by the determination of rights and duties based upon existing facts and law;
- (iii) the remedies which the body can award;<sup>12</sup> and most importantly
- (iv) whether the body's determination is binding or conclusive between the parties.<sup>13</sup>

The Commonwealth's submission was then considered. Deane, Dawson, Gaudron and McHugh JJ rejected this submission, stating that the determination became an order of the court upon registration, even though there was provision for review. The Commonwealth's counter-argument that this was analogous to the entry of default judgment was also rejected. Ultimately, the review process was characterised as an appeal by rehearing, and not as a proceeding in the original jurisdiction of the Federal Court, especially as new evidence was excluded except by leave of the court.

For these reasons it was held that ss. 25ZAA, 25ZAB and 25ZAC of the *RDA* were invalid, as well as s. 25ZC, which relied upon s. 25ZAC for its application.

#### 4. Conclusion

The concept of judicial power has been a difficult one to define. Unfortunately, the High Court has provided little new insight into what this concept entails. Both judgments spoke of notions such as determining issues of fact and law between parties, and the enforceability of such determinations. However, the High Court was reluctant to nominate any of these factors as 'necessary'.

Since the *Boilermakers'* case, the High Court has encountered difficulties in adhering to the rule of strict separation of the Commonwealth judicial power. In several cases exceptions were made to the *Boilermakers'* rule,<sup>14</sup> but the separation of judicial power rule is still insisted on by the High Court.

This case reinforces the paradoxical nature of the separation of judicial power. In one sense this separation does provide an important safeguard to individual rights.<sup>15</sup> However, in some cases, like the present, a strict separation of judicial power works to the detriment of individual rights.

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12 In this case the remedies available under s. 25Z of the *RDA* included damages, declaratory and injunctive relief, which it was said were closely analogous to those of a court in deciding civil or criminal cases.

13 (1995) 127 ALR 1 at 18.

14 See for example, *Hilton v. Wells* (1985) 157 CLR 57 where a Federal Court judge was permitted to exercise administrative power.

15 See for example, *Chu Kheng Lim v. Minister for Immigration* (1992) 110 ALR 97 where legislation directing the court not to grant bail to 'designated persons' was held invalid.