



# RESEARCH NOTE

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## Harry Brandy v Human Rights and Equal Opportunity Commission

On 23 February 1995 the Full Court of the High Court found in *Harry Brandy v Human Rights and Equal Opportunity Commission* that certain provisions of the *Racial Discrimination Act 1975* (the Act), which combine to make a determination of the Commission binding, authoritative and enforceable are invalid. This is because the provisions purport to invest judicial power in the Human Rights and Equal Opportunity Commission (the Commission) contrary to Chapter III of the Constitution.

All seven members of the High Court held sections 25ZAB, 25ZAC and 25ZC of the Act invalid. Justices Deane, Dawson, Gaudron and McHugh also held section 25ZAA invalid.

- Section 25ZAA provides that as soon as practicable after the making of a determination, the Commission must lodge the determination with a Registry of the Federal Court.
- Section 25ZAB provides that upon registration of a determination, the determination has the effect as if it were an order made by the Federal Court. The respondent to a registered determination has 28 days from the date of registration in which to apply to the Federal Court for review.
- Section 25ZAC provides that the Federal Court

may review all issues of fact and law and may, following its review, make any orders it thinks fit.

- Section 25ZC provides that a person applying for review may apply to the Attorney-General for assistance, including legal and financial assistance, in respect of the proceeding.

### The Facts

The plaintiff, Harry Brandy, and the third defendant, John Bell, had been officers of the then Department of Aboriginal Affairs and are now officers of ATSIC. On 13 March 1990, Bell lodged a complaint against ATSIC with the Commission alleging breaches of sections 9 and 15 of the Act. Bell alleged verbal abuse and threatening behaviour on the part of Brandy while both were officers of the Department. Bell also alleged that ATSIC and its Chief Executive Officer had not responded adequately to his complaint.

- On 22 December 1993 the Commission found in favour of Bell and declared that:
  - the plaintiff apologise to Bell;
  - the plaintiff pay \$2,500 to Bell by way of damages for pain, humiliation, distress and loss of personal dignity suffered by him;

- ATSIC take disciplinary action against the plaintiff;
- ATSIC apologise to Bell; and
- ATSIC pay \$10,000 to Bell.

On 23 December 1993, the Commission lodged the determination with the Federal Court. On 20 January 1994, the plaintiff applied to the Federal Court for a review of the determination.

### The Law

Sections 9 and 15, making certain conduct unlawful, are contained in Part II, 'Prohibition of Racial Discrimination', of the *Racial Discrimination Act*. A written complaint, alleging a breach of Part II, may be lodged with the Commission. The Commission then notifies the Commissioner who is required to commence an inquiry. Following the inquiry the Commission may make a final determination under section 25Z(1) dismissing the complaint or if finding the complaint substantiated make certain determinations, including for example:

- that the respondent has acted unlawfully and should not continue such conduct;
- that the respondent compensate the plaintiff; and
- that the respondent employ or re-employ the plaintiff.

Section 25Z(2) provides that a determination made under 25Z(1) is not binding or conclusive between any of the parties.

However, the Commission must register the determination with the Federal Court at which time it takes effect as if it were an order of the Court, and as a result is enforceable.

### **The Plaintiff's argument**

The plaintiff argued that the relevant provisions were invalid because they provide for an exercise of judicial power otherwise than in conformity with Chapter III of the Constitution. The Commission is not a court established pursuant to s71 and constituted in accordance with s72 of the Constitution. The plaintiff also argued that this was so even though the Federal Court could review determinations made by the Commission.

### **The Decision**

The High Court accepted the argument put by the plaintiff.

The Court considered that it is difficult to formulate a comprehensive definition of judicial power. However, the concept involves:

- the binding and authoritative decision of controversies between subjects or between subjects and the Crown (although not every such decision will be an exercise of judicial power);

- the determination of existing rights and duties according to law by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion; and
- the enforceability of the decision.

In short, the exercise of judicial power involves the making of a decision which is binding and authoritative and which is enforceable.

In respect of the Commission, the High Court said:

- the Commission decides controversies between parties and does so by the determination of rights and duties based upon existing facts and law;
- the Commission may award a variety of remedies including damages, and declaratory or injunctive relief; and
- the determinations of the Commission are enforceable as an order of the Federal Court.

The Court also stated that had it not been for the provisions providing for the registration and enforcement of the Commission's determinations, the Commission would not exercise judicial power.

### **Implications**

The potential implications of the decision are very wide.

The Commission will still be able to conciliate disputes and make

determinations. However it cannot validly register those determinations with the Federal Court and hence cannot enforce them. The power of the Commission has, therefore, been considerably weakened.

The ramifications will most likely affect other areas of human rights law, for example, sex discrimination, disability discrimination and native title legislation. Although other Federal tribunals most likely exercise administrative or arbitral power rather than judicial power, the impact of the decision on such tribunals, will also need to be

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carefully considered.