HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE ATTORNEY-GENERAL OF
THE COMMONWEALTH APPELLANT

AND

BRECKLER & ORS RESPONDENTS

Attorney-General of the Commonwealth v Breckler [1999] HCA 28
17 June 1999
P28/1998

ORDER

1. *Appeal allowed.*

2. *Orders 1, 2(a), and 2(b) of the orders made by the Full Court of the Federal Court and entered on 20 March 1998 set aside.*

3. *Remit the proceeding to the Full Court of the Federal Court for further consideration in conformity with the reasons for judgment of this Court.*

4. *Appellant to pay the costs of the first respondents.*

On appeal from the Federal Court of Australia.

Representation:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and G R Kennett for the appellant (instructed by Australian Government Solicitor)

D H Solomon for the first respondents (instructed by Solomon Brothers)

No appearance for the second respondent

CATCHWORDS

Attorney-General of the Commonwealth v Breckler & Ors

Constitutional law – Judicial power of the Commonwealth – Power of Superannuation Complaints Tribunal to make decisions deemed to be decisions of trustees of regulated superannuation fund – Whether binding, authoritative and curially enforceable determination – Whether determination is subject to collateral attack.

High Court – Practice – Intervention and *amicus curiae* – Circumstances where appropriate to allow and refuse.

Words and phrases – "lawful excuse", "reasonable excuse".

Income Tax Assessment Act 1936 (Cth), s 6E(1), Pt IX.
Superannuation Industry (Supervision) Act 1993 (Cth), ss 19, 34, 285, 315, 341, 343, 350.
Superannuation (Resolution of Complaints) Act 1993 (Cth), ss 14, 20, 37, 41(3).
Superannuation Industry (Supervision) Regulations, reg 13.17B.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The Federal Court of Australia had before it a proceeding identified in s 46(1) of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth) ("the Complaints Act") as an appeal on a question of law from a determination of the Superannuation Complaints Tribunal ("the Tribunal"), a body established by s 6 of that statute. The Tribunal had exercised the powers conferred by s 37 of the Complaints Act. These included all the powers, obligations and discretions conferred on the trustees of the fund the subject of the complaint to the Tribunal.

2 The notice of appeal to the Federal Court included a ground that all provisions in the Complaints Act and the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act") enabling decisions to be made by the Tribunal which are deemed to be trustees' decisions or providing for those decisions to be enforced are invalid. A judge of the Federal Court, acting pursuant to s 25(6) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"), reserved a question for the consideration of a Full Court which presented an issue in different terms, limited to one section of the Complaints Act and divorced from a consideration of the particular private rights, established by the general law, upon which the Tribunal determination had operated in the instant case. The question was:

> "Is s 37 of the [Complaints Act], or any part thereof, invalid in that it purports to confer the judicial power of the Commonwealth on the Tribunal and is therefore inconsistent with Chapter III of the Constitution?"

In acting under s 25(6) of the Federal Court Act, the Full Court (Lockhart and Heerey JJ; Sundberg J dissenting) was exercising original jurisdiction. It answered the question "Yes, wholly". In reaching that conclusion, the members of the Full Court applied the reasoning in their respective judgments delivered on the same day in *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*[1]. The Attorney-General of the Commonwealth had intervened in the proceedings in the Full Court, pursuant to s 78A(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). As a consequence, under s 78A(3) he had the standing to institute and prosecute an appeal and he is the appellant in this Court.

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1 (1998) 79 FCR 469.

The Plan

3 The litigation arose in the following way. The late Mr Cecil Breckler was a member of the Cecil Bros Pty Ltd Superannuation Plan ("the Plan") constituted by a trust deed ("the Trust Deed") made 28 July 1975, and amended from time to time. The Trust Deed was made between Cecil Bros Pty Ltd of the one part (defined as "the Principal Employer") and trustees of the other part. The first respondents in this Court are the present trustees. Mr Breckler died on 1 August 1994, aged 92. He was survived by one child, Mrs Leshem, who is the second respondent in this Court. She entered a submitting appearance. Mrs Leshem has two adult children. Mr Breckler's other child, his son, had predeceased him, leaving three children, two of whom are executors of their grandfather's estate. By his will, Mr Breckler left his estate to be divided equally between his five grandchildren. Mrs Leshem is not a beneficiary under the will.

4 Clause 18 of the Trust Deed provides for the management of the Plan in accordance with Rules set out in the Schedule to the Trust Deed or as amended in accordance with cl 19 of the Trust Deed. The effect of cl 19 is to empower the trustees and the Principal Employer by resolution or by deed to add to or alter the Trust Deed and the Rules in any respect which would in their opinion be for the benefit of the past, present or future employees of the Principal Employer or certain subsidiary companies and associated corporations or firms or their dependants generally; however, no additional alteration is to impose any further liability on any member of the Plan without that member's consent.

5 At the relevant time, r 11 was headed "PAYMENT OF DEATH BENEFITS". Rule 11.1 was headed "Dependant" and stated:

> "If the Member [sic] dies the Trustees shall pay or apply the benefits payable in accordance with this Deed and the Rules to or for the benefit of such one or more Dependants of the deceased Member and the Legal Personal Representative of the deceased Member and in such shares and proportions and in such manner as the Trustees in their discretion determine."

In r 1, the term "Dependant" was defined, so far as relevant, to mean any child of Mr Breckler and any other person who, in the opinion of the trustees, was at the relevant date wholly or partially dependent upon him.

6 Clause 13 of the Trust Deed stated:

> "The Trustees in the exercise of the powers authorities and discretions vested in them by this Deed and the Rules shall have an absolute and uncontrolled discretion and may exercise or enforce all or any of those powers authorities or discretions from time to time and at any time or may refrain from exercising all or any of those powers authorities or discretions from time to time or at all and their decisions as to the interpretation and effect of this Deed and the Rules shall be final."

7 In *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*, Heerey J set out a passage in which the primary judge in that case (Northrop J) summarised the effect of decisions defining the scope for challenges in courts of equity to the exercise of discretions reposed in the trustee of a settlement. In this Court, the accuracy of that summary was not disputed. It is as follows[2]:

> "Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously[3], wantonly, irresponsibly[4], mischievously or irrelevantly to any sensible expectation of the settlor[5], or without giving a real or genuine consideration to the exercise of the discretion[6]. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable[7] or unwise[8]. Where a discretion is expressed to

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2 (1998) 79 FCR 469 at 480.

3 *In re Pauling's Settlement Trusts* [1964] Ch 303 at 333.

4 *Lutheran Church of Australia South Australia District Incorporated v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 639.

5 *In re Manisty's Settlement* [1974] Ch 17.

6 *Karger v Paul* [1984] VR 161, which includes a survey of the authorities.

7 See *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896.

8 *Gisborne v Gisborne* (1877) 2 App Cas 300 at 307.

be absolute it may be that bad faith needs to be shown[9]. The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness[10]."

8 However, by a deed of variation dated 14 December 1989, cl 1.2 was inserted in the Trust Deed. This provision is of considerable importance in the present dispute. It is headed "Compliance with the Act" and states:

> "To the extent that the provisions of this Deed and the Rules are inconsistent or in conflict with the requirements of the Act from time to time with which the Plan must comply (*which requirements shall be deemed to form part of this Deed*) the said requirements shall prevail and the Trustees shall act or refrain from acting, notwithstanding anything to the contrary or otherwise contained in this Deed, in order to comply with those requirements." (emphasis added)

In the Trust Deed, the term "the Act", as a result of changes made by a deed of variation dated 22 August 1994, means the Supervision Act and includes the Superannuation Industry (Supervision) Regulations[11] as the same may be amended from time to time ("the Supervision Regulations"). The term "the Act" also includes "any other Act or subsidiary or delegated legislation from time to time in force with which the Plan must comply to gain or maintain the most favourable taxation treatment of the Plan".

Regulated superannuation funds

9 A "regulated superannuation fund" is a superannuation fund in respect of which there has been compliance with the requirements of s 19 of the Supervision Act. One requirement of s 19 is that the trustee has given to the Insurance and Superannuation Commissioner ("the Commissioner")[12] appointed under the

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9 *Gisborne v Gisborne* (1877) 2 App Cas 300 at 305.

10 See *In re Londonderry's Settlement* [1965] Ch 918 at 928-929; *Karger v Paul* [1984] VR 161 at 165-166.

11 SR No 57 of 1994.

12 The Commissioner was the regulatory body at all relevant times, but is no longer: see *Financial Sector Reform (Amendments and Transitional Provisions) Act* 1998

(Footnote continues on next page)

Insurance and Superannuation Commissioner Act 1987 (Cth)[13] a notice electing that the Supervision Act is to apply in relation to the fund (s 19(4)). Such an election is irrevocable (s 19(5)) and the trustee has power to make the election despite anything in the governing rules of the fund (s 19(6)).

10 One consequence of such an election is to render applicable to what thereby has become a "regulated superannuation fund" the requirements of Pt 4 (ss 35-36) with respect to the lodgment of annual returns by the trustee with the Commissioner. Another is to attract the monitoring and investigative powers of the Commissioner under Pt 25 (ss 253-299). Further, s 343 operates to render the rules of law relating to perpetuities inapplicable to the trusts of a regulated superannuation fund. However, to the extent that the law of a State or a Territory, for example that in the various Trustee Acts, is capable of operating concurrently with the Supervision Act, it is the intention of the Parliament that the Supervision Act is not to apply to its exclusion. Section 350 so states.

11 The reasons which favour the making of an election by a trustee to invoke the operation of the Supervision Act are indicated by the statement of the object of the Supervision Act set out in sub-ss (1) and (2) of s 3. These provide:

> "(1) The object of this Act is to make provision for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision by the [Commissioner].
>
> (2) The basis for supervision is that those funds and trusts are subject to regulation under the Commonwealth's powers with respect to corporations or pensions (for example, because the trustee is a corporation). In return, the supervised funds and trusts may become eligible for concessional taxation treatment."

(Cth) ("the Amending Act"), s 3 and Scheds 16 and 17. The regulatory bodies are now the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

13 Repealed by the Amending Act, s 3 and Sched 11, effective from 1 July 1998. The repeal of this Act does not affect this case: see Pt 3 of Sched 19 of the Amending Act.

The concessional taxation treatment is found in Pt IX of the *Income Tax Assessment Act* 1936 (Cth) ("the Income Tax Act").

12 A regulated superannuation fund (i) which is a resident superannuation fund within the meaning of s 6E(1) of the Income Tax Act and (ii) the trustee of which did not contravene the Supervision Act or the Supervision Regulations in respect of a particular year of income, has the status under s 42 of the Supervision Act of a complying superannuation fund. In such a case, the Commissioner must (s 41(2)) give a notice under s 40. This produces the result that, in respect of a complying superannuation fund in relation to that year of income (s 45(1)), the trustee is liable to pay tax on the taxable income of the fund as provided by Pt IX of the Income Tax Act[14].

13 In the case of the Plan, the amendments made on 22 August 1994, which had the effect of varying the changes made on 14 December 1989 so as to oblige the trustees to act or refrain from acting in order to comply with requirements of the Supervision Act and the Supervision Regulations, were expressly made in order that the Plan remain a continuously complying superannuation fund as defined in Pt IX.

14 Further, the effect of these amendments was to treat the requirements of the Supervision Act and the Supervision Regulations as part of the Trust Deed itself and therefore as elements in the charter of rights, duties and powers of the trustees and also of those with interests in the Plan.

15 Section 31 of the Supervision Act authorises the making of Regulations to prescribe "standards applicable to the operation of regulated superannuation funds". The term "superannuation entity" identifies, among others, a regulated superannuation fund[15] and s 34 of the Supervision Act states:

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14 Part IX comprises ss 267-315F and s 278 states:

> "(1) The trustee of a complying superannuation fund is liable to pay tax on the taxable income of the fund of the year of income.
>
> (2) Except as provided by Division 11A of Part III, the income of a complying superannuation fund of the year of income is not subject to tax except as provided by this Part."

15 Section 10(1) of the Supervision Act.

"(1) The trustee of a superannuation entity must ensure that the prescribed standards applicable to the operation of the entity are complied with at all times.

(2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.

(3) A contravention of subsection (1) does not affect the validity of a transaction."

The prescribed standards are found in the Supervision Regulations. Regulation 13.17B[16] provides that, for the purposes of s 31(1) of the Supervision Act:

"it is a standard applicable to the operation of regulated superannuation funds … that the trustee of a fund must not fail, without lawful excuse, to comply with an order, direction or determination of the [Tribunal]".

16 Further, if it appears to the Commissioner that the trustee of a regulated superannuation fund has refused or failed to give effect to a determination of the Tribunal under s 37 of the Complaints Act, the Commissioner may notify the trustee that the Commissioner proposes to conduct an investigation of the whole or a part of the affairs of that fund (s 263). For that purpose, the Commissioner may appoint an inspector (s 265). A person must not, "without reasonable excuse", intentionally or recklessly refuse or fail to comply with a requirement of the Commissioner or an inspector under the Supervision Act (s 285). These provisions are found in Pt 25.

17 The phrase "reasonable excuse" has been used in many statutes but whether an excuse answers that description depends not only on the circumstances of the particular case but also on the purpose of the provision to which the exception is provided[17]. However, the scope of the phrase "lawful excuse" appears to be more limited. A trustee will have a lawful excuse for failure to comply with an order, direction or determination of the Tribunal if the trustee has a reason recognised by

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16 Added by Superannuation Industry (Supervision) Regulations (Amendment) (SR No 189 of 1994).

17 *Taikato v The Queen* (1996) 186 CLR 454 at 464.

law as sufficient justification for such failure, whether by way of answer, defence, justification or other legal right or immunity[18].

18 Reference also should be made to Pt 27 of the Supervision Act (ss 309-318) which is headed "POWERS OF COURT". The effect of sub-ss (3) and (12) of s 315 is to empower the Court[19], on the application of the Commissioner or any persons whose interests have been, are or would be affected by the refusal of a trustee to give effect to a determination made by the Tribunal, to grant an injunction, on such terms as the Court thinks appropriate, requiring the trustee to give effect to the determination.

19 The point of immediate significance is that, by reason of the amendments to the Trust Deed to which we have referred, the trustees were obliged by the trust instrument itself to comply with an order, direction or determination of the Tribunal in the manner specified in reg 13.17B of the Supervision Regulations. Non-compliance could also attract the operation of ss 263 and 315 of the Supervision Act. This obligation was a matter of what might be called private law and in addition to the statutory requirements imposed by or under the Supervision Act.

The litigation

20 Following the death of Mr Breckler, the trustees determined that a benefit be paid. On 16 August 1994, the then trustees decided to distribute the benefit so that 17 per cent was paid to Mrs Leshem and 83 per cent was paid to Mr Breckler's legal personal representative. The trustees reviewed their decision and, after calling for submissions from Mrs Leshem, on 2 February 1995 they affirmed the decision and determined that she had not demonstrated any special need.

21 On 19 September 1995, Mrs Leshem lodged a complaint with the Tribunal in compliance with the procedures specified in s 14 of the Complaints Act. Section 14 was engaged because, in acting in respect of the Plan, the trustees had made a "decision" in relation to a "regulated superannuation fund" (s 14(1)).

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18 See *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 105; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 338-339, 347-348; *Signorotto v Nicholson* [1982] VR 413 at 416-417.

19 An expression defined in s 10(1) of the Supervision Act to mean the Federal Court of Australia or the Supreme Court of a State or Territory.

Unless the contrary intention appears, an expression such as "regulated superannuation fund", when used in the Complaints Act, has the same meaning as in the Supervision Act[20].

22 The functions of the Tribunal are, so far as is relevant[21], stated in s 12 of the Complaints Act as being:

> "(a) subject to paragraph (b), to inquire into a complaint and to try to resolve it by conciliation; and
>
> (b) if the complaint cannot be resolved by conciliation – to review the decision of the trustee to which the complaint relates".

Section 4 provides that a trustee makes a decision if the trustee makes or fails to make a decision or engages in any conduct, or fails to engage in any conduct, in relation to making a decision. The term "decision" is not otherwise defined.

23 At the time Mrs Leshem lodged her complaint, s 14(2) of the Complaints Act provided the grounds for her grievance to be that "the decision" of the trustees had been in excess of their powers, an improper exercise of their powers or "unfair or unreasonable". Section 14(2) was amended, with effect from 12 December 1995[22], by specifying as the only ground of complaint "that the decision is or was unfair or unreasonable" and applying the amended provision to complaints then pending.

24 The limitation of the grounds of complaint to one that the decision was unfair or unreasonable suggests that what is involved is a complaint as to the exercise by the trustee of a discretion rather than the discharge of duties, for example to distribute to those answering specified criteria. In his dissenting judgment in *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*, Sundberg J gave as an example a determination by the trustee that a person

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20 Section 3(1) of the Complaints Act.

21 This section was substituted by the *Superannuation Legislation Amendment (Resolution of Complaints) Act* 1998 (Cth), s 3 and Item 6 of Sched 1, effective from 11 December 1998. Nothing turns on this substitution.

22 By s 5 and Items 28 and 70 of Sched 5 of the *Superannuation Industry (Supervision) Legislation Amendment Act* 1995 (Cth) ("the 1995 Amendment Act").

was not entitled to a benefit because the criterion of total and permanent disability was not satisfied[23]. In the present case, plainly the decision of the trustees in respect of which Mrs Leshem complained to the Tribunal was made in exercise of discretionary powers which, however, in a court of equity, would not be open to attack by application of a criterion of fairness or reasonableness.

25 The effect of the amendments to the Trust Deed to which we have referred, in conjunction with the Supervision Act, reg 13.17B of the Supervision Regulations and the Complaints Act, in particular s 14, was to qualify the apparent conferral upon the trustees of the Plan by cl 13 of the Trust Deed of an absolute and uncontrolled discretion amenable to review only in accordance with the case law summarised by Northrop J in the passage set out earlier in these reasons.

26 The three children of Mr Breckler's deceased son were joined as parties to the complaint on 4 September 1996. Section 18(1) and s 24A[24] of the Complaints Act provide, in certain circumstances, for joinder of parties to a complaint. However, with respect to Mrs Leshem, a person may make a complaint under s 14 only if, in the case of a decision that relates to the payment of a "death benefit", that person has an interest in the benefit, or claims to be entitled to benefits through such a person, or the person is acting for a person in either of those categories (s 15(1)(a)).

27 The expression "death benefit" is defined in s 3(2)[25] of the Complaints Act, as regards a benefit that is payable by the trustee of a regulated superannuation fund in respect of a member of the fund on or after the death of the member, as meaning a benefit provided in accordance with certain provisions of s 62 of the Supervision Act. Section 62 of the Supervision Act contains provisions to ensure that the trustee of a regulated superannuation fund sees that the fund is maintained only for what are identified as "core purposes" or for "core purposes" and one or more "ancillary purposes". One matter in issue before the Tribunal was whether

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23 (1998) 79 FCR 469 at 493.

24 Section 24A was inserted on 12 December 1995 by s 5 and Item 53 of Sched 5 of the 1995 Amendment Act.

25 The definition was inserted on 12 December 1995 by s 5 and Item 5 of Sched 5 of the 1995 Amendment Act.

the complaint related to the payment of a death benefit in the necessary statutory sense.

28 On 13 February 1997, purporting to act under s 37 of the Complaints Act, the Tribunal decided to set aside the decision of the trustees and to substitute its decision that 50 per cent of the death benefit be paid to Mrs Leshem and 50 per cent to her father's legal personal representative. Section 40 of the Complaints Act obliges the Tribunal to give written reasons for a determination and these were provided on 2 May 1997.

29 By their notice of appeal to the Federal Court, the trustees sought orders setting aside the determination of the Tribunal and affirming and reinstating the decisions of the trustees of 16 August 1994 and 2 February 1995. The trustees asserted that the Tribunal had made various errors of law but, as we have indicated, the question reserved dealt only with the issue of validity of s 37 of the Complaints Act. Further, the issue of validity is concerned only with Ch III of the Constitution.

Validity

30 Section 37 of the Complaints Act is of critical importance[26]. It states:

> "(1) For the purpose of reviewing a decision of the trustee of a fund that is the subject of a complaint under section 14:
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> (a) the Tribunal has all the powers, obligations and discretions that are conferred on the trustee; and
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> (b) subject to subsection (6), must make a determination in accordance with subsection (3).
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> …
>
> (3) On reviewing the decision of a trustee, insurer or other decision-maker that is the subject of, or relevant to, a complaint under section 14, the Tribunal must make a determination in writing:

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26 The original s 37 was repealed on 12 December 1995 and replaced with the current s 37 by s 5 and Item 69 of Sched 5 of the 1995 Amendment Act.

(a) affirming the decision; or

(b) remitting the matter to which the decision relates to the trustee, insurer or other decision-maker for reconsideration in accordance with the directions of the Tribunal; or

(c) varying the decision; or

(d) setting aside the decision and substituting a decision for the decision so set aside.

(4) The Tribunal may only exercise its determination-making power under subsection (3) for the purpose of placing the complainant as nearly as practicable in such a position that the unfairness, unreasonableness, or both, that the Tribunal has determined to exist in relation to the trustee's decision that is the subject of the complaint no longer exists.

(5) The Tribunal must not do anything under subsection (3) that would be contrary to law, [or] to the governing rules of the fund concerned ...

(6) The Tribunal must affirm a decision referred to under subsection (3) if it is satisfied that the decision, in its operation in relation to:

(a) the complainant; and

(b) so far as concerns a complaint regarding the payment of a death benefit – any person (other than the complainant, a trustee, insurer or decision-maker) who:

(i) has become a party to the complaint; and

(ii) has an interest in the death benefit or claims to be, or to be entitled to benefits through, a person having an interest in the death benefit;

was fair and reasonable in the circumstances."

31 In the course of argument in this Court, it became apparent that, in order to determine the appeal respecting the invalidity of s 37, it would be necessary also to consider other provisions of the Complaints Act, in particular ss 41(3) and 20.

32 Section 41(3) currently states[27]:

"A decision of a trustee, RSA provider, insurer or other decision-maker as varied by the Tribunal, or a decision made by the Tribunal in substitution for a decision of a trustee, RSA provider, insurer or other decision-maker:

(a) is, for all purposes (other than the making of a complaint about the decision) taken to be a decision of a trustee, RSA provider, insurer or other decision-maker concerned; and

(b) on the coming into operation of the determination by the Tribunal, unless the Tribunal otherwise orders, has effect, and is taken to have had effect, on and from the day on which the original decision has or had effect."

33 Section 20 provides:

"(1) The Tribunal cannot deal with a complaint if a proceeding has been begun in a court about the subject matter of the complaint and the proceeding has not been finally disposed of.

(2) If, after a complaint has been made to the Tribunal, a proceeding is begun in a court about the subject matter of the complaint, the Tribunal cannot deal with the complaint until the proceeding is finally disposed of."

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27 The original s 41(3) was repealed on 12 December 1995 and replaced by the current s 41(3) by s 5 and Item 71 of Sched 5 of the 1995 Amendment Act and by s 3 and Item 54 of Sched 2 of the *Retirement Savings Accounts (Consequential Amendments) Act* 1997 (Cth).

The effect of s 20 is to remove the ground for complaint such as that in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[28] that such activities by the Tribunal would, to the extent to which they created a risk of interfering, or involved a tendency to interfere, with the administration of justice, constitute a contempt of court. Section 20 also recognises the intention stated in s 350 of the Supervision Act that the regulatory scheme not operate to the exclusion of the law of a State or Territory to the extent that that law is capable of operating concurrently with it.

34 We have referred to the operation of s 46 of the Complaints Act to confer jurisdiction upon the Federal Court with respect to an "appeal" on a question of law from a determination of the Tribunal. In addition, s 39 provides for the reference of questions of law to the Federal Court. The Tribunal may, on its own initiative or at the request of a party, refer a question of law arising in relation to a complaint to the Federal Court for decision (s 39(1)). Once that step has been taken, the Tribunal must not, while the reference is pending, make a determination to which the question is relevant and, after the Federal Court has determined the question of law, the Tribunal must not do anything that is inconsistent with it (s 39(3)). Further, to secure the effectiveness of the hearing and determination of an "appeal" under s 46, the Federal Court may stay the operation or implementation of the determination of the Tribunal which is in question (s 47(2)).

35 The members of the Tribunal, who, pursuant to s 7 of the Complaints Act, are appointed either by the Governor-General or by the Minister, are officers of the Commonwealth within the meaning of s 75(v) of the Constitution. The result is to attract the jurisdiction conferred on this Court by that provision and, in respect of the Federal Court, by s 39B(1) of the Judiciary Act. The Complaints Act contains no privative clause purporting to limit what otherwise would be the scope for the operation of s 75(v).

36 If the determination of a complaint by the Tribunal be characterised as activity of an administrative nature, then in the absence of legislative prescription to the contrary, the determination would be open to collateral review by a court in the course of dealing with an issue properly arising as an element in a justiciable controversy of which the court was seized. This proposition recently was applied

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28 (1982) 152 CLR 25.

in this Court in *Ousley v The Queen*[29]. We have referred earlier in these reasons to the phrases "reasonable excuse" and "lawful excuse" appearing respectively in s 285 of the Supervision Act and in reg 13.17B of the Supervision Regulations. These provisions are consistent with, and confirmatory of, the general principle discussed in *Ousley*. Further, the determination of the Tribunal would be open to review by the Court in determining whether to grant an injunction under s 315(3) of the Supervision Act to compel the trustee to give effect to a determination made by the Tribunal.

37 However, the Supervision Act gives protection to a trustee who has complied with a determination against subsequent complaint, for example in a suit for breach of trust, by parties who, at that later stage, seek to impugn the determination. Section 341 of the Supervision Act states:

> "A person is not liable in a civil action or civil proceeding in relation to an act done in fulfilment of an obligation imposed by this Act or the regulations."

38 Section 14 of the Complaints Act applies to decisions in relation to members or former members of a "regulated superannuation fund" or beneficiaries or former beneficiaries of an "approved deposit fund". As we have indicated earlier in these reasons, the former expression, which pertains to the Plan with which this litigation is concerned, takes its meaning from s 19 of the Supervision Act and a criterion for the operation of s 19 is an irrevocable election by the trustee that the Supervision Act applies in relation to the fund. It follows that, in turn, the operation of the Complaints Act, in respect of a decision of the trustee of such a fund, is the product of an election by the trustee, not the imperative commands of the legislation. In his dissenting judgment in *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*, Sundberg J spoke of the Complaints Act itself as creating a new substantive right for members of regulated superannuation funds not to be adversely affected by unfair or unreasonable decisions of trustees[30]. However, the enjoyment of the new substantive right is contingent upon, and would not exist without, there having been the election under s 19 of the Supervision Act. The power of the trustee to make such an election

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29 (1997) 192 CLR 69 at 79-80, 86-87, 100-105, 125-127, 144-146. See also *Boddington v British Transport Police* [1998] 2 WLR 639 at 653-654, 663-664; [1998] 2 All ER 203 at 216-217, 226-227.

30 (1998) 79 FCR 469 at 494.

will be found in private law, in the express powers conferred by the trust instrument or those conferred by general principles of trust law, as supplemented by State or Territory statute law. If, as was not the case with the Plan involved here, the governing rules deny the trustee that power, then s 19(6) of the Supervision Act supplies it.

39 The scheme disclosed by the joint operation of Pt IX of the Income Tax Act, the Supervision Act and the Complaints Act, with respect to regulated superannuation funds, is that the trustee thereof may elect to follow a course which leads to concessional treatment under the income tax law. However, the exercise of that statutory election brings with it a regulatory regime which subjects the exercise of the powers of the trustee to constraints to which they would not be subject, in the absence of express provision in the trust instrument or modification by operation of the State or Territory statute law governing the trust. In particular, an unjust or unreasonable exercise by the trustee of a discretionary power may attract the complaints procedures which gave rise to the present litigation in circumstances where there had been no breach of trust by the trustee.

40 In *Federal Commissioner of Taxation v Munro*[31], Isaacs J gave as examples of functions which are appropriate exclusively to judicial action not only the determination of criminal guilt but also actions in contract and tort. These examples indicate a view of what, at least by reference to history and tradition, are basic rights and interests necessarily protected and enforced by the judicial branch of government[32]. To those examples there may readily be added suits to obtain remedies to enforce compliance by a trustee with the terms of the trust in question. The institution of the trust had its genesis in curial enforcement of the trust and confidence reposed by the settlor in the holder of the legal estate[33].

41 In *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*, Heerey J correctly stressed[34] that the rights of members

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31 (1926) 38 CLR 153 at 175. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258, 269.

32 A view propounded in express terms by Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

33 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-519; varied on other grounds (1982) 149 CLR 431.

34 (1998) 79 FCR 469 at 484.

of superannuation funds arise from and are governed by the general law which is enforceable in the ordinary courts and that the rights of members of such funds are not derived from a statute which itself confers an administrative power of modification or destruction[35]. However, that consideration is not determinative of the matter in issue here. Given the nature of the rights and liabilities in question, the question is whether the Complaints Act, in particular the provisions for the determination by the Tribunal of complaints against trustees of regulated superannuation funds, brings about a conclusive determination as to the existing rights and entitlements of members, either inter se or against the trustee or both, and as to the existing duties and responsibilities of the trustee. Does a determination by the Tribunal of a complaint offend Ch III because it creates, to adapt what was said by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[36], in a passage frequently applied in this Court[37], a new charter by reference to which the existence of the rights or obligations of the parties to the complaint are to be decided between those persons or classes of persons? Is the existence of the determination something which "entitles and obliges" the parties to observance of the deemed decision of the trustee?[38]

42 In *Brandy v Human Rights and Equal Opportunity Commission*[39], the mere registration in the Federal Court of the determination by the Commission gave it the effect of an order of that Court. Registration, an administrative act, converted a non-binding administrative determination into a determination of the character identified by Kitto J, namely a binding, authoritative and curially enforceable determination. It followed that the legislation which so provided contravened Ch III.

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35 A point made by Barwick CJ in *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 5.

36 (1970) 123 CLR 361 at 374.

37 See, for example, *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 12, 31; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 532, 685.

38 (1970) 123 CLR 361 at 374.

39 (1995) 183 CLR 245.

43 The present case does not fall under that proscription for several reasons. The first is founded in the terms of the Trust Deed constituting the Plan. The evident purpose as well as the effect of the variations of the Trust Deed to which we have referred were to change the terms themselves of the charter by reference to which the rights and obligations of the trustees and the members of the Plan were, as a matter of private law, to be determined and decided. The trustees became expressly obliged by cl 1.2 to observe the requirements which have their source in the Supervision Act and the Supervision Regulations. These included obligations to observe determinations by the Tribunal under the Complaints Act (reg 13.17B). Thus, the determination by the Tribunal involved not the exercise of the sovereign power referred to by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*[40] but the arbitration of a dispute using procedures and criteria adopted by the constituent trust instrument, the existing charter, for the resolution of certain disputes arising thereunder.

44 Secondly, even without a provision in the Trust Deed such as cl 1.2, the situation would bear a similar character. The application of the provisions of the Complaints Act was possible only because the Plan had the status of a regulated superannuation fund. The attainment of that status was the product of the exercise of an election provided to the trustees by the Supervision Act. Given the importance of attracting the operation of Pt IX of the Income Tax Act, cases may readily be imagined where it would be a breach of trust not to exercise the election so as to obtain the revenue benefits which follow, albeit at the concomitant price of attracting the regulatory regime of which the Tribunal is a component. The availability of an election of this nature may be[41], and in the context of the present legislative scheme is, a decisive pointer in favour of validity.

45 Thirdly, the Complaints Act and the Supervision Act take the existence of a determination by the Tribunal as a criterion by reference to which legal norms are imposed and remedies provided for their enforcement. Examples are the injunctive remedy provided in s 315(3) of the Supervision Act and the obligation imposed upon trustees by s 34 of that Act. Further, the immunity from liability in a civil action or civil proceeding, which is conferred by s 341 of the Supervision Act in relation to an act done in fulfilment of obligations imposed by that statute or the

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40 (1909) 8 CLR 330 at 357.

41 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 544 (PC); [1931] AC 275 at 297-298; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 218.

regulations, may take as a criterion for its operation in a given case the existence of a determination by the Tribunal. A determination which "constitutes the factum by reference to which" legislation operates to confer curially enforceable rights and liabilities does not necessarily involve the exercise of judicial power[42]. The provisions we have discussed would involve what Mason CJ, Brennan and Toohey JJ identified in *Brandy v Human Rights and Equal Opportunity Commission* as "an independent exercise of judicial power" to give effect in this way to a determination by the Tribunal[43].

46 Reference also should be made to a consideration which, although not necessarily decisive, strengthens the case for validity which is otherwise made out. It is that the Complaints Act does not purport to give determinations of the Tribunal that conclusive character which would prevent collateral challenge in proceedings to compel observance of those determinations. Section 37(3) of the Complaints Act obliges the Tribunal to make a determination in writing which affirms the decision of the trustee in question, remits it, varies it, or sets it aside by substituting the decision of the Tribunal for that of the trustee. Upon such variations or substitutions, s 41(3)(a) operates by specifying that the decision of the Tribunal is "for all purposes" to be taken to be a decision of the trustee. That proposition is qualified by the phrase "other than the making of a complaint about the decision" so as to avoid a situation whereby the machinery beginning with the operation of s 14 is again set in motion, this time in respect of the Tribunal's deemed decision. Conferral upon the determination of the Tribunal of the status of a decision of the trustee does not bring with it a preclusive effect which immunises the determination, and thus its status, from attack in properly constituted curial proceedings. The scope and range of such proceedings is indicated earlier in these reasons.

47 The present situation may be contrasted to that in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*. Section 51 of the *Trade Practices Act* 1965 (Cth) considered in that case stipulated that the effect of a determination by the Trade Practices Tribunal that a restriction in an agreement was contrary to the public interest was that the agreement thereafter became

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42 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378.

43 (1995) 183 CLR 245 at 261.

"unenforceable" as regards the observance of the restriction[44]. The validity of the determination was, s 102(1) provided, not to be "challenged, reviewed or called in question in any proceedings"[45]. However, s 102(2) provided that this did not limit the exercise of any jurisdiction of this Court to issue a writ of prohibition, mandamus or certiorari or an injunction[46]. The validity of the legislation was upheld. In the present case, the avenues for collateral challenge are broader than in *Tasmanian Breweries*.

Conclusion

48 The appeal should be allowed. Orders 1, 2(a) and 2(b) of the orders made by the Full Court and entered on 20 March 1998 should be set aside.

49 As indicated earlier in these reasons, the question dealt with by the Full Court was stated in an inapt form. The matter should be returned to the Federal Court for the making of an order stating a question to the effect:

> "In making the determination identified in par (1) of the notice of appeal dated 30 May 1997, was the Superannuation Complaints Tribunal purporting to exercise the judicial power of the Commonwealth, contrary to Ch III of the Constitution?"

The revised question should then be answered by the Full Court in the negative. There may then still remain for decision by the Federal Court grounds in that notice of appeal which are yet to be dealt with by the Federal Court.

50 It was a term of the grant of special leave by this Court that the appellant would pay the costs of the first respondents of the appeal to this Court in any event.

51 Order 2(c) of the orders of the Full Court was to the effect that the costs in that Court of the present first respondents, the trustees, be borne by the present second respondent, Mrs Leshem. We would not disturb that order.

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44 (1970) 123 CLR 361 at 380.

45 (1970) 123 CLR 361 at 382.

46 (1970) 123 CLR 361 at 382.

52 KIRBY J. A quarter of a century ago, Barwick CJ declared[47] that the reasons of this Court[48] and of the Privy Council[49] in the *Boilermakers' Case*, prohibiting the combination of the judicial power with non-judicial power, had led to decisions of "excessive subtlety and technicality". He observed that the "unprofitable inconveniences" which had ensued had brought no "compensating benefit" for the "working of the Constitution in the circumstances of the nation". He suggested that the time might come when the *Boilermakers' Case* doctrine would need reconsideration.

53 That time has not yet come. This appeal from orders of the Full Court of the Federal Court of Australia[50] was not argued in that way. The appeal does not, therefore, afford the occasion for a root and branch reconceptualisation of the meaning and purposes of the provisions in Ch III of the Constitution. That Chapter creates the Judicature as a separate branch of government in a constitutional arrangement which also provides for a Legislature[51] and Executive Government[52] which are not strictly divorced from each other. Yet the analysis required in this case demonstrates once again the lack of an "essential or constant characteristic"[53] for the judicial power of the Commonwealth which will mark it off from non-judicial functions which may be performed by an administrative tribunal established outside the Judicature. Once again, this Court is obliged to engage in a somewhat transcendental analysis[54]. It is an unsatisfying task.

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47 In *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87 at 90. See also at 102 per Mason J.

48 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (hereafter "the *Boilermakers' Case*").

49 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288.

50 *Breckler v Leshem* unreported, Federal Court of Australia, 12 February 1998 applying *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 (hereafter "*Wilkinson*").

51 Ch I.

52 Ch II.

53 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267 (hereafter "*Brandy*").

54 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J (hereafter "*Ex parte Tasmanian Breweries*").

54 At issue in this appeal is the constitutional validity of key provisions of the legislation establishing the Superannuation Complaints Tribunal ("the Tribunal"), a federal administrative body[55]. By an analysis of the functions and powers of the Tribunal, a majority of the Full Court concluded[56] that provisions of s 37 of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth) ("the Complaints Act") were wholly invalid as purporting, inconsistently with Ch III, to confer upon the Tribunal the judicial power of the Commonwealth. By special leave, the Attorney-General of the Commonwealth, pursuant to s 78A(3) of the *Judiciary Act* 1903 (Cth), appeals to this Court to challenge the orders giving effect to that decision.

Background facts

55 The background facts are stated in the reasons of the other members of this Court ("the joint reasons"). Important amongst those facts are the variations of the subject trust deed on 14 December 1989 and 22 August 1994 by which the provisions of the relevant federal Acts were deemed to form part of the deed. As will be shown, taxation concessions in that legislation effectively obliged the Trustees to bring the plan within the federal legislation. They duly elected to do so. When, following the death of Mr Cecil Breckler, a dispute broke out amongst his "dependants", the second respondent invoked the jurisdiction of the Tribunal[57].

56 At a meeting in February 1997, in reliance upon the powers conferred upon it by s 37 of the Complaints Act, the Tribunal decided to set aside the decision of the Trustees. It substituted its own decision imposing on the Trustees a requirement to pay an additional sum to the second respondent. The Trustees promptly filed an "appeal" to the Federal Court[58]. This raised several questions of law challenging the Tribunal's determination. Most of the questions do not presently concern this Court. However, the first of the questions raised involved the contention that the Tribunal had purported to exercise the judicial power of the Commonwealth although not established as a court in accordance with Ch III of the Constitution. To remove the uncongenial decision of the Tribunal, and to restore their own determination concerning the obligations arising under the trust deed, the Trustees invoked the Constitution. If the Tribunal's powers offended Ch III, its decision would be a nullity and the Trustees' determination would be revived.

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55 Established by the *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 6.

56 *Breckler v Leshem* unreported, Federal Court of Australia, 12 February 1998, per Heerey J (Lockhart J concurring), Sundberg J dissenting.

57 By a complaint pursuant to the Complaints Act, s 14.

58 Pursuant to the Complaints Act, s 46(1).

Scheme of the legislation

57 The Complaints Act is one of a number of recent laws enacted by the Parliament concerning superannuation. By the 1990s, with increasing numbers of retirees in Australia, huge funds invested in superannuation, and variable standards observed by trustees, the superannuation industry began to attract federal legislation. It is unnecessary to mention all of the legislation enacted as a consequence of this development[59]. However, one Act was the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the Supervision Act"). That Act must be read with the Complaints Act in order to understand how compliance with the determinations of the Tribunal, enforced in accordance with the latter Act, were intended to contribute to, and reinforce, the supervision of the superannuation industry and to attain improved standards within it, as envisaged by the former Act. The terms of s 37 of the Complaints Act which the Full Court found to be constitutionally invalid are set out in the joint reasons. Also set out are the applicable provisions of the Complaints and Supervision Acts. I will not repeat them.

58 Before the creation of the Tribunal, disputes between beneficiaries, trustees and insurers concerning superannuation were decided, where necessary, by courts of competent jurisdiction, applying to the problem in hand the general law relating to trusts, contracts, insurance and so forth. The grounds for challenge to the exercise by trustees of the powers reposed in them, particularly if the trustees gave no reasons for their decision, were limited[60]. The circumstances in which relief could be obtained from a court were accurately summarised in *Wilkinson*[61]. They are reproduced in the joint reasons. They did not extend to cases where the decision of the trustee was criticised as unfair or unreasonable[62] or unwise[63].

59 The confined circumstances in which courts could intervene in this class of case, and the increasing importance of superannuation funds to society, appear to have propelled the Parliament into establishing the Tribunal. The Complaints Act

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59 See eg *Superannuation Guarantee (Administration) Act* 1992 (Cth); *Superannuation Industry (Supervision) Consequential Amendments Act* 1993 (Cth); *Superannuation Supervisory Levy Amendment Act* 1993 (Cth); and *Occupational Superannuation Standards Amendment Act* 1993 (Cth).

60 *In re Londonderry's Settlement* [1965] Ch 918 at 928-929 per Harman LJ; cf *Karger v Paul* [1984] VR 161 at 185 per Young CJ; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

61 (1998) 79 FCR 469 at 480.

62 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896.

63 *Gisborne v Gisborne* (1877) 2 App Cas 300 at 307 per Lord Cairns.

provides that the Tribunal may receive a complaint against a "decision" of a trustee[64] filed by a person with an interest as set out in s 15 of the Act. The Tribunal is required, where conciliation fails, to "review" the decision of the trustee to which the complaint relates[65]. Amongst the Tribunal's stated objectives is the duty to carry out its functions and exercise its powers, relevantly by "providing mechanisms … that are fair, economical, informal and quick"[66]. In addition, the Complaints Act affords the Tribunal substantial powers to obtain information and to secure documents from trustees relevant to the discharge of its functions[67].

60 It is clear enough that the Parliament recognised that the Tribunal would not be a "panacea for righting all wrongs that may be complained of by fund members"[68]. The Complaints Act expressly contemplates that the Tribunal will have a relationship with the courts and be subordinate to them. Specifically, provision is made[69] for a party to "appeal" to the Federal Court on a question of law from a determination of the Tribunal – the facility exercised by the Trustees in this case. A reference of a question of law might also be made by the Tribunal on its own initiative or at the request of a party[70]. If a question of law in relation to a complaint is so referred to the Federal Court, the Tribunal "must not" make a determination to which the question is relevant whilst the reference is pending, or do anything inconsistent with the opinion of the Federal Court on that question, once received[71]. More generally, the Act provides that the Tribunal may not deal with a complaint "if a proceeding has been begun in a court about the subject matter of the complaint and the proceeding has not been finally disposed of"[72]. If, after a complaint has been made to the Tribunal, a proceeding is begun in a court

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64 Complaints Act, s 14(1).

65 Complaints Act, s 12(b).

66 Complaints Act, s 11.

67 Complaints Act, s 25.

68 *Briffa v Hay* (1997) 75 FCR 428 at 437 per Merkel J.

69 Complaints Act, s 46(1).

70 Complaints Act, s 39(1).

71 Complaints Act, s 39(3).

72 Complaints Act, s 20(1).

about the subject matter of the complaint, "the Tribunal cannot deal with the complaint until the proceeding is finally disposed of"[73].

61 These provisions recognise that access to courts concerning disputes relating to superannuation will continue to occur and have initial primacy over proceedings before the Tribunal. The Tribunal's limited powers are narrowed still further from those first provided in the original form of the Complaints Act. The amended legislation makes it inevitable that the Tribunal might "not always be an entirely satisfactory vehicle for determining a dispute over a fund member's actual entitlements"[74]. Yet within the defined area of its jurisdiction, the Tribunal enjoys powers extending (in a respect relevant to the present proceedings) beyond the powers enjoyed by courts of law dealing with a complaint against a decision of a trustee. Additionally, the Tribunal enjoys procedural powers and facilities not always available to the courts.

62 By the Complaints Act, the Tribunal members are to be appointed from persons with relevant knowledge and experience in "matters of kinds in respect of which complaints may be made to the Tribunal"[75]. The procedure for the initiation of a complaint[76] is very simple. Ordinarily, a party without a disability which is not a body corporate or unincorporate "must … act on his or her own behalf"[77]. The Tribunal must first try to settle the complaint by conciliation[78]; and a conference for that purpose may be conducted by telephone, closed-circuit television or any other means of communication[79]. The Tribunal's procedures for the review of the decisions of trustees are likewise informal. The review meeting is held in private[80]. In reviewing a decision, the Tribunal "is not bound by technicalities, legal forms or rules of evidence"[81]. It is "to act as speedily as a

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73 Complaints Act, s 20(2).

74 *Briffa v Hay* (1997) 75 FCR 428 at 437.

75 Complaints Act, s 8(3).

76 Complaints Act, s 17(1).

77 Complaints Act, s 23(3). Power is given to the Tribunal to allow representation by an agent if the Tribunal considers it necessary. See Complaints Act, ss 23(2)(b) and 23(3).

78 Complaints Act, s 27.

79 Complaints Act, s 29.

80 Complaints Act, s 38(1).

81 Complaints Act, s 36(a).

proper consideration of the review allows, having regard to the objectives laid down by section 11 and the interests of all the members of the fund to which the complaint relates"[82]. The Tribunal is authorised to "inform itself of any matter relevant to the review in any way it thinks appropriate"[83]. It is obliged to give written reasons for its determination[84]. It must give notice to each party affected by a determination so that, if it chooses to do so, that party may "appeal" to the Federal Court from such determination on a question of law[85].

63 The foregoing provisions of the Complaints Act are obviously intended to address the practical disadvantages which proceedings in the ordinary courts often have for people who become involved in a dispute relating to their superannuation. The amount at stake in the present matter is relatively substantial. But it need not be so. Often, the stakes, although important to the beneficiaries, will not warrant the expense, delay and other off-putting features of court proceedings. It is in this context that this Court must judge the Parliament's provision of a specialised, informal, economical tribunal with enhanced powers, facilities for conciliation and informal procedures.

64 As originally enacted, the Complaints Act provided that a person might make a complaint to the Tribunal that the decision impugned "(a) was in excess of the powers of the trustee; or (b) was an improper exercise of the powers of the trustee; or (c) is unfair or unreasonable"[86]. The provisions of par (c) were novel. They went beyond the powers previously enjoyed by the courts. But the powers contained in pars (a) and (b) were not dissimilar to those long enjoyed by courts in supervising the conduct of trustees.

65 Following the decision of this Court in *Brandy*[87], it may be inferred that concern arose as to the dangers presented to the constitutional validity of the jurisdiction of the Tribunal by the terms of pars (a) and (b). Accordingly, in

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82 Complaints Act, s 36(b).

83 Complaints Act, s 36(c).

84 Complaints Act, s 40.

85 Complaints Act, s 45.

86 Complaints Act, s 14(2), as originally enacted by Act No 80 of 1993.

87 (1995) 183 CLR 245.

1995[88], the Complaints Act was amended to delete pars (a) and (b) and to amend the sole remaining paragraph (par (c)) to read, relevantly:

> "14(2) … [A] person may make a complaint … to the Tribunal, that the decision is or was unfair or unreasonable."

66 At this point in my reasons, I am reminded of the remark of Isaacs J when commenting on the difference between the Taxation Board of Appeal (which this Court had declared to involve an impermissible exercise of the judicial power[89]) and the Board of Review (challenged one year later after legislative amendments were adopted). His Honour said[90]:

> "When Parliament has shown so unmistakably its resolve to steer clear of the judicial rocks plainly charted in the earlier case, it would be a serious matter to impute an intention which would wreck the legislation and confuse the finances."

The Trustees argued that the amendment to s 14(2) of the Complaints Act was inadequate and the legislation remained fatally flawed. Were this so, this Court would be obliged to perform its serious and responsible duty to declare the provisions invalid.

67 The details of the Supervision Act are far too complex to be analysed here. The provisions of that Act attach, relevantly, to a "regulated superannuation fund"[91]. The inducement to bring private sector superannuation funds, not otherwise regulated, within the supervisory scheme established by the Supervision Act is the provision of advantages to "complying superannuation funds" enacted

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88 *Superannuation Industry (Supervision) Legislation Amendment Act* 1995 (Cth), s 5 and Sched 5, Item 28. In the Explanatory Memorandum it was stated that the first two grounds were removed "to ensure that the powers conferred on the Tribunal cannot be construed as judicial in character": Explanatory Memorandum to the Superannuation Industry (Supervision) Legislation Amendment Bill 1995 (Cth), par 171; cf *Briffa v Hay* (1997) 75 FCR 428 at 438.

89 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422.

90 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175 (hereafter "*Munro*").

91 Supervision Act, s 19. The trustee of such a fund must either be a "constitutional corporation" or the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.

by the *Income Tax Assessment Act* 1936 (Cth)[92]. A superannuation fund and its trustees unconcerned with such advantages could presumably ignore the detailed scheme for the regulation of the superannuation industry contained in the Complaints and Supervision Acts. However, in practical terms, the advantages are such that continued operation beyond the federal legislative pale became unthinkable for all but a few non-corporate mavericks, of which the present fund is not an example. That is why the Trustees prudently elected[93] that the Act should apply in relation to the Fund constituted by the trust deed. The Trustees enjoyed a discretion to exercise powers, authorities and discretions from time to time arising[94]. It is in this way that the Fund became a "regulated superannuation fund" both for the purposes of the Supervision Act and also the Complaints Act[95]. The powers of the Insurance and Superannuation Commissioner and of the courts pursuant to the Supervision Act in dealing with "regulated superannuation funds" are set out in the joint reasons. Again, I will not repeat them. Suffice it to observe that the Trustees of the Fund were potentially subject to an injunction requiring them, although unwilling, to comply with the Tribunal's determination[96]. This, it was said, evidenced the same effective intrusion of a non-judicial body into the area reserved to the courts by Ch III of the Constitution as had been invalidated in *Brandy*. The Trustees claimed relief akin to that provided in that case.

Decision of the Full Court

68 The orders which the Trustees sought in the Federal Court were for the setting aside of the determination of the Tribunal and the affirmation and reinstatement of the decisions of the Trustees dated 16 August 1994 and 2 February 1995. The reserved question dealt with the validity of s 37 of the Complaints Act under Ch III of the Constitution. In earlier decisions of the Federal Court concerning the Complaints Act, a difference of view had emerged about whether the Tribunal was restricted by the Complaints Act to the review of "discretionary decisions". By reference to the provisions of ss 14 and 37 of that Act, some judges had held that

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92 Supervision Act, Pt 5, esp ss 45-50.

93 Supervision Act, s 19(4).

94 Trust deed of 28 July 1975, cl 13 and deed of variation of 14 December 1989, cl 1.2.

95 Complaints Act, s 3(2) definition of "fund"; see also s 14(1).

96 Supervision Act, ss 263 and 315, and *Superannuation Industry (Supervision) Regulations (Amendment)* 1994 (Cth), reg 13.17B.

the Tribunal was so confined[97]. Others had held that it was not[98]. The significance of the difference was thought to lie in the fact that, if the Tribunal were involved in the review of non-discretionary matters, this would establish (or at least tend to indicate) that it was reviewing the legal correctness of a trustee's decision about the entitlement of a beneficiary as a matter of law or fact and thus intruding into the exercise of judicial power[99]. A great deal of attention was paid to this issue in the Federal Court. Indeed, it attracted more attention than it deserved.

69 The majority of the Full Court[100] upheld the conclusion of the primary judge[101] that the Tribunal's jurisdiction was confined to the review of discretionary decisions. Only in discretionary cases would questions as to the unfairness or unreasonableness of the decision under review arise for the Tribunal's determination. Upon this issue the dissenting judge[102] reached the same conclusion. He relied on the fact that "[i]n the case of non-discretionary decisions the Tribunal is denied that ability [of determining whether or not the decision is unfair or unreasonable] by s 37(5)"[103]. That is the sub-section which forbids the Tribunal from doing "anything … that would be contrary to law, to the governing rules of the fund concerned and, if a contract of insurance between an insurer and trustee is involved, to the terms of the contract". Having established that the jurisdiction of the Tribunal was so confined to functions arguably apt to a non-judicial body engaged in broad evaluation of merits (as distinct from the determination of purely legal rights) the point of difference between the majority and dissentient in the Full Court was reached.

70 The majority concluded, by reference to the cumulative effect of several factors, that the powers conferred on the Tribunal by the Complaints Act involved

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97 See eg *Collins v AMP Superannuation Ltd* (1997) 75 FCR 565; *Briffa v Hay* (1997) 75 FCR 428.

98 *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* unreported, Federal Court of Australia, 31 July 1997 per Northrop J.

99 *Wilkinson* (1998) 79 FCR 469 at 483-484 per Heerey J.

100 *Wilkinson* (1998) 79 FCR 469 at 483-484 per Heerey J, with whom Lockhart J agreed at 471.

101 *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* unreported, Federal Court of Australia, 31 July 1997 per Northrop J.

102 Sundberg J. See *Wilkinson* (1998) 79 FCR 469 at 493.

103 *Wilkinson* (1998) 79 FCR 469 at 492 per Sundberg J.

the exercise of the judicial power. The nominated considerations were the following:

(a) The rights and obligations under review were not "within the province of administration"[104] but related to private rights as to property in respect of which the Tribunal could give a "binding and authoritative decision"[105];

(b) The complaints to the Tribunal were initiated by individuals against private bodies, not by or against government bodies[106];

(c) The Tribunal did not create new rights but adjudicated upon claims that rights conferred by law had been breached[107];

(d) The Tribunal's functions did not involve the application of broad policy considerations but the application of criteria ("fairness and reasonableness") which, although indeterminate, were objective and discoverable[108]; and

(e) The decision of the Tribunal could be enforced under the Supervision Act by an injunction and criminal penalties[109]. The suggestion that a decision of the Tribunal was liable to collateral attack in a court of law – and not therefore conclusive – was rejected[110].

71 The dissenting judge explored these *indicia* of judicial power but came to the opposite conclusion. He accepted that the Tribunal applied the law to existing facts and did not, by its determination, create new rights and obligations as between the trustee and the beneficiary[111] (and that the Tribunal's powers were not completely analogous to those of the Administrative Appeals Tribunal

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104 *Wilkinson* (1998) 79 FCR 469 at 484 per Heerey J.

105 *Wilkinson* (1998) 79 FCR 469 at 485 per Heerey J, referring to *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ (hereafter "*Huddart Parker*").

106 *Wilkinson* (1998) 79 FCR 469 at 485 per Heerey J.

107 *Wilkinson* (1998) 79 FCR 469 at 485 per Heerey J.

108 *Wilkinson* (1998) 79 FCR 469 at 486 per Heerey J.

109 *Wilkinson* (1998) 79 FCR 469 at 486 per Heerey J.

110 *Wilkinson* (1998) 79 FCR 469 at 486 per Heerey J.

111 *Wilkinson* (1998) 79 FCR 469 at 494 per Sundberg J.

("the AAT")[112]). However, he concluded that the essential point which deprived the Tribunal of the critical characteristic involved in the exercise of judicial power concerned the enforcement of its determinations. According to this opinion, the Complaints Act did not entitle the Tribunal to enforce its own decisions. It required that resort be had under the Supervision Act to the Federal Court or a Supreme Court. When such resort was had, it called forth an "independent exercise of judicial power by a court of competent jurisdiction"[113]. This feature, it was suggested, distinguished the present case from *Brandy*[114]. Because the decisions of the Tribunal lacked the essential element of enforceability, the Parliament had held back from conferring the judicial power. The resulting law did not, in the view of the dissenting judge, offend the requirements of Ch III.

Attack on the Tribunal: the arguments of the Trustees

72 Fairness to the arguments of the Trustees, and to the opinion of the majority of the Full Court, requires that I indicate the several ways in which the Trustees asserted that the Tribunal's function and powers offended the Constitution. Despite the amendment, after *Brandy,* to limit the grounds of complaint (and hence the functions of the Tribunal) to consideration of whether the decision "is or was unfair or unreasonable"[115], the Trustees submitted that the Tribunal was still required to adjudicate upon a complaint by reference to a pre-existing norm established by law. Once "unfairness" or "unreasonableness" was stated as a ground for complaint for the exercise by the Tribunal of "its determination-making power"[116], obligations were necessarily cast upon trustees to conform to that standard or face adverse determinations of the Tribunal. These might require trustees to reconsider their decisions with directions from the Tribunal or submit to the variation or setting aside of their decisions and substitution by a decision of the Tribunal

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112 Upheld as administrative in nature in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 584; see also *Wilkinson* (1998) 79 FCR 469 at 495-497 per Sundberg J.

113 *Wilkinson* (1998) 79 FCR 469 at 502 per Sundberg J.

114 (1995) 183 CLR 245.

115 Complaints Act, s 14(2).

116 Complaints Act, s 37(4).

itself[117]. The criteria might be expressed very generally. However, they were objective and ascertainable. They did not involve matters of pure policy[118].

73 Secondly, the Trustees submitted that, properly construed, it was the Complaints Act which created the rights of beneficiaries in superannuation funds and not the order of the Tribunal altering a pre-existing legal position[119]. In light of these two factors, the Trustees argued that the Tribunal was impermissibly engaging in a court-like function. Considerations relating to the character of the Tribunal's activities were relied upon to support these arguments. Thus, it was pointed out that the jurisdiction of the Tribunal was invoked by an individual complainant tendering his or her dispute for decision[120]. This was not a case where the non-judicial character of the body was indicated by the representative features of the proceedings. They looked like, and were (so it was argued), purely *inter partes* litigation concerning property rights conventionally reserved to courts, usually courts of equity.

74 The Trustees refuted the contention that the criteria of "unfairness" and "unreasonableness" were so imprecise as to involve nothing but policy[121]. They pointed out that courts themselves must often apply indeterminate standards no different in kind from those of "unfairness" or "unreasonableness" and are commonly involved in the exercise of discretionary decisions. For the Trustees, the point was that the Tribunal was not at large in a sea of policy. Rather, it was obliged, as a preliminary step to the exercise of its "determination-making power", to ascertain and identify the legal rights of the parties and then to consider whether, in cases involving an exercise of a discretion, the resulting decision "is or was unfair or unreasonable".

75 The Trustees also argued that the provision of an "appeal" on a point of law to the Federal Court, pursuant to s 46(1) of the Complaints Act, did not sufficiently

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117 Complaints Act, s 37(3).

118 Reliance was placed on *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191 (hereafter "*Precision Data*") and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360 per Gaudron J (hereafter "*Re Dingjan*").

119 Contrasting *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 464-465 and *Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 378.

120 Contrasting *Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 375 and *Precision Data* (1991) 173 CLR 167 at 190.

121 cf *Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 399; *Precision Data* (1991) 173 CLR 167 at 191; *Re Dingjan* (1995) 183 CLR 323 at 360-361 per Gaudron J. See also *Finch v Herald & Weekly Times Ltd* (1996) 65 IR 239 at 242-246.

insulate the Tribunal from an impermissible exercise of the judicial power. On the contrary, the Trustees submitted that the limitation of the "appeal" to a question of law, thereby excluding the review of factual determinations, left unrepaired the Tribunal's effective invasion of an important feature of judicial decision-making[122]. Despite the provisions of the *Federal Court of Australia Act* 1976 (Cth)[123], the Trustees argued that the nature of the jurisdiction conferred on the Federal Court by the Complaints Act[124] was truly appellate. By the Constitution, no true "appeal" can lie from a non-judicial body to a federal court[125].

76 When the apparent analogies to the legislation establishing the AAT were explored, the Trustees contested the supposed similarities. True, the Tribunal stands in the shoes of the primary decision-maker in reviewing a decision of a trustee, and is obliged to determine the issues of law which are inherent in the exercise of its jurisdiction, without thereby necessarily invading the judicial power[126]. True also, the "appeal" on a question of law to the Federal Court would, by statute, be heard in the original jurisdiction of that Court, just as in the case of the AAT[127]. But there, it was argued, the analogies broke down. The decisions committed to review by the AAT were ordinarily made by functionaries of the Executive Government or its emanations, whereas those of trustees of superannuation funds were made by private individuals acting wholly outside the continuum of governmental power[128]. The Trustees submitted that this factor lent colour to the character of the Tribunal's "determination-making power" and revealed it as involving the determination of private rights between private citizens rather than of aspects of public administration. A tribunal deciding such matters by reference to the criteria stated in the Complaints Act therefore took on the

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122 *Harris v Caladine* (1991) 172 CLR 84 at 164 per McHugh J.

123 Section 19(2); cf *McCaughey v The Commissioner of Stamp Duties* (1945) 46 SR (NSW) 192 at 207; *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283.

124 Complaints Act, s 46(1). The Trustees pointed to the distinction between appeals in which a question of law was *involved* (as in *Munro* (1926) 38 CLR 153 at 201) and an appeal "on" a question of law under s 46 of the Complaints Act (as in this case) as suggesting an attempt to confer judicial power.

125 See *Boilermakers' Case* (1956) 94 CLR 254 at 268-272; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 299-300.

126 cf *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 584-585.

127 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44.

128 *Munro* (1926) 38 CLR 153 at 177.

characteristics of a court and not those of an administrative body performing purely administrative functions[129].

77 The main thrust of the Trustees' attack on the Tribunal was directed to demonstrating that (contrary to the opinion of the dissenting judge in the Full Court) the decision of the Tribunal was directly enforceable and so enlisted an essential, or at least most common, attribute of the exercise of judicial power[130]. The Trustees' argument on this issue went this way: Once the Tribunal had made its determination, the Trustees were obliged to comply with it unless they had a lawful excuse not to do so[131]. Coercive reinforcement for the criminal liability attaching to the Supervision Act[132] was provided by other provisions of that Act contemplating investigation by the Commissioner[133], civil proceedings[134] and the grant of an injunction to require the trustee to give effect to a determination made by the Tribunal[135]. The Supervision Act and the Complaints Act were clearly intended to be read together. The effect of doing so was to afford a beneficiary who had succeeded before the Tribunal ample means to ensure immediate compliance by a trustee with the Tribunal's decision. Thus, although in form not directly enforceable, the determinations of the Tribunal were effectively so. That was sufficient to clothe the Tribunal with the most universal characteristic of a judicial body: the direct enforceability of its decisions.

Judicial power and the task of characterisation

78 Given that it is impossible to point to any essential or constant characteristic of the judicial power[136], the task upon which a court must embark, when responding to submissions such as the foregoing, is rarely, if ever, a straightforward one. The court must examine the features of the legislation impugned to draw from them those elements which appear to involve an impermissible conferral of judicial power on a non-judicial body. At the same

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129 *Brandy* (1995) 183 CLR 245 at 258; cf *R v Davison* (1954) 90 CLR 353 at 369.

130 *Brandy* (1995) 183 CLR 245 at 268-269.

131 Supervision Act, s 34 and *Superannuation Industry (Supervision) Regulations (Amendment)* 1994 (Cth), reg 13.17B.

132 Supervision Act, s 34(2).

133 Supervision Act, s 263(1).

134 Supervision Act, s 298.

135 Supervision Act, s 315.

136 *Brandy* (1995) 183 CLR 245 at 267.

time it must weigh those features which are neutral and which may exist in both courts and non-judicial tribunals. It must also weigh those which are peculiarly characteristic of administrative decision-making.

79 Because the Parliament, and those who draft federal legislation, are well aware of the problem presented by a long line of authority in this Court, it cannot be expected that legislation will again present the challenge of a stark attempt to confer on a non-judicial tribunal all of the features of a court. Most federal statutory tribunals have a number of features in common with the courts. These include the provision of a person independent of the parties reaching conclusions on the basis of the evidence and submissions followed by the rendering of a decision. Tribunals today operate amidst the plethora of modern administrative bodies which partake of some court-like characteristics, but also of other features by which the drafter has attempted to "steer clear of the judicial rocks". It cannot be the requirement of a decision-maker in such a case simply to list the features that do, and do not, partake of court-like functions and to add them up and then derive the resulting outcome.

80 To chart the territory marked off exclusively to the courts, it is necessary to have a conception not only of the essential features of the judicial power but also of the reasons why some matters may only be performed by courts. With the passage of time, the large expansion of public administration, the growth in the responsibilities and activities of government and the changing needs of a modern and complex society, some earlier decisions on the scope of judicial power need to be read with care. This is because they were written in a different world in which the functions of government were more limited and fewer citizens had the needs or means to obtain the kind of speedy, informal and inexpensive decision-making which modern tribunals can offer and which courts, typically, cannot.

81 The language of Ch III of the Constitution has remained relatively unchanged since 1901. The wisdom, particularly in a federation (indeed in any modern society), of separating the judicial power so that it "cannot be usurped or infringed by the executive or the legislature"[137] remains as true today as it was when the Constitution was adopted. The importance of maintaining the separation of the judicial power and protecting it from attempts to undermine or alter the constitutional scheme set up by Ch III[138], demands continuing vigilance on the part of the courts. Tenured and constitutionally protected judges in courts established by or under Ch III are likely to be in a stronger position to decide controversies involving powerful interests than tribunals where members are typically appointed

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137 *Liyanage v The Queen* [1967] 1 AC 259 at 289.

138 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 115 per McHugh J.

for short terms and subject to removal or non-reappointment if they upset such interests.

Inessential and essential features of judicial power

82 It is possible to cut away a large number of the debates in this appeal, concerned as many of them were with immaterial (or at least inessential) *indicia* of the conferral of judicial power. Thus, arguments as to the existence or absence of analogies with the AAT can, at best, only be persuasive. There is no single model or unique subject matter that must be demonstrated in order to avoid a constitutional dispute about the functions and powers of a new tribunal. In issue is not the extent to which the legislation diverges from a model which has been accepted as constitutionally valid[139] but whether the legislative scheme in question impermissibly vests a non-judicial tribunal with functions and powers which are judicial in character and so reserved to the courts.

83 Similarly, arguments about provisions for initiating proceedings in a tribunal, the extent to which the tribunal is involved in questions of policy and the manner in which its decisions may be reviewed in a court, can be no more than factors which add weight to a conclusion derived from the application of more critical criteria. This is because particular procedures and functions are frequently found both in courts and in non-court tribunals[140]. A function may be administrative or judicial, depending on the way in which it is to be exercised. Thus courts must frequently apply vague and indeterminate criteria which involve imprecise conclusions, moral judgments, evaluative assessments and discretionary considerations that are nonetheless proper to their functions as courts[141]. In a particular context the familiar criteria of "just and equitable" may pass muster for an adjudicative tribunal whilst a touchstone of "contrary to the public interest" may be judged inapt to judicial adjudication and more apt to lawmaking[142].

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139 The constitutional validity of the AAT was upheld in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577. It has been assumed in several proceedings in this Court: cf *Walker v Secretary, Department of Social Security (No 2)* (1997) 75 FCR 493 at 498; cf *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530; [1931] AC 275.

140 *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628; *Precision Data* (1991) 173 CLR 167 at 189.

141 *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J; cf *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317; *Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 376-377.

142 *Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 377.

84 The characterisation of a power as judicial cannot therefore depend only on the use of particular verbal formulae. It must also be derived from: (1) a consideration of what the tribunal in question is authorised to do; (2) whether its functions purport to deprive those affected of access to the courts for the resolution of connected legal controversies; and (3) to what extent the tribunal's decisions, once made, are directly enforceable, as the orders of courts typically are[143]. Nor is it conclusive that the tribunal which is impugned makes decisions affecting controversies concerned with the property of private citizens or outside the central functions of the Executive Government[144]. These can be characteristics of administrative bodies as well as of courts.

85 The interest of the Parliament in ensuring that proper standards are observed in the decisions of trustees affecting regulated superannuation funds appears to be based, principally, upon the huge sums constituted by the aggregate of such funds and their large significance for the financial well-being of the nation and those living within it[145]. Once it is accepted that a fund administered by trustees is a

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143 This is not a universal rule. The enforcement of some orders of a Court of Petty Sessions, undoubtedly exercising judicial power, required a warrant to be issued by a Justice of the Peace as an independent administrative act. See *R v Davison* (1954) 90 CLR 353 at 368; *Brandy* (1995) 183 CLR at 245 at 269.

144 See eg *Huddart Parker* (1909) 8 CLR 330 at 357; *Munro* (1926) 38 CLR 153 at 165, 177, 200, 212. Contrast these with the modern regulation of activities which, although private, have large public consequences: see *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815 at 835; cf *Victoria v Master Builders' Association* [1995] 2 VR 121 at 163.

145 The recent history of superannuation legislation requires qualification of the statement of Heerey J in *Wilkinson* (1998) 79 FCR 469 at 485 that superannuation operates in an "area of private law". The recent history of the industry is outlined in the report of the Australian Law Reform Commission, *Collective Investments: Superannuation*, Report No 59, (1992) at 6-16. Specific legislation providing federal regulation of superannuation may be traced to the *Occupational Superannuation Standards Act* 1987 (Cth). This followed the introduction of provisions in several industrial awards providing for compulsory employer contributions to superannuation for their employees. That Act provided for certain prudential requirements. This legislation was, in turn, followed by a series of laws enacted pursuant to a statement of the Federal Treasurer: *Security in Retirement – Planning for Tomorrow Today,* 30 June 1992. The introduction of a federal retirement incomes policy was effected by the *Superannuation Guarantee (Administration) Act* 1992 (Cth). That Act compels specified employers to provide minimum levels of superannuation contribution for specified employees and deemed employees. This law was supplemented by the *Superannuation Guarantee Charge Act* 1992 (Cth). The Complaints Act and the Supervision Act were introduced to ensure a

(Footnote continues on next page)

"regulated superannuation fund" within the legislation, the interest of the Parliament to provide for a measure of federal regulation is attracted. It would be a mistake to view the "continuum" of federal administrative power today as confined to the kinds of activities performed by government at the time of federation. The Constitution does not impose such rigid limitations.

86 When the legislation constituting the Tribunal in question in this appeal is examined, it does not, in my view, offend the Constitution in the manner complained of by the Trustees. This can be demonstrated by reference to three considerations. These are, first, the limited nature of the functions assigned to the Tribunal; secondly, the absence of any attempt to exclude the ordinary courts from the discharge of their functions in related controversies; and thirdly, the lack of direct enforceability of the Tribunal's orders[146].

Judicial power is not conferred on the Tribunal

87 *Nature of the Tribunal's functions:* As the reasons of the judges of the Full Court demonstrate[147], there are strong arguments for both sides as to the reconciliation of ss 14 and 37 of the Complaints Act. In the end, it may not help much, for constitutional purposes, to classify some of the Trustees' decisions as "discretionary" and others as "non-discretionary", as the judges of the Full Court did. A safer course is to recognise that, in terms, s 14(2) of the Complaints Act is not restricted to a "decision" of a particular character whether described as "discretionary" or otherwise. The sub-section affords a person the entitlement to make a complaint to the Tribunal about *any* decision of a trustee. But then, by s 37, the Tribunal is restricted in the response which it may give to such a complaint. Specifically, it must not do anything "that would be contrary to law, to the governing rules of the fund concerned" and, if relevant, to the terms of a contract of insurance. In effect, these restrictions require the Tribunal to form a view (necessarily not conclusive) about the requirements of the applicable law, including the meaning of the rules of the fund and of any relevant contract of

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comprehensive and effective prudential framework asserted to be necessary to protect superannuation savings and to promote a more stable and efficient superannuation industry in Australia. To facilitate participation in the scheme, a system of notice concerning compliance was introduced by the Supervision Act to afford eligibility to tax concessions under Pt IX of the *Income Tax Assessment Act*. Amendments concerned with superannuation were introduced at around the same time into other federal legislation including the *Bankruptcy Act* 1966 (Cth), the *Family Law Act* 1975 (Cth) and the *Social Security Act* 1991 (Cth).

146 cf *Brandy* (1995) 183 CLR 245.

147 Compare *Briffa v Hay* (1997) 75 FCR 428 with the views of all of the judges on this point in *Wilkinson* (1998) 79 FCR 469.

insurance. But it is not unusual for statutory tribunals to be obliged, in the performance of their functions, to make findings of fact and to apply rules of law[148]. Doing so involves no inherent invasion of the judicial power. It amounts to nothing more than the tribunal's complying, like every other individual and legal entity, with the law of the land.

88 Where an applicable legal rule imposes a duty on a trustee, or confers a right or privilege on a beneficiary, compliance with s 37(5) of the Complaints Act obliges the Tribunal to give effect to its understanding of that law. This is not because it deems a decision in accordance with the applicable law to be "fair" or "reasonable" as the Attorney-General suggested. Nor is it because the decision, which is otherwise within the trustee's jurisdiction, is somehow placed outside that jurisdiction by the limited powers which the Tribunal enjoys to disturb the decision. It is simply because, although the decision is reviewed pursuant to the complaint, the Tribunal is forbidden to do anything that would be contrary to law, to the governing rules of the fund concerned and to any contract of insurance that is relevant. Obviously, the occasions for the intervention of the Tribunal on the grounds of "unfairness, unreasonableness, or both"[149] may, as a practical matter, be confined to cases where the law, the rules of a fund or the terms of the contract of insurance do not yield a single result. The "unfairness" or "unreasonableness" which the Tribunal may address will thus arise where the exercise by a trustee of its powers involves an element of discretion, opinion or judgment. That alone will enliven the "determination-making power" of the Tribunal in a way that can be effective. The restriction of the grounds of complaint to present or past unfairness or unreasonableness matches the restrictions in ss 37(4) and (6) of the Complaints Act on the Tribunal's powers to interfere with a decision of a trustee.

89 Although the construction of the Complaints Act as it now stands is by no means certain, the better view is therefore that, as s 14(2) provides, each relevant "decision" may be the subject of complaint to the Tribunal on the ground that it "is or was unfair or unreasonable". But only in those cases where such complaint will give rise to relevant powers on the part of the Tribunal to grant relief, will the result be the substitution by the Tribunal of one of the determinations open to it[150]. Where, as in this case, the Tribunal concludes that the trustees enjoy a power involving an element of discretion, opinion or judgment, it is entitled to make a determination "setting aside the [trustees'] decision and substituting a decision for the decision so set aside"[151]. The new decision, which might have retrospective

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148 cf *Re Boulton; Ex parte Construction, Forestry, Mining and Energy Union* (1998) 73 ALJR 129.

149 Complaints Act, s 37(4).

150 Complaints Act, s 37(3).

151 Complaints Act, s 37(3)(d).

operation, will speak from the time specified in the determination. What is involved is not a determination that the trustees misapplied the law to the facts. Nor that they mistook their powers and obligations under the governing rules of the fund. Rather it is a determination by the Tribunal of its own opinion that the trustees' decision is, or was, unfair, unreasonable or both. It is the reaching of that opinion which authorises the Tribunal, conforming with s 37(5) of the Complaints Act, to exercise its own determination-making power and to substitute a fresh decision. The object of the determination is to effect the purpose of removing the unfairness and unreasonableness which the Tribunal has determined to exist[152].

90 Whatever may have been the position prior to the 1995 amendments, once the Complaints Act was altered to confine the powers of the Tribunal to issues of unfairness or unreasonableness, it was plain that the Tribunal's functions were not those normal to a court. Inevitably, the availability of a successful complaint to the Tribunal by reference to criteria such as "unfairness" and "unreasonableness" would have consequences. In many cases it would encourage decision-making on the part of trustees which was "fair" and "reasonable", so as to avoid the risk of a complaint to the Tribunal. So much would be a purpose of the legislation. But the criteria of "unfairness" and "unreasonableness" are so general and controversial that the trustees' assessment in a particular case might be quite different from that of the Tribunal whose determination alone would resolve the difference.

91 The applicable statutory norms are most imprecise. Until applied by the Tribunal in response to the case of a complaint which enlivens its powers, the position of the parties would be as the ordinary law provides. Specifically, no complaint would be open to a beneficiary under that law solely on the basis of any suggested unfairness or unreasonableness of a trustee's decision. The Complaints Act changed all that. But it did so by creating a tribunal with a power to make determinations. Its determinations do not declare or enforce the legal rights of the parties. They create new rights by force of the determination, albeit in the form of a decision which is then substituted for the decision of the trustees which is set aside. The functions of the Tribunal were accordingly those apt to a non-court body created for a limited purpose within the Executive Government. They involved no attempt to confer on that body functions confined to the judicial power of the Commonwealth and thus to a court. The first consideration should therefore be determined in favour of validity.

92 *Non-exclusion of the courts*: The Trustees next complained that effectively, and in law, a decision of the Tribunal would be conclusive as to the rights and obligations of the parties. Because such determinations were "binding and

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152 Complaints Act, s 37(4).

authoritative"[153] or "final and conclusive"[154] they assumed characteristics common to the orders of courts. They were thus an exercise of the judicial power[155].

93 There are several answers to these contentions. The first is, as the Attorney-General submitted, that there is nothing in the Complaints Act or the Supervision Act, or any other law, that purports to forbid a collateral attack on a decision of the Tribunal concerning the exercise of its determination-making power. In the Full Court, the majority[156], by reference to *R v Wicks*[157], a decision of the House of Lords, rejected the argument that a determination of the Tribunal was open to collateral attack by a person adversely affected by it. The majority held that it was no answer to the arguments on enforceability of the Tribunal's decisions to say that they might be attacked in related proceedings. A trustee faced with an adverse determination of the Tribunal could not ignore it without fear of sanction. So much may be accepted. However, for present purposes it is enough to note that the scheme of the legislation does not purport to exclude collateral attacks on the validity of a decision of the Tribunal. On the contrary, by expressly marking out an area of decision-making where the Tribunal is forbidden to enter, the Act invites judicial supervision should a suggestion be made that the Tribunal has exceeded its limited powers.

94 Whatever may be the law elsewhere, in Australia it is well established that administrative acts are open to collateral review by the courts. In a sense, this habit of mind is encouraged by the existence of constitutional review which renders the activities of all persons exercising governmental powers accountable to the requirements of the Constitution. In its consideration of collateral challenges to the decisions of the Tribunal, it does not appear that the Full Court had its attention drawn to the then recent decision of this Court in *Ousley v The Queen*[158]. Although this Court divided on other issues in that case, it was unanimously of the opinion that warrants issued by judges of the Supreme Court of Victoria, pursuant to s 4A

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153 *Huddart Parker* (1909) 8 CLR 330 at 357.

154 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 543; [1931] AC 275 at 296.

155 cf *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 199; *Brandy* (1995) 183 CLR 245 at 257, 269.

156 *Wilkinson* (1998) 79 FCR 469 at 486 per Heerey J.

157 [1998] AC 92. The case may be distinguished on the ground that the argument that the enforcement notice was invalid did not go to any element in the offence: see at 109, 117-119; cf *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 365 per Lord Diplock.

158 (1997) 192 CLR 69.

of the *Listening Devices Act* 1969 (Vic), involved administrative and not judicial acts. They were thus open to collateral review by a judge exercising judicial power and conducting a trial at which the evidence gathered, pursuant to the warrant, was tendered[159].

95 The mere fact that the determination of the Tribunal was purportedly substituted for the decision "so set aside"[160] (and hence that the Tribunal notionally made the decision of the trustees) would not render that determination immune from a challenge in a court of competent jurisdiction. Where a particular determination is challenged, it would not be the Tribunal but a court which decided the challenge, applying to all of the relevant facts the entire body of the applicable law. This would include the general law governing the duties of trustees, the powers to challenge their decisions, the requirements of the rules governing the fund and the terms of any relevant contract of insurance. But it would also include the modifications introduced by the Complaints Act and the Supervision Act, to the extent that they amended the general law and empowered the Tribunal, in limited and specified circumstances, to set aside a trustee's decision and to substitute its own[161].

96 The existence of the facility of collateral attack, although doubtless inconvenient, expensive and time-consuming, contradicts the Trustees' suggestion that the Complaints Act conferred on the Tribunal the powers finally and conclusively to determine a controversy between the parties before it. The second consideration should also be decided in favour of validity.

97 *Judicial controls on enforcement:* The final aspect of the scheme of the legislation which distinguishes this case from *Brandy* relates to the enforceability of the Tribunal's determinations. Here, I agree with the opinion of the dissenting judge in the Full Court[162].

98 The ability to carry a decision into effect has long been recognised as an important *indicium* of the conferral of the judicial power[163]. In many cases, this

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159 (1997) 192 CLR 69 at 79-80 per Toohey J; 87 per Gaudron J; 100 per McHugh J; 130-131 per Gummow J; 144-146 of my reasons.

160 Complaints Act, s 37(3)(d).

161 See also *Foley v Padley* (1984) 154 CLR 349; *Coco v The Queen* (1994) 179 CLR 427.

162 *Wilkinson* (1998) 79 FCR 469 at 497 per Sundberg J.

163 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 451-452; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 199-201; *R v Davison* (1954) 90 CLR 353 at 368.

has been the consideration regarded as most important. Sometimes the legislative scheme has failed because it is judged to be an attempt to confer upon a body, other than a court, decision-making functions which are immediately enforceable and effectively conclusive. This may be so even if there is an express legislative assertion that a determination is "not binding or conclusive"[164]. In *Brandy*, this Court made it plain that, in the event of a challenge, it would be necessary to examine the whole statutory scheme and to decide whether (whatever the mechanism adopted to give effect to the Tribunal's determination) it was not conclusive and binding without the facility of an independent exercise of the judicial power by a court of competent jurisdiction.

99 As was demonstrated in the dissenting opinion in the Full Court[165], although the scheme in the Supervision Act for the enforcement of standards (and specifically of determinations made by the Tribunal) is clearly intended to be effective and to give "teeth" to such determinations, provision is made in the Complaints Act for the interposition of a judicial decision before any of the enforcement machinery can be successfully invoked[166]. Thus, although it may be an offence for a trustee intentionally or recklessly to fail to comply with a determination of the Tribunal[167], such is only the case where a trustee's failure is shown to be "without lawful excuse"[168]. If the determination of the Tribunal were, as a matter of law, invalid, that would, without more, constitute a "lawful excuse" for failing to comply with it. Similarly, although a power exists for the Tribunal to report to the Commissioner any refusal or failure of a trustee to give effect to a determination made by the Tribunal[169], thereby initiating a possible investigation of the trustee's affairs by the Commissioner[170] and giving rise to possible prosecution for the offence of intentionally or recklessly refusing or failing to comply with a requirement of the Commissioner[171], again the offence envisaged does not exist where the court concludes that the trustee has a "reasonable excuse"

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164 See *Racial Discrimination Act* 1975 (Cth), s 25Z(2) considered in *Brandy* (1995) 183 CLR 245.

165 *Wilkinson* (1998) 79 FCR 469 at 498-502 per Sundberg J.

166 Complaints Act, s 20(1).

167 Supervision Act, s 34(2).

168 Superannuation Industry (Supervision) Regulations (Amendment) 1994 (Cth), reg 13.17B.

169 Supervision Act, s 263(1)(c).

170 Supervision Act, s 263(1).

171 Supervision Act, s 285.

for its actions. It certainly would do so if the determination in question were beyond the Tribunal's powers.

100 In an application under s 315(3) of the Supervision Act for an injunction requiring a trustee to give effect to a determination of the Tribunal, the applicant is obliged to prove the determination and the trustee's failure to give effect to it. Before any such order is made, it is necessary for the Federal Court to be satisfied of a breach of the Act. Any order made is then the Court's order, not that of the Tribunal. This, therefore, involves an "independent exercise of judicial power", ie the exercise of a judicial discretion as to whether an order should be made and if so in what terms[172]. Such provisions may be contrasted with the legislation found to be invalid in *Brandy* where nothing that the Federal Court decided gave the determination of the Commission the effect of a judicial order. This was done by the legislation itself operating upon the registration of the Commission's determination[173].

101 The element of conclusiveness is missing from the determination of this Tribunal. Naturally enough, in most cases, it might be expected that such determinations would be complied with. However, in the case of a contest, the necessity for an independent judicial decision saves the Tribunal's determinations from offending against the characteristics typical of a judicial order. This conclusion, when taken with those earlier stated concerning the nature of the Tribunal's powers and the availability of collateral attack upon its determinations, is sufficient to answer the Trustees' arguments. The third consideration is also decided in favour of validity. The judicial power of the Commonwealth has not been conferred upon the Tribunal.

Refusal of leave to an *amicus curiae*

102 Before departing from the appeal, it is necessary to remark upon a procedural ruling made at the commencement of the hearing. The Association of Superannuation Funds of Australia Limited ("the Association") applied for leave to make submissions to the Court as an *amicus curiae*. The Attorney-General raised no objection. The Trustees opposed it. By majority, leave was refused. I would have granted the application.

103 The power of this Court to grant such an application was not doubted[174]. The limits upon the exercise of the power are well known. They include the important

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172 *Brandy* (1995) 183 CLR 245 at 261.

173 cf *Brandy* (1995) 183 CLR 245 at 270.

174 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331; *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155

(Footnote continues on next page)

constraint that the time and cost involved in the intervention should not be disproportionate to the assistance which, it is anticipated, will be derived[175]. In many proceedings, especially in recent years, this Court has granted leave to governmental and non-governmental organisations to make submissions as *amici curiae* where their interests have suggested a capacity to provide submissions from a specialised viewpoint, an industry perspective or in the public interest[176]. Sometimes the submissions received have been confined to written material. In answer to my questions, after leave was refused in this case, the Trustees made it clear that they had no objection to resort being had to the Association's written submissions in so far as these dealt with issues of law. I have taken advantage of those submissions in that way.

104 I remain of the view which I expressed in *Levy v Victoria*[177]. This Court should adapt its procedures. It should particularly do so in constitutional cases and those where large issues of legal principle and legal policy are at stake. It should do this to ensure that its eventual opinions are informed by relevant submissions of law and by the provision of any relevant facts, not otherwise called to notice, which can be made available without procedural unfairness to a party[178]. According to the evidence in support of its application, the Association is the main industry body of the superannuation industry in Australia. It represents all

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CLR 513; cf, for the Federal Court of Australia, *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534.

175 *Levy v Victoria* (1997) 189 CLR 579 at 604-605, 650-652.

176 Recent cases include *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 where leave was granted to the Tasmanian Wilderness Society Inc; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 where leave was granted to the Australian Securities Commission; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 where leave was granted to various newspaper corporations; *Levy v Victoria* (1997) 189 CLR 579 where leave was granted to various media corporations; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841; 153 ALR 490 where leave was granted to 11 applicants including the Australian Film Commission; and *Garcia v National Australia Bank Ltd* (1998) 72 ALJR 1243; 155 ALR 614 where leave was granted to the Consumer Credit Legal Centre (NSW) Inc. See Kenny, "Interveners and Amici Curiae in the High Court", (1998) 20 *Adelaide Law Review* 159.

177 (1997) 189 CLR 579 at 651-652.

178 Mason, "Interveners and Amici Curiae in the High Court: A Comment", (1998) 20 *Adelaide Law Review* 173; Owens, "Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy", (1998) 20 *Adelaide Law Review* 193; Henderson, "Brandeis briefs and the proof of legislative facts in proceedings under the Human Rights Act 1998", [1998] *Public Law* 563 at 571.

segments of the industry. It has 593 constituent members. Their aggregate assets amount to approximately $290 billion. This is about 80% of the total superannuation funds under management in Australia. The Association is concerned with the standards of services provided to consumers of superannuation. It makes submissions to parliamentary inquiries. Necessarily, it has an intensive experience in the operation of the complex federal legislation enacted for the regulation of the superannuation industry.

105 With all respect to those of the contrary view, I regard the decision to exclude the submissions of such a body, when offered to this Court in an important case such as the present, as unwarranted. Constraints of cost and other inhibitions (as well as the Court's power to control the receipt, duration and mode of reception of such submissions and to impose conditions as to any additional costs incurred) protect the parties and the process from dangers of abuse. Once this Court became the final court of appeal for Australia and recognised that its function involved more than the declaration of indisputable, pre-ordained law, it was necessary to adapt the Court's procedures to permit assistance to be had in some cases from a wider range of interests than those conventionally received. This is a simple truth. It is reflected, in part, in the statutory intervention by the Law Officers[179] and by various statutory agencies[180]. It has not yet found full acceptance in the general procedures of this Court. But in due course it must.

106 The potential utility of such assistance is recognised by other ultimate courts[181]. Even if the practice in the United States of America is considered disharmonious with our legal tradition in this regard, the practice in England and Canada should not be. In the House of Lords, there is a developing trend towards receiving assistance from interveners and *amici curiae*, as in immigration cases[182]. Moreover, in Canada, interventions are allowed in all classes of case, including

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179 *Judiciary Act*, s 78A; see also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182; *Bropho v Western Australia* (1990) 171 CLR 1 at 8-9; *Northern Territory v Mengel* (1995) 185 CLR 307 at 315-322.

180 Corporations Law, s 1330; *Australian Securities Commission v Ampolex Ltd* (1995) 38 NSWLR 504; cf *Catto v Ampol Ltd* (1989) 16 NSWLR 342 at 347 and cases there cited.

181 cf *Mapp v Ohio* 367 US 643 (1961) (American Civil Liberties Union intervening) commented upon by Kenny, (1998) 20 *Adelaide Law Review* 159 at 168.

182 *R v Immigration Appeal Tribunal, ex parte Shah (United Nations High Commissioner for Refugees intervening)* [1999] 2 WLR 1015; [1999] 2 All ER 545. Lord Steyn noted ([1999] 2 WLR 1015 at 1028; [1999] 2 All ER 545 at 558) that "counsel for the UNHCR ... placed before the House all the relevant background materials and produced a valuable written review supplemented by helpful oral argument".

criminal[183], and are available to a broad range of interested persons[184]. The Supreme Court of Canada can also itself appoint an *amicus curiae* in special circumstances[185]. In *Reference Re Workers' Compensation Act, 1983 (NFLD) (Application to Intervene)*[186], Sopinka J summarised the two criteria for intervention: (1) the proposed intervener has "an interest" in the proceedings; and (2) the proposed intervener is able to make "submissions which will be useful and different from those of the other parties". The adoption of this approach has proved beneficial in Canada. In my view, this Court should, harmoniously with its own decisions, adopt a similar approach.

107 At present, the Court's practice may seem to an outsider to be unpredictable and inconsistent. In another constitutional challenge, on the day immediately following the refusal of the Association's application, the Court permitted, without demur, the intervention of a non-party employer interest whose only additional contribution was to reinforce the submissions of the appellant[187]. The intervener's submissions were useful in that case as providing a further perspective on the issues in the appeal from the point of view of an organisation with relevant interests, with the motivation and means to provide assistance to the Court and with the responsibility to realise the constraints which lay upon it. In the case of the Association, and in this appeal, each of those elements was, in my opinion, present.

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183 Leave to intervene is granted, exceptionally, in a criminal case where an important public issue is at stake: *Re Seaboyer and The Queen* (1987) 37 CCC (3d) 53; R v *Zundel* [1992] 2 SCR 731. Leave to intervene in criminal proceedings was refused to the Commonwealth in *Papakosmas v The Queen* (No S139 of 1998), transcript of proceedings, 5 March 1999, but allowed to several governmental and Aboriginal interests in *Yanner v Eaton* (No B52 of 1998), transcript of proceedings, 4 May 1999.

184 Intervention in the Supreme Court of Canada is governed by Rule 18 of the *Rules of the Supreme Court of Canada*.

185 Rule 13 of the *Rules of the Supreme Court of Canada*; applied in *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854. See further in Crane and Brown, *Supreme Court of Canada Practice 1998* (1997).

186 [1989] 2 SCR 335 at 339.

187 Senior counsel was given leave to appear for Australian Postal Corporation ("APC") intervening in the interests of Telstra Corporation Ltd ("Telstra") in a challenge to the application of State workers' compensation law to Telstra employees. Telstra and APC now conduct activities which were formerly performed by the Postmaster-General. See *Telstra Corporation Ltd v Worthing* (1999) 73 ALJR 565; 161 ALR 489.

108 Moreover, when the written submissions of the Association are examined, they reveal precisely the kind of assistance which a responsible body with large interests may provide but which the parties may overlook or neglect. The submissions collect publicly available legal materials, most notably those relevant to the scheme of the interconnected superannuation legislation. With all respect to them, the Attorney-General and the Trustees conducted their arguments in the appeal in a way that seemed to be narrowly focussed and controlled by the issues which had been contested in the Federal Court and referred to in that Court's reasons. Their arguments were thus addressed to the details of the relationship between ss 14 and 37 of the Complaints Act and the enforcement and conclusiveness of the orders of the Tribunal. Yet, for constitutional elucidation, such questions must be approached by this (and any other) Court with a broader appreciation of the context and operation of the laws in question. This, with respect, the parties' submissions failed to give.

109 In my view, the Association ought to have been permitted to provide that assistance to the Court, as it sought, as *amicus curiae*. At the least, this Court ought to have received the Association's written submission, excising or disregarding any factual materials that raised contested issues not ventilated in the courts below. Instead, the application was simply refused. Against that ruling, I respectfully dissent.

Orders

110 In the manner in which the proceedings have gone forward, the non-constitutional points raised by the Trustees in their "appeal" to the Federal Court have remained in abeyance. It was common ground that, in the event that the constitutional challenge were to fail, the proceedings would have to be remitted to the Federal Court so that the outstanding issues could be determined. That is what should now occur.

111 Although I would not myself have condescended to revise the form of the question stated for answer in the Federal Court, I do not feel sufficiently strongly about this to differ from the joint reasons. I therefore agree in the orders which are there proposed.