Further, Menzies J. indicated that if section 12(1) of the Act stood by itself, without the support of the later provisions, it would have been necessary to determine whether it would suffice to support the authority conferred upon the Minister by section 38 of the Ordinance.

His Honour indicated that if he had to decide this point, he would probably hold that if section 12(1) "constitutes a plenary grant of legislative power, it would do so, but otherwise it would not".[20] The extent of the authority given to the Governor-General would tend to indicate that his power was plenary.[21] In furtherance of this point, it may be open to a court to hold that, despite the fact that the Governor-General is not a representative of the people, as he performs the functions of a legislative body in the Australian Capital Territory, he stands in the same position *vis-à-vis* the Parliament as a Colonial Parliament does *vis-à-vis* the Imperial Parliament; that is, a Colonial Parliament is not a delegate of the Imperial Parliament, but within the authority conferred, has power as plenary and ample as that of the Imperial Parliament.[22]

J. D. McMILLAN

THE QUEEN v. TRADE PRACTICES TRIBUNAL; EX PARTE TASMANIAN BREWERIES PTY LTD[1]

Constitutional Law — Judicial power of the Commonwealth Trade Practices Tribunal — Whether exercising judicial power.

The question that arose in this case was whether the powers conferred upon the Trade Practices Tribunal by Part VI of the Trade Practices Act 1965-1967 were within the concept of the judicial power of the Commonwealth.

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[20] 44 A.L.J.R. 211, 216C.

[21] Section 12(1) of the Act gave to the Governor-General the power to "make Ordinances having the force of law in the Territory".

In *The Queen* v. *Lampe and Others; ex parte Maddalozzo* (*supra*), the Supreme Court of the Northern Territory upheld as being a plenary grant, a grant of legislative authority to the Legislative Council of the Northern Territory which was of virtually the same extent as the grant to the Governor-General at present under consideration, yet which was expressed differently: "for the peace order and good government of the Territory".

Section 12(1) of the Act has recently been amended, to establish uniformity with the grants of power given to other legislative bodies in Australia: viz. "for the peace order and good government of the Territory"; Seat of Government (Administration) Act 1970, section 3.

[22] See *Cobb & Co. Ltd* v. *Kropp* (1966) 40 A.L.J.R. 177 and Kitto J.'s comment on that case—44 A.L.J.R. 211, 214B; *The Queen* v. *Burrah* (1878) 3 App. Cas. 889, *Hodge* v. *The Queen* (1883) 9 App. Cas. 117, and *Powell* v. *Apollo Candle Co. Ltd* (1885) 10 App. Cas. 282.

[1] [1970] A.L.R. 449; (1970) 44 A.L.J.R. 126. High Court of Australia; McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

The narrowness of the issue had resulted, of course, from the response by Tasmania to the invitation for complementary State legislation to apply the provisions of the Act to matters within the legislative powers of the Parliament of a State. This response took the form of a referral by Tasmania of its "trade practices power" to the Commonwealth by the Commonwealth Powers (Trade Practices) Act 1966 (Tasmania) and was followed by the Trade Practices Act 1967 (Commonwealth) which dealt with Tasmanian trade practices and inserted section 7A in the principal Act.

On 28 January 1969, the Commissioner had lodged with the Registrar of Trade Practices a document alleging that Tasmanian Breweries, being in a dominant position in the supply of draught beer, had taken advantage of that position. This constituted monopolisation[2] and, as such, was an examinable practice.[3] Proceedings[4] before the Tribunal had commenced when, on 6 May 1969, Menzies J., on application by Tasmanian Breweries, made an order nisi for a writ of prohibition. The return of the order nisi was considered by the Full High Court from 4 November to 7 November 1969.

Members of the Trade Practices Tribunal are to be appointed for a period not exceeding seven years[5] and there is also provision for the appointment of acting members.[6] Yet the law has long been settled that for a federal body to exercise the judicial power of the Commonwealth, it must be constituted in a manner fulfilling the requirements of Chapter III of the Constitution, which include conferring life tenure on the members of the body.[7] Furthermore, the *Boilermakers'* case[8] had decided that both judicial and non-judicial functions cannot be combined in the one tribunal.

In support of the contention that the Act purported to confer the judicial power of the Commonwealth upon the Tribunal, the prosecutor relied on a number of arguments:

1. The finding by the Tribunal required it to determine questions of law and fact and this finding, made conclusive by section 98, is challengeable only by means of the prerogative writs of the High Court.

2. The criteria to which the Tribunal had to have regard in deciding under section 50 whether a restriction or practice was contrary to the public interest involved the Tribunal in the execution of a judicial function.

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[2] S. 37(1.) Trade Practices Act 1965-1971 hereinafter Trade Practices Act.

[3] *Id.*, s. 36(2.).

[4] S. 47(2.).

[5] *Id.*, s. 11(1.) provides that, subject to Part II, "a member holds office for such period, not exceeding seven years, as is specified in the instrument of his appointment, but is eligible for re-appointment".

[6] *Id.*, s. 13.

[7] *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd* (1918) 25 C.L.R. 434.

[8] (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).

3. The orders which the Tribunal was empowered to make under sections 52 and 54 were similar to injunctions.[9]

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[9] Among the provisions of the Trade Practices Act of particular importance in this litigation were—

—s. 49 which provides that if, in proceedings under s. 47, the Tribunal, after such enquiry as it considers appropriate, "is satisfied that an examinable agreement exists or has existed or an examinable practice has been, is being or is proposed to be, engaged in, shall make a determination by which it—

(a) records its findings as to those matters, including its findings as to the parties to, and terms of, the agreement, or the particulars of the examinable practice; and

(b) determines, in accordance with its opinion, whether the relevant restrictions to which the proceedings relate are contrary to the public interest or, as the case may require, whether the examinable practice is contrary to the public interest."

By virtue of s. 49(2.), where the Tribunal makes a determination, it shall state and record the reasons for its opinion.

—s. 50 which sets out the principle which the Tribunal is to take as the basis of its consideration (*viz.* "that the preservation and encouragement of competition are desirable in the public interest").

—s. 51 which provides—

"(1.) Where the Tribunal determines that a restriction accepted under an examinable agreement is contrary to the public interest, the agreement (if in force) becomes, upon the date of the determination, unenforceable as regards observance of the restriction on and after that date.

(2.) Where the Tribunal determines that a practice is contrary to the public interest and finds that the practice is provided for by an agreement, the agreement (if in force) becomes, upon the date of the determination, unenforceable as regards engaging in the practice on and after that date.

(3.) Where the Tribunal determines that a restriction or practice is contrary to the public interest, a transaction entered into, whether before or after the making of the determination, in pursuance of the restriction or in accordance with the practice is not illegal or unenforceable by reason only of the making of that determination."

—s. 52 which empowers the Tribunal to make certain orders in consequence of its determinations including, where the Tribunal determines that a restriction accepted under an examinable agreement is contrary to the public interest, "such orders as it thinks proper for restraining all or any of the parties to the agreement from—

(a) giving effect to, or enforcing or purporting to enforce, the agreement in respect of that restriction or any restriction to the like effect; or

(b) entering into any other agreement (whether with the same parties or with other parties) under which any restriction to the like effect is accepted."

By virtue of sub.-s. (5.), an order restraining a person from entering into an agreement of a specified description shall, unless the contrary intention appears, "be deemed to be expressed, and to operate, also to restrain that person from giving effect to, enforcing or purporting to enforce—

(a) an agreement entered into by that person in contravention of the order; or

(b) an agreement entered into by that person after the commencement of the proceedings and before the making of the order, being an agreement of the specified description,

in respect of any matter by reason of which the agreement is of the specified description."

Against this, the respondent advanced these arguments:

1. A determination by the Tribunal that an agreement is an examinable agreement has, of itself, no consequences; also an order under section 52 operated only *in futuro*.

2. The discretion exercised by the Tribunal in deciding whether a restriction or practice was contrary to the public interest involved considerations of economic and commercial policy and not judicial standards.

3. The composition and procedure prescribed for the Tribunal did not suggest a judicial body.

Only Menzies J. was prepared to hold that the Act involved the Tribunal in the exercise of judicial power as he considered that a judicial process with legal consequences was an essential part of the proceedings before the Tribunal. He was not satisfied, however, that the making of a restraining order was an exercise of judicial power.

The remaining members of the Court were agreed that the powers conferred on the Tribunal were not within the concept of judicial power. The approaches they adopted differed to some extent and ranged over the various criteria and tests developed over the years as indications that a body is exercising judicial power.

Definitions of Judicial Power

Only Windeyer J. seemed to be prepared to attempt a definition of "judicial power of the Commonwealth" which he suggested "predicates not merely a capacity for adjudication, but the authoritative character, the binding consequences and the indirectly coercive effect of adjudication by a court".[10] He referred also to the classic statement of Griffith C.J. in *Huddart Parker & Co. Pty Ltd* v. *Moorehead*[11] but made it clear that the statement was of the "broad features" of the judicial power and drew attention to observations of the Privy Council[12] emphasising that the presence or absence of many features of judicial power could not be regarded as conclusive in itself.[13]

Kitto J., who regarded an exhaustive definition of judicial power as impossible to frame[14] adopted the same basic approach as had Windeyer J. to the statement of Griffith C.J.[15] referred to above.

Opinions have varied on the features of the statement of Griffith C.J. on which emphasis should be placed. In *The Queen* v. *Davison*,[16]

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[10] [1970] A.L.R. 449, 463.

[11] (1909) 8 C.L.R. 330, 357.

[12] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd* [1949] A.C. 134, 149; *Shell Co. of Australia Ltd* v. *Federal Commissioner of Taxation* [1931] A.L.R. 1, 6.

[13] [1970] A.L.R. 449, 466-467.

[14] *Id.*, 451.

[15] *Id.*, 452.

[16] (1954) 90 C.L.R. 353.

Dixon C.J. saw the essential element as a controversy between the parties, while in *Rola Co. (Aust.) Pty Ltd* v. *Commonwealth*,[17] Latham C.J. had seen it as the power of enforcement.

Definitions of judicial power are consequently unlikely to be decisive in deciding whether a body is exercising such a power.

A Determination of the Rights and Duties of the Parties

In applying this test of the presence of judicial power, two aspects present themselves: the first is the nature of the issue between the parties; the second is the binding effect of the determination made by the body in question.

McTiernan J., while seeing that the mandate given to the Tribunal involved adjudication, regarded this as not necessarily inconsistent with true executive or administrative action and was satisfied that the Act did not assign jurisdiction to the Tribunal in any "matter" within the meaning of Chapter III of the Constitution.[18] In reaching this position, McTiernan J. referred to the joint judgment in *Re Judiciary Act 1903-1920 and Re Navigation Act 1912-1920*[19] which decided that "there can be no matter within the meaning of the section [section 76] unless there is some immediate right, duty or liability to be established by the determination of the Court".[20]

The approach adopted by Kitto J. was that the Tribunal was not involved in an adjudication in the proper sense of the word.[21] In reaching this opinion, his Honour pointed out that the concept of the judicial function is inseparably bound up with the idea of a suit between parties and was able to distinguish the proceedings before the Tribunal, first, by the absence of a decision, settling for the future the existence of a right or obligation and, secondly, by the role of the parties in the proceedings.[22]

Windeyer J. agreed with Kitto J. that the adjudication was not in a dispute between parties[23] and in agreeing with McTiernan J. that an adjudication was involved, he considered that this could be an incidental to an administrative task and emphasised that the judicial power is concerned with existing rights.[24] After pointing out the distinction between legislative power and judicial power and admitting that the proceedings involved the Tribunal in deciding both questions of law and fact, Windeyer J. concluded that the exercise of judicial power

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[17] (1944) 69 C.L.R. 185.
[18] [1970] A.L.R. 449, 450.
[19] (1921) 29 C.L.R. 257.
[20] *Id.*, 265.
[21] [1970] A.L.R. 449, 452.
[22] *Id.*, 452-453.
[23] *Id.*, 471.
[24] *Id.*, 467-468.

required more than an adjudication. Here His Honour saw the adjudication as a preliminary matter to the exercise by the Tribunal of a quasi-legislative function.[25]

Similarly, Walsh J. regarded the conferring upon the Tribunal of authority to find facts and make decisions of law as not conclusive. In fact, he could find no single feature or element in the functions of the Tribunal which was conclusive.[26] He regarded, as a strong indication against attributing to the adjudication the character of an exercise of judicial power, its place as a preliminary matter to a further investigation which was not of a judicial character.[27] Nor did he regard the Tribunal as engaged in the determination of existing rights and he agreed with Windeyer J. that a determination by the Tribunal was not the exercise of a judicial function but the carrying out of a quasi-legislative or administrative function.[28]

Owen J. did not consider that the power of the Tribunal to determine jurisdictional questions of fact indicated any intention to confer judicial power.[29]

On the other hand, Menzies J. had no doubt that a determination acted to the legal detriment of the parties to the agreement or practice.[30] He conceded that this, in itself, was insufficient to conclude that the power exercised was judicial power and proceeded to examine the steps involved in a determination that an examinable agreement existed. He saw this as requiring the application of judicial standards, the construction of statutes, findings of fact, application of the Act—steps which, if taken by a Court, would be clearly judicial.[31]

A further and probably decisive factor so far as Menzies J. was concerned was that the determination was made unchallengeable and that, in subsequent proceedings for contempt, the Industrial Court would be bound by the Tribunal's finding on the question of law. Such a finding by the Tribunal that an examinable agreement exists, whether right or wrong, gave the Tribunal, said Menzies J., power to make a determination and this capacity so to decide, his Honour pointed out, was indicative of judicial power.[32] Menzies J. would not agree that a determination of the Tribunal had no legal consequences and, while agreeing that the determination and enforcement of existing rights and liabilities was the simplest form of the exercise of judicial power, did not regard this as decisive in itself. His Honour's conclusion was that a judicial process had been prescribed as an essential

[25] *Id.*, 469, 472.
[26] *Id.*, 478, 480.
[27] *Id.*, 478.
[28] *Id.*, 480, 482.
[29] *Id.*, 475-476.
[30] *Id.*, 458.
[31] *Id.*, 458-459.
[32] *Id.*, 460.

part of the proceedings, that this involved a decision with legal consequences and, consequently, the Tribunal was exercising judicial power.[33]

While Menzies J. relied, to quite an extent, on the findings of the Tribunal being unchallengeable except in the High Court and Walsh J. conceded the force of the argument and the significance of the protection against challenge, the latter did not regard this factor as decisive and considered that the availability of the prerogative writs could not be regarded as of no significance. He pointed out that the opinion reached by the Tribunal had to be such as could be formed by a reasonable man who correctly understands the law and that the consequences which attached to a determination were prospective.[34] Kitto J. saw the effect of the determination of the Tribunal, the making of its "findings" (as section 49 calls them), in the following light—

> It answers only the question whether the Tribunal is in fact so satisfied—and does not answer even that question conclusively, for if the Tribunal were to record that it was so satisfied when in fact it was not, the next step which the Tribunal is authorised to take only if it is so satisfied, could be set aside by this Court in exercise of the jurisdictions which s. 102(2) acknowledges.[35]

Windeyer J. considered that the Tribunal's decision that there was an examinable agreement was itself examinable and that prohibition could issue if there was no evidence which could reasonably have led to that decision.[36]

Another feature of the effect of the Tribunal's determination was the view expressed by McTiernan and Kitto JJ. that it was merely the factum on which the operation of section 51 depended.[37]

Thus, only Menzies J. could see the nature of the proceedings and the consequences flowing from the determination made as a result of those proceedings as indicative of the exercise of judicial power. However, limitations to the conclusiveness of the Tribunal's finding are themselves so limited that they may permit an argument against the validity of the Trade Practices Act based on the grounds that the Act purports to confer on the Tribunal a power to decide conclusively whether a matter is within the constitutional power of the Commonwealth.[38]

In *Rola Co. (Aust.) Pty Ltd* v. *Commonwealth*[39] Williams J., with whom Rich J. agreed, considered that to remit any of the elements involved in the determination of a controversy to a tribunal which is

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[33] *Id.*, 461-462.
[34] *Id.*, 478 *et seq.*
[35] *Id.*, 453.
[36] *Id.*, 469.
[37] *Id.*, 450, 454.
[38] Cf. *Australian Communist Party* v. *Commonwealth* (1951) 83 C.L.R. 1.
[39] (1944) 69 C.L.R. 185.

not a court is an infringement of the judicial power. Also, the judgment of Latham C.J. in that case carries the implication that an administrative tribunal cannot conclusively determine a question of law. Further, *Deputy Commissioner of Taxation for N.S.W.* v. *Brown*[40] can also be regarded as authority for the same proposition where there is a controversy about existing rights and duties.

Here, however, there was also the somewhat fine distinction, explained earlier, that the determination was not in relation to a controversy between parties.

Type and Degree of Discretionary Powers

The prosecutor had argued that the criteria to which the Tribunal was required to have regard by section 50 in determining whether a restriction or practice was contrary to the public interest were judicial standards whereas the respondent contended that they involved considerations of economic and commercial policy.

The Court agreed with the latter view. Kitto J. saw the question as "essentially non-justiciable . . . does not depend upon the application of any ascertained criterion"; Menzies J. regarded it as requiring "no more than the application of an administrative discretion for which guidelines are provided"; Windeyer J. referred to American authority that the power to decide according to the public interest was not judicial power; Walsh J. saw this stage of the proceedings of "such a character that no exercise of the judicial power of the Commonwealth is involved"; and Owen J. referred to "questions of general economic policy to which regard is to be had".[41]

Thus, other than McTiernan J., who expressed no opinion on this point, there was general agreement that the lack of precision in the criteria provided by section 50 did not indicate an intention to confer judicial power on the Tribunal.

In *Peacock* v. *Newtown etc. Building Society*[42] the conferring on courts of a discretion to vary the existing rights of parties was regarded as not incompatible with judicial power. However, in *The Queen* v. *Spicer; Ex parte Waterside Workers' Federation of Australia*[43] it was held that the discretionary power must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards. There can be no real argument about the decision that here the criteria "needs and interest of consumers, employees, producers et cetera", "promotion of new enterprises", "full and efficient use and distribution of labour, capital, materials, et cetera" fall on the non-judicial side of the dividing line.

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[40] (1958) 100 C.L.R. 32.
[41] [1970] A.L.R. 449, 453-454, 459, 477, 476.
[42] (1943) 67 C.L.R. 25.
[43] (1957) 100 C.L.R. 312.

Powers of Enforcement

One of the arguments put forward by the prosecutor was in reference to the orders which the Tribunal was empowered to make by sections 52 and 54 to restrain persons giving effect to restrictions which it decides are contrary to the public interest; this provision, it was contended, enabled the Tribunal to enforce its orders and determinations.

Owen and Walsh JJ. agreed that these provisions did not amount to a power of enforcement;[44] so did Menzies J. All were agreed that the absence of a power of enforcement, although indicative that judicial power may also be absent, was not decisive in itself.[45]

Kitto J. regarded an order made under section 52 or section 54 as in direct contrast to an injunction granted by a court as a means of enforcing obligations that have been established by adjudication. This was because such an order restrained future conduct not as being in breach of ascertained obligations but as being in conformity with them. The distinction his Honour draws is rather fine; an injunction could also restrain conduct which was in conformity with contractual obligations.

The conferring on a body of a power to enforce its own orders is normally regarded as the most important single indication of an intention by the legislature to confer judicial power[46] and its absence here was regarded by Owen J. as a strong indication that judicial power was not intended to be conferred.[47] The use of this test to determine the intention of the legislature might suggest that a decision whether or not judicial power is being exercised may depend more on the legislative scheme followed by the draftsman rather than the practical application of the legislation.

Historical Context and Legislative Intention

Where the nature of powers is such that they could be exercised in the course of a judicial function or by a quasi-legislative or administrative act, the historical context or the legislative intention may indicate whether judicial power has been conferred.[48]

Here the historical context was of no assistance and this was adverted to by Kitto and Menzies JJ.[49] So far as the legislative intention was concerned, the prosecutor had relied upon the fact that the Tribunal had many of the trappings of a court. On the other hand the respondent had argued that the composition and procedure prescribed for the Tribunal did not suggest a judicial body.

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[44] [1970] A.L.R. 449, 476, 478.

[45] *Id.*, 476, 478, 461.

[46] The *Boilermakers'* case (1957) 95 C.L.R. 529; *Alexander's* case (1918) 25 C.L.R. 434; *Rola Co. (Aust.) Pty Ltd* v. *Commonwealth* (1944) 69 C.L.R. 185.

[47] [1970] A.L.R. 449, 476.

[48] *The Queen* v. *Davison* (1954) 90 C.L.R. 353.

[49] [1970] A.L.R. 449, 451, 461.

The answer given by Menzies J. to the respondent's argument did not deny that the Parliament had clearly enough intended the Tribunal to be something other than a judicial tribunal but emphasised that a non-judicial tribunal cannot be given power to make decisions that are judicial.[50] Thus Menzies J. was more concerned with what had resulted rather than what had been intended.

Owen and Walsh JJ. considered that the qualifications required for appointment as a member of the Tribunal suggested that it was not the intention of the Parliament to create a Tribunal with judicial power.[51] Walsh J. also referred to the constitution of the Tribunal, while McTiernan J. observed that there had been no attempt by the Parliament to confer judicial power.[52]

Conclusion

The absence of any decisive touchstone for the presence of judicial power in a tribunal or body has had the effect that the draftsman's best efforts to frame his legislation so as to exclude the implication of judicial power being conferred may from time to time still be unsuccessful. Yet, the machinery of modern government can often best be served by informal tribunals rather than by federal courts.

Consequently, a new administrative tribunal may first have to overcome an initial challenge to its authority from an assertion that it is exercising the judicial power of the Commonwealth before undertaking the functions conferred on it by the legislature.

K. M. CROTTY

[50] *Id.*, 461.
[51] *Id.*, 476, 477.
[52] *Id.*, 450.