# THE SEPARATION OF POWERS AND THE EXERCISE OF ANCILLARY POWERS THROUGH THE SUPERVISION OF THE COMMONWEALTH EXECUTIVE

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[*The separation of powers doctrine, as embodied in the Australian Constitution, vests different governmental functions in separate branches of government. In this article, the author discusses the exercise of incidental, ancillary power by the various branches of government vested with their respective principal power. In this context, the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act are examined. The author submits that in so far as the Administrative Appeals Tribunal Act attempts to vest judicial power in an administrative body, it is* ultra vires *because judicial power will never be incidental to the making of an administrative decision. It is further submitted that the provisions of the Administrative Decisions (Judicial Review) Act vesting ancillary executive power in the judiciary are valid, by parity of reasoning with High Court decisions upholding the incidental exercise of legislative power when ancillary to the principal judicial power.*]

This article will examine the implications of the doctrine of separation of powers for the operation of the legislative scheme devised to supervise the Commonwealth executive. The legislation examined, but only in the context of the doctrine, will be the Administrative Appeals Tribunal Act 1975 (Cth) and the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereinafter the Review Act).[1]

The article will be presented in five parts. The first part will compare the executive power with the judicial power; the second part will briefly allude to the distinction between the executive power and the legislative power; the third part will examine the relevant provisions of the Administrative Appeals Tribunal Act in the context of the doctrine of separation of powers; the fourth part will similarly deal with the relevant provisions of the Review Act; and the fifth part will conclude the article.

## 1. THE EXECUTIVE POWER AND THE JUDICIAL POWER

In the Constitution of the Commonwealth of Australia it is necessary to distinguish between judicial power and the narrower concept of the judicial power of the Commonwealth. In the case of *In Re Judiciary and Navigation Acts*[2] (hereinafter *In Re Judiciary*) the High Court ruled that although the

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[1] The Ombudsman Act 1976 (Cth) will not be examined because none of its provisions seems to raise any issues concerning the doctrine.

[2] (1921) 29 C.L.R. 257.

giving of an advisory opinion by a court of law was clearly a judicial function,[3] such a function was nevertheless not a part of the judicial power of the Commonwealth.[4] The Court in *In Re Judiciary* was concerned with the original jurisdiction of federal courts, and it held that such jurisdiction was exhaustively and exclusively conferred by Chapter III of the Commonwealth Constitution.[5] The Court held that Chapter III of the Constitution confined the federal jurisdiction to the determination of a 'matter'[6] and that a matter therein was, 'some immediate right, duty or liability to be established by the determination of the Court'.[7] The ruling in *In Re Judiciary* means that if a power is not judicial in character then such a power cannot be conferred on a federal court. However, even if a power is judicial, the further question has to be raised as to whether such a judicial power falls within the ambit of Chapter III of the Constitution.[8]

The definition of 'matter' given by the High Court would seem to exclude from the federal jurisdiction any alteration of, as distinct from an adjudication upon, a litigant's rights, duties or liabilities. The definition would also seem to exclude from this jurisdiction the power to apply to facts, criteria of an unspecific nature in purported determination of a litigant's rights, duties or liabilities. The alteration of a legal situation appears to be quintessentially legislative in character, whereas the exercise of wide discretionary powers permitted by the application of unspecific criteria (as contradistinguished from the complete absence of criteria — which is an aspect of legislative power) would appear to be illustrative of the executive function. It would appear that, in terms of the ambit of discretionary power exercisable by an authority, the largest measure of such power is given to the legislative authority, and the smallest to the judicial authority, with the executive authority falling into the intermediate position. Because the executive authority exists to execute the law, it would seem that the executive, conceptually, shares with the judiciary the same incompetence to alter the law. As a matter of logical sequence, it would appear to be unexceptionable to suggest that the legislature first exacts the law, which the executive would then attempt to implement pursuant to an assumption which it has to make about the meaning of the enacted law. Finally, the judiciary would determine whether or not the executive's attempt to implement the law was correct. In determining this question, one of the issues which the judiciary must decide is whether or not the assumption made by the executive about the meaning of the enacted law was correct.

[3] *Ibid.* 264.
[4] *Ibid.* 265-7.
[5] *Ibid.* 265, 267.
[6] *Ibid.* 266.
[7] *Ibid.* 265.
[8] *Ibid.* 264.

A useful starting point from which to compare the judicial power with the executive or administrative[9] power is the High Court decision of *New South Wales v. The Commonwealth*.[10] One of the questions in this case was whether or not the Inter-State Commission was constitutionally empowered to grant injunctions. The Commonwealth contended that the Commission was a properly constituted court because of the presence of the phrase 'powers of adjudication' in section 101 of the Constitution, and the reference in section 73(iii) thereof to appeals on questions of law from the Commission to the High Court.[11] A majority[12] of the Court rejected this contention. Griffith C.J., pointed out that section 103 of the Constitution precluded the Inter-State Commissioners from being judges in terms of section 72 thereof. The Inter-State Commission could not, therefore, be a federal court within the meaning of section 72. To the argument that the Commission was a federal court outside section 72, Griffith C.J., riposted that:

> [T]he provisions of sec. 71 are complete and exclusive, and there cannot be a third class of Courts which are neither federal Courts, nor State Courts invested with federal jurisdiction.[13]

Rejecting the argument that the Commission was a court because of the provision in section 73(iii) for an appeal from it to the High Court on a question of law,[14] Griffith C.J., commented that this provision simply meant that the Commission might have to deal with mixed questions of law and fact, and that in so far as the determination of fact embodied suppositions of law there was a right of appeal on questions of law to the High Court.[15] In any event, the circumstance that it was necessary to expressly confer this right of appeal indicated that the Commission was clearly not a federal court, from whose decisions another part of section 73 of the Constitution already provided a right of appeal to the appellate jurisdiction of the High Court.[16]

Answering the contention that the reference in section 101 of the Constitution to the Commission's, 'powers of adjudication' denoted that the Commission could be made a court, Griffith C.J., observed that it was:

> [N]ot true that the function of adjudication is either by common law or by the course of modern legislation confined to Courts.[17]

His Honour's conclusion is particularly instructive on the role of the Commission. His Honour said:

> In my judgment, the functions of the Inter-State Commission contemplated by the Constitution are executive or administrative, and the powers of adjudication intended

[9] The terms 'executive' and 'administrative' will be used interchangeably in this article.
[10] (1915) 20 C.L.R. 54.
[11] *Ibid.* 61.
[12] Griffith C.J., Isaacs, Powers and Rich JJ. (Barton and Gavan Duffy JJ., dissenting).
[13] *Ibid.* 62.
[14] *Ibid.* 61.
[15] *Ibid.* 62.
[16] *Ibid.*
[17] *Ibid.* 63.

> are such *powers of determining questions of fact* as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication *as are incidental and ancillary to these functions.*[18]

The learned Chief Justice was propounding, in the above passage, the extremely important concept that one form of governmental power can always be added to the exercise of another form of governmental power, provided that the additional power is introduced only as an ancillary facility to effectuate the exercise of the main power. This concept would enable, for example, the executive to exercise even what would otherwise be the legislative power of the Commonwealth — provided that such legislative power was being exercised subserviently to the executive power.[19] Other permutations of governmental powers would logically also be possible under this concept. However, the element of subserviency in the different, additional, power ensures that the addition of the different power does not produce a compound of two co-ordinate powers such as would infringe the doctrine of separation of powers. Thus, in the instant case itself, the performance of the Commission's administrative functions was held not to have authorized the Commonwealth Parliament to invest it with the power to grant injunctions. Such authorisation was precluded because the administrative efficacy of the Commission did not require that it be given the power to grant injunctions. However, since the criterion of subserviency in an additional power cannot be applied with mechanical certitude, the question of what measure of a different, additional, power constitutes a mere ancillary power will always remain a matter for the courts to determine.

It is further suggested that the term 'quasi-judicial' is not as amorphous as it may initially appear. In the light of *New South Wales v. The Commonwealth*, this term clearly means the exercise of what would otherwise constitute judicial power by a body primarily charged with the exercise of administrative functions. In other words, a quasi-judicial power is merely a power which would be an entirely judicial power if it were exercised by the courts, but would, if it were exercised as an ancillary power to essentially administrative powers, be subordinated by its governing non-judicial context into a quasi-judicial power.

The next case to be examined was also adverse to the Commonwealth's attempt to invest an administrative body with judicial power. The decision is that of the High Court in *The British Imperial Oil Company Ltd v. The Federal Commissioner of Taxation*[20] (hereinafter the *Board of Appeal Case*). One issue raised in that case was the validity of the Income Tax Board of Appeal which was introduced under the Income Tax Assessment Act 1922 (Cth). The Board of Appeal was purportedly empowered to reconsider decisions of the Commissioner of Taxation and to make such orders as it thought fit, whether on questions of law or on questions of

[18] *Ibid.* 64. Emphasis added.
[19] *Tooheys Ltd v. Minister for Business and Consumer Affairs* (1981) 36 A.L.R. 64.
[20] (1925) 35 C.L.R. 422.

fact.[21] As an alternative to appealing to the Board of Appeal, a taxpayer could appeal to either the Supreme Court of a State or the High Court.[22] There was also to be an appeal on questions of law from the Board of Appeal to the High Court.[23] The High Court ruled that the Parliament had attempted to vest a part of the judicial power of the Commonwealth in the Board of Appeal, and that such an investiture was void because the membership of the Board was not based on section 72 of the Constitution. Isaacs J., pointed out that the taxpayer could appeal, *inter alia*, either to the Board of Appeal or to the High Court. Because an appeal to the High Court necessarily engaged the judicial power of the Commonwealth, an appeal to the Board would involve the latter in the exercise of a similar power. Consequently, the right of appeal to the Board of Appeal, which was no more than an administrative body, had been invalidly conferred.[24] The High Court thus pronounced that an administrative body could not be invested with the jurisdiction to determine questions of law.

The sequel to this case was the High Court decision in *The British Imperial Oil Company Ltd v. The Federal Commissioner of Taxation*[25] (hereinafter the *Board of Review Case*). As a result of the High Court decision in the *Board of Appeal Case* the Income Tax Assessment Act 1922 (Cth) was amended to, *inter alia*, remove one of the three optional avenues of appeal from the Commissioner to the High Court, the Supreme Court of a State, or the Board (renamed the Board of Review). Instead, there was simply to be an appeal from the Commissioner to either the High Court or the Supreme Court of a State. The taxpayer could, alternatively, ask for the Commissioner's assessment to be reconsidered by the Board of Review with a right of appeal therefrom to the High Court on questions of law. In contradistinction to the Board of Appeal, the new Board of Review could not be said to exercise the same jurisdiction as the High Court, in that the taxpayer could not appeal, on points of law, to the Board of Review for a determination, as distinct from appealing to it for a reconsideration of the Commissioner's decision. This removal from the taxpayer of his alternative right of appeal was hailed by Isaacs J., as creating between the new Board of Review and the old Board of Appeal 'the difference between daylight and dark'.[26] Crucially, the Board of Review was not given any power to pronounce upon questions of law. As Isaacs J., emphasised of the new situation: 'All questions of law are for the court.[27]

It appears that the *Board of Appeal Case*, when contrasted with the *Board of Review Case*, quite clearly establishes that, as far as the Commonwealth

[21] *Ibid.* 432.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.* 436.
[25] (1926) 38 C.L.R. 153.
[26] (1926) 38 C.L.R. 153, 175.
[27] *Ibid.* 176.

Parliament is concerned, legislation cannot confer on an administrative body the jurisdiction to pronounce upon questions of law. Such questions are to be answered only by courts exercising the judicial power of the Commonwealth.

The *Board of Review Case* was affirmed by the Privy Council in *The Shell Company of Australia Ltd v. The Federal Commissioner of Taxation*[28] (hereinafter the *Shell Case*). In affirming the conclusion of the High Court, the Privy Council concluded:

> [T]he legislation in this case does not transgress the limits laid down by the Constitution because the Board of Review is not exercising judicial powers, but is merely *in the same position as* the Commissioner himself; namely, it is *another administrative tribunal* which is *reviewing the determination of the Commissioner*, who admittedly is not judicial, *but executive*.[29]

It is difficult to exaggerate the significance of this observation. It supplies unambiguous and unimpeachable authority for the proposition that an administrative tribunal established to reconsider primary administrative decisions is itself no more than another administrative unit of the executive government, exercising essentially executive authority only, and therefore incompetent ,as was the condemned old Income Tax Board of Appeal, to pronounce upon or determine questions of law.

The distinction between administrative power and judicial power is further and aptly illustrated by contrasting the decisions of the High Court in *Bond v. George A. Bond and Co. Ltd*[30] (hereinafter *Bond*) and *R. v. Davison*[31] (hereinafter *Davison*). In *Bond*, it was held that the issue of a bankruptcy notice by a Registrar in Bankruptcy was an act which was 'entirely ministerial',[32] and thus one which did not trench upon the judicial power of the Commonwealth. On the other hand, in *Davison*, it was held that the making of a sequestration order was an exercise of the judicial power of the Commonwealth, and that the power to make such an order had been invalidly conferred on the Registrars and Deputy Registrars in Bankruptcy, neither being entitled, as mere functionaries and hence not members of the courts exercising federal jurisdiction, to exercise the judicial power of the Commonwealth.

In *Davison*, Dixon C.J., and McTiernan J., illustrated the concept of the ancillary power by noting that even courts of law may be empowered to legislate in aid of the judicial power through authorization to make procedural rules of court.[33] In other words, just as an administrative body may, but only in an ancillary form, exercise power that would otherwise be strictly judicial, so also a judicial body may, but again only in an ancillary form, exercise power that would otherwise be essentially legislative.

[28] (1930) 44 C.L.R. 530.
[29] *Ibid.* 545. Emphasis added.
[30] (1930) 44 C.L.R. 11.
[31] (1954) 90 C.L.R. 353.
[32] (1930) 44 C.L.R. 11, 22.
[33] (1954) 90 C.L.R. 353, 369.

It is now perhaps appropriate to note the case of *R. v. Kirby; Ex parte Boilermakers' Society of Australia*[34] (hereinafter *Boilermakers*). It was decided by the High Court in *Boilermakers* that the Court of Conciliation and Arbitration did not possess the power to punish for contempt of its process because the latter was not a court at all, since, its jurisdiction being essentially arbitral, it was not a court within the meaning of Chapter III of the Commonwealth Constitution. Hence it was incompetent to exercise the judicial power of the Commonwealth, of which the power to punish for contempt was a part. In holding that a non-judicial (in this case arbitral) body could not, under Commonwealth legislation, be invested with a judicial means of enforcement, the High Court in *Boilermakers* was following, precisely, its own earlier reasoning in *New South Wales v. The Commonwealth.* The High Court in *Boilermakers* also reiterated the view of Griffith C.J., in *New South Wales v. The Commonwealth* that a principal power may, quite legitimately, be reinforced by an ancillary power of a different character.[35] That a principal power may be so reinforced was clearly also the view of the Privy Council in *Boilermakers.*[36]

An excellent illustration of the reinforcement of the judicial power of the Commonwealth with an ancillary power of a different kind is afforded by the High Court's decision in *Lansell v. Lansell.*[37] Section 86(1) of the Matrimonial Causes Act 1959 (Cth) provided that in proceedings for divorce or other matrimonial causes the court was empowered to make an *inter partes* settlement of property as the court thought to be just and equitable in the circumstances of the case. The High Court upheld the validity of the sub-section on the ground that it was only an ancillary facility for the determination of substantive proceedings with respect to which the Commonwealth Parliament clearly had power to legislate pursuant to section 51(xxii) of the Constitution. Section 86(1) of the Act undoubtedly gave the court power to alter rights to property. The power to alter, as distinct from the power to identify, rights to property is clearly a legislative power. The court was constitutionally authorised to exercise this legislative power only because the power had been conferred as a power ancillary to the court's principal power to hear and determine proceedings on divorce and other matrimonial causes. In other words, a power which, when regarded independently of a principal power is a power different from the principal power, may, when regarded dependently on such a principal power, become a mere incident of that principal power. When dependently exercised, it becomes an exercise of the nature of the principal power itself. It is therefore technically apposite to say that when a court exercises the ancillary power to alter rights to property, it is exercising an

[34] (1956) 94 C.L.R. 254 (High Court); (1957) 95 C.L.R. 529 (Privy Council).
[35] (1956) 94 C.L.R. 254, 269-70, 271-2, 278, 294, 296.
[36] (1957) 95 C.L.R. 529, 543-4.
[37] (1964) 110 C.L.R. 353.

incidental aspect of the judicial power. In *Cominos v. Cominos*[38] the High Court expressly held that the power conferred under section 86(1) of the Matrimonial Causes Act 1959 (Cth) on State Supreme Courts to alter rights to property was, when construed in its ancillary context, a part of the judicial power of the Commonwealth. Again, in *R. v. The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[39] (hereinafter *Tasmanian Breweries*) it was held by the High Court[40] that the power to alter the law by making unexaminable determinations of fact from which specific legal consequences followed, was, when conferred as an independent power, necessarily not a part of the judicial power of the Commonwealth.[41] A comparison between *Cominos* and *Tasmanian Breweries* demonstrates the crucial significance in the doctrine of separation of powers of the distinction between a principal power, on the one hand, and an ancillary power, on the other. In *Cominos*, a power to alter rights, because it had been conferred as only an ancillary facility for the exercise of the judicial power, was characterised in context as forming a part of the judicial power of the Commonwealth, and not, as it would have been characterised if it had been designed to operate independently, as a legislative power. By contrast, in *Tasmanian Breweries*, where the power to alter rights had not been conferred as only an ancillary facility to the exercise of the judicial power, such a power, assessed as an independent power, was characterised as legislative,[42] quasi-legislative,[43] or even administrative.[44] It is respectfully suggested that those Justices in *Tasmanian Breweries* who regarded the power of the Trade Practices Tribunal to alter rights, by the making of unexaminable determinations of fact, as an administrative power, must have considered this particular power as losing its legislative character by being made a mere ancillary facility to the exercise by the Tribunal of its administrative jurisdiction. On the other hand, Kitto J., in treating the Tribunal's power to alter rights as legislative in character, must have regarded the power in question as fulfilling a more than ancillary role in the constitution of the Tribunal's functions. Finally, those Justices who classified the power in question as quasi-legislative might well not have done so but for the circumstance that this otherwise legislative power had been committed to a body whose functions were principally administrative. However, a common thread runs through these divergent views: those Justices who formed the majority in the case unanimously took the view that the power conferred on the Tribunal was neither essentially judicial in character nor a power different in character conferred to facilitate the exercise of the judicial power.

[38] (1972) 127 C.L.R. 588.
[39] (1970) 123 C.L.R. 361.
[40] McTiernan, Kitto, Windeyer, Owen and Walsh JJ., Menzies J., dissenting.
[41] The judgment of Kitto J., (*ibid.* 378) is particularly explicit on this point.
[42] *Ibid. per* Kitto J., 378.
[43] *Ibid., per* Windeyer J., 402; and *per* Walsh J., 416.
[44] *Ibid., per* McTiernan J., 372; *per* Owen J., 409; and *per* Walsh J., 416.

In *R. v. Quinn; Ex parte Consolidated Foods Corporation*[45] (hereinafter the *Trade Marks Removal Case*), the High Court held that the power vested in the Registrar of Trade Marks by section 23(1) of the Trade Marks Act 1955 (Cth) to remove a trade mark from the Register of Trade Marks was an administrative and not a judicial power. The Court[46] expressly rejected the submission that the registration of a trade mark created a legal right. The registration of a trade mark was simply an administrative act which, in itself, did not confer a legal right on anyone. Because the registration of a trade mark did not create a legal right, it logically followed that the removal of a trade mark from the Register could not operate to extinguish any legal right.[47] Since neither the registration nor the removal of a trade mark affected any legal right in any person, the conclusion of the Court was that neither form of action by the Registrar could be regarded as judicial in nature, and that either form of action by the Registrar was evidently administrative in character.[48]

Again, in *Trade Practices Commission v. Pioneer Concrete (Vic.) Pty Ltd*,[49] the Full Court of the Federal Court held, *inter alia*, that the power conferred on the Trade Practices Commission under section 155 of the Trade Practices Act 1974 (Cth) to require, for the purposes of the Act, the supply of information and documents, and the giving of testimony, was a power of an administrative character. It is submitted that this decision entails that a similar investigative power conferred on the Commonwealth Ombudsman under section 9 of the Ombudsman Act 1976 (Cth) should be regarded as administrative in character.

Finally, in *R. v. Hegarty; Ex parte Salisbury City Corporation*,[50] the High Court held that the power of a Board of Reference, constituted by the Conciliation and Arbitration Commission under section 50 of the Conciliation and Arbitration Act 1904 (Cth), to arbitrate on the proper classification of an employee under an industrial Award was unequivocally administrative in character. The Court observed that the suggestion that such a power was judicial in nature verged on the ludicrous.[51]

## 2. THE EXECUTIVE POWER AND THE LEGISLATIVE POWER

In *The Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan*[52] (hereinafter *Dignan*) the High Court was explicitly faced with the

[45] (1977) 138 C.L.R. 1.
[46] *Ibid., per* Jacobs J., 12, in whose judgment Barwick C.J., Gibbs, Stephen, Mason and Murphy JJ., concurred. Aickin J., gave his own reasons for reaching the same decision as his brethren.
[47] *Ibid.*
[48] *Ibid.*
[49] (1981) 36 A.L.R. 151.
[50] (1981) 36 A.L.R. 275.
[51] *Ibid., per* Mason J., 280, in whose judgment Gibbs C.J., Stephen and Wilson JJ., concurred. Murphy J., gave his own reasons for reaching the same decision as his brethren.
[52] (1931) 46 C.L.R. 73.

issue of whether or not it was an infringement of the doctrine of separation of powers for the Commonwealth Parliament to authorise the Governor-General to make regulations capable of overriding earlier Commonwealth Acts of Parliament themselves, even though such regulations were to be subject to the enabling Act.[53] The Court held that the doctrine had not been thus infringed, and that the authorisation was consequently constitutional. Dixon J., entertained no doubt that this power to make regulations possessed *'the very characteristic of law-making'*.[54] However, his Honour noted that:

> [I]t has always been found difficult or impossible to deny to the Executive, *as a proper incident of its functions*, authority to require the subject or the citizen to pursue a course of action which has been determined for him by the exercise of an *administrative* discretion.[55]

In this passage, Dixon J., was clearly adverting to the concept of the ancillary power when he described the Executive's power to make regulations (laws) as a proper incident of its executive functions. Consider a power which would, when exercised independently of other powers, be of an essentially legislative nature. It would, when exercised dependently on the exercise of, say, the executive power by contrast, become, by virtue of its ancillary role, a mere incident of the executive power itself. Hence the doctrine of separation of powers prohibits the exercise by any one branch of government of two or more governmental powers in co-ordinate conjunction only. The doctrine does not, however, preclude the exercise by any one branch of government of two or more governmental powers where only one of these powers fulfils the principal role. The exercise of a super-ordinate power in conjunction with a different but subordinate power does not seem to be inconsistent with the doctrine of separation of powers in the form in which it has been allowed to operate under the Commonwealth Constitution. It is submitted that such a view is not incompatible with the judicial authorities, and that it is in fact illustrated by an observation of Dixon J., in *Dignan* itself, wherein his Honour said:

> But sec. 3 of the Transport Workers Act cannot, in my opinion, be regarded as doing less than authorizing the Executive to perform a function which, *if not subordinate*, would be *essentially legislative*. It gives the Governor-General in Council a complete, although, of course, *a subordinate power*, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted.[56]

It is, of course, obvious that when Dixon J., referred to the legislative power which was conferred on the Governor-General as being a subordinate

[53] The constitutional issue in the case was whether or not s. 3 of the Transport Workers Act 1928 (Cth) could validly authorize the Governor-General to make regulations with respect to the employment of transport workers, provided that such regulations complied with the enabling Act itself.

[54] (1931) 46 C.L.R. 73, 92. Emphasis added.

[55] *Ibid.* Emphasis added.

[56] *Ibid.* 100. Emphasis added.

character, his Honour was regarding such a power as being subordinate to the legislative power of the Commonwealth Parliament. However, such an explanation of his Honour's view, although doubtless unexceptionable, is clearly incomplete. Such an explanation would be incomplete because it would fail to disclose why his Honour regarded the Governor-General's legislative power as a subordinate power. The Governor-General's legislative power was evidently not subordinate simply because it could have been overridden by the Parliament, since it is axiomatic that even Acts of Parliament can themselves be overridden by subsequent Parliamentary legislation — and Acts of Parliament are not thereby reduced to the status of subordinate legislation. It is submitted that the only reason why the Governor-General's legislative power was described as a subordinate power was that this power to legislate had been vested in him to be used as a mere ancillary facility to his principally executive role in the scheme of the Commonwealth Constitution. In this connection it is critical to note, contradistinctively, that the conferment of legislative power on a legislative organ of government does not operate as the conferment of subordinate legislative power, but as the conferment of plenary legislative power. This last proposition is supported by no fewer than three decisions of the Judicial Committee of the Privy Council: *R. v. Burah*;[57] *Hodge v. R.*;[58] and *Powell v. Appollo Candle Co. Ltd.*[59] The combined authority of *Dignan* and the *Burah* line of authorities appears, therefore, to suggest that whereas the conferment of legislative power upon an essentially executive authority results in the conferment of a subordinate legislative power upon the executive authority as an ancillary facility, the conferment of legislative power upon an essentially legislative authority results, by contrast, in the conferment of a plenary legislative power upon the legislative body as a constituent of its legislative capacity. In other words, legislative power that is invested in a legislative body remains essentially legislative, whereas legislative power that is invested in an executive body thereby becomes a mere incident of the exercise of the principal executive power of that executive body.[60]

## 3. THE ADMINISTRATIVE APPEALS TRIBUNAL ACT AND THE SEPARATION OF POWERS

Section 27(1) of the Administrative Appeals Tribunal Act 1975 (Cth) (hereinafter the Act) provides that where either the Act itself or some other enactment allows an application to be made to the Administrative

[57] (1878) 3 App. Cas. 889.
[58] (1883) 9 App. Cas. 117.
[59] (1885) 10 App. Cas. 282.
[60] Similarly, the authority of a court of law to make procedural rules of court is no more than a subordinate legislative power exercisable only as an *incident* of the exercise of the judicial power of the court.

Appeals Tribunal (hereinafter the Tribunal) for the review of a decision, an applicaton for such a review may be made by or on behalf of any person whose interests are affected by that decision. Section 30(1)(c) implicitly allows a person whose interests have been affected by such a decision to apply to the Tribunal to be made a party to a proceeding before it. Thus it is apparent that under either section 27(1) or section 30(1)(c) of the Act, the Tribunal may have to decide whether or not an applicant is someone whose interests have been affected by a decision. The Tribunal's power to decide this question (if indeed it could constitutionally be given such a power) obviously cannot be found in section 43(1) of the Act because the prefatory words of that sub-section 'For the purpose of reviewing a decision' presuppose that the prerequisites for the review of a decision have been satisfied, whereas the question of whether or not a person's interests have been affected is clearly a question as to whether or not one of the prerequisites for review has been satisfied. Consequently, section 31 of the Act expressly confers authority on the Tribunal to decide such a question, and to decide it conclusively if its decision is that the person in question is someone whose interests have been affected by a decision of the primary administrator. It is respectfully submitted that section 31 of the Act is an attempt by the Commonwealth Parliament to vest in the Tribunal the power to decide a question of law, in one case conclusively,[61] and in the other case subject to an appeal to the Federal Court.[62] There are two reasons for the view that this power of the Tribunal amounts to a power to decide a question of law. Firstly, it is to be noticed that the Tribunal has purportedly been given power to hand down a binding decision on the meaning of a statutory requirement, that is, the meaning of the requirement that an applicant's interests must have been affected by a decision of the primary administrator. It is, of course, true that any person or body is entitled to make an assumption about the meaning of a statutory requirement, but such an assumption, made for whatever legitimate purpose, is drastically distinct from a binding interpretation of the meaning of such a requirement.

Secondly, it is to be noticed that where the Tribunal answers the question of a person's interest in the negative, there is an appeal as of right to the Federal Court against such a determination. There is, of course, no doubt that the Federal Court is a court within the meaning of Chapter III of the Commonwealth Constitution. Again, there is no doubt, that being such a court, the Federal Court is empowered only to exercise the judicial power of the Commonwealth.[63]

[61] This is the case of the AAT answering the question in the *affirmative*: see s. 31 of the Act.

[62] This is the case of the AAT answering the question in the *negative*: see s. 44(2) of the Act.

[63] *Boilermakers, supra* n. 40.

In any event, this particular jurisdiction of the Tribunal and the Federal Court creates a constitutional dilemma. If the jurisdiction to give a binding interpretation of a statutory requirement[64] is not a part of the judicial power of the Commonwealth, then such a jurisdiction cannot be vested in the Federal Court. On the other hand, if the jurisdiction to give such a binding interpretation is a part of the judicial power of the Commonwealth, then such a jurisdiction cannot be vested in an administrative tribunal like the Administrative Appeals Tribunal. It should be emphasized that the right to make an application for a review of a decision[65] as well as the right to be made a party to a proceeding before the Tribunal[66] is clearly a legal right,[67] and consequently, the power to give a binding determination on whether or not such a right exists forms a part of the judicial power of the Commonwealth. It is respectfully submitted that section 31 of the Administrative Appeals Tribunal Act is beyond the legislative ambit of the Commonwealth Parliament because the section purports to confer upon an administrative body (the Tribunal) a part of the judicial power of the Commonwealth.[68] Proceeding upon the view that section 31 of the Act is invalid, section 44(2) of the Act is similarly invalid in that the latter cannot operate without the former. It is submitted that section 31 and section 44(2) of the Act should be read out of the Act in accordance with section 15A of the Acts Interpretation Act 1901 (Cth). The lacuna thus occasioned in the Act should be filled by a provision that the question of whether or not a person's interests have been affected by a decision should be answered, in the first instance, by the Federal Court.

It is further submitted that section 42 of the Act, which presupposes the Tribunal's jurisdiction to give binding determinations on questions of law, is also invalid. It is to be recalled that in the *Shell Case* the Privy Council was quite explicit in its view that the Income Tax Board of Review was no more than an administrative tribunal which exercised the same kind of executive authority as the Commissioner of Taxation himself.[69] Just as the Board of Review, being no more than an administrative tribunal, cannot make binding determinations on, as distinct from merely making assumptions about, questions of law, so too, it is submitted that the Administrative Appeals Tribunal, being just another administrative tribunal, is not constitutionally competent to make binding determinations of law — again, as distinct from making assumptions about the state of the law. Indeed, to repeat the words of Isaacs J., in the *Board of Review Case*, the critical distinction between the constitutional Board of Review and the unconstitutional Board

[64] The requirement in question is that the applicant's interests must have been affected by the decision of the primary administrator.
[65] s. 27(1) of the Act.
[66] s. 30(1)(c) of the Act.
[67] Contrast this legal right with the 'right' to have one's trademark registered in the *Trade Marks Removal Case* (*supra* n. 53).
[68] *Boilermakers, supra* n. 40.
[69] *Supra* n. 35.

of Appeal was that the Board of Review, quite unlike the Board of Appeal, had not been purportedly given the power to hand down binding determinations on questions of law.[70] His Honour had said that the difference between an administrative body which had not been purportedly given such a power, and one which had been purportedly so endowed, made 'the difference between daylight and dark'.[71]

It is submitted that section 43 of the Act presents no constitutional difficulties. This provision does not purport to empower the Tribunal to make binding determinations on questions of law. It is true that the Tribunal, in common with all other administrative bodies which have to make decisions, has to make certain assumptions about the state of the law, but if any of its decisions are shown to have been based upon erroneous assumptions about the state of the law, then such decisions, in common with all other similarly erroneous decisions made by administrative bodies, will be impeachable for error of law. In the case of the Administrative Appeals Tribunal, errors of law made by it in purported exercise of its jurisdiction under section 43 of the Act can be corrected by the Federal Court under section 44(1) of the Act.[72]

## 4. THE REVIEW ACT AND THE SEPARATION OF POWERS

Section 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (hereinatfer the Act) allows any person who has been aggrieved by an adminsitrative decision made under an enactment[73] to apply to the Federal Court for an order of review.

Section 16(1)(d) provides that upon such an application the Federal Court may, in its discretion, make 'an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from doing, of which the Court considers necessary to do justice between the parties'.[74]

It is suggested that section 16(1)(d)[75] purports to confer on the Federal Court powers comprehending parts of the judicial as well as the executive power of the Commonwealth. It is to be noted that the Court is purportedly empowered to direct the doing of any act or thing[76] by any of the parties which the Court considers necessary to do justice between them. It is to be emphasised that the sole criterion for the exercise of this power by the Federal Court is that which the Court considers to be just between the parties. There is absolutely no prohibition discernible in the language of this provision against the making of an order directing an administrator

[70] *Supra* n. 31.
[71] *Supra* n. 30.
[72] *Director-General of Social Services v. Chaney* (1980) 31 A.L.R. 571.
[73] An 'enactment' is defined in s 3(1) of the Act.
[74] Analogous provisions in the Act are s. 16(2)(b) and s. 16(3)(c).
[75] And, by parity of reasoning, s. 16(2)(b) and s. 16(3)(c).
[76] Or the abstention therefrom.

to do or not to do any act or thing, provided the Court considers such an order to achieve justice between the parties. In other words, there is nothing in section 16(1)(d) to prevent, for example, the Court from directing an administrator to exercise his discretion in such a way as to produce a particular result. Apart from calling in aid the concept of the ancillary power, it would appear that this provision has invalidly attempted to vest in the Court a part of the executive[77] power of the Commonwealth, in that it has attempted to allow the Court to exercise the executive authority of governmental administrators.[78] However, there are *obiter dicta* in three decisions of the Federal Court which suggest that the Act does not enable the Court to substitute its own decision for that of the relevant administrator. The decisions in question are: *Hamblin v. Duffy*;[79] *Turner v. Minister for Immigration and Ethnic Affairs*;[80] and *Evans v. Frieman*.[81] With respect, the strength of these *dicta* may well be impaired by the circumstance that, in expressing this view, none of their Honours did specifically relate his view to the express terms of section 16(1)(d). It is respectfully reiterated that the natural meaning of the language used in the provision does purport to authorise the Court, *inter alia*, to exercise the executive authority of the relevant administrator.

However, does it follow from this view of section 16(1)(d) that the latter may have been too widely enacted? It is submitted that it does not so follow. It will be recalled that in both *Lansell*[82] and *Cominos*[83] the High Court upheld the validity of a power conferred on courts exercising federal jurisdiction to alter rights to property on the ground that such a power was incidental to the judicial power to resolve disputes with respect to divorce and other matrimonial causes. The circumstance that the power to alter rights to property, if exercised independently of other powers, would have been clearly legislative in character did not prevent the same power, when exercised as an ancillary facility of the judicial power, becoming an incident of the judicial power itself. By parity of reasoning, the power conferred upon the Federal Court, whenever the Court considers it necessary to do justice between the parties, to direct an administrator to exercise his authority to produce a particular (just) result, should be regarded as the conferment on the Court of an ancillary executive power to be exercised as an incident of the exercise of the judicial power of the Commonwealth. If

[77] That 'a decision of an administrative character' embraces an exercise of the executive power of the Commonwealth, is made evident by the necessity for the express exclusion from the ambit of such a decision, a decision made by the Governor-General. See s. 3(1) of the Act.

[78] The significance of s. 16(1)(d) of the Act has been examined, somewhat tentatively, by Curtis L.J., 'Judicial Review of Administrative Acts' (1979) 53 *Australian Law Journal* 530, 537-8, 541-2.

[79] (1981) 34 A.L.R. 333, 335 (*per* Lockhart J.).

[80] (1981) 35 A.L.R. 388, 391 (*per* Toohey J.).

[81] (1981) 35 A.L.R. 428, 433 (*per* Fox A.C.J.).

[82] (1964) 110 C.L.R. 353.

[83] (1972) 127 C.L.R. 588.

courts exercising federal jurisdiction may be given, as an ancillary facility only, a power which is otherwise legislative in character (*Cominos*), then there does not appear to be anything in the Commonwealth Constitution to prevent the conferment upon such courts, again as an ancillary facility only, a power which is otherwise executive in character. No doubt the Federal Court will exercise its ancillary executive authority with judicial circumspection, but this is no reason for denying to section 16(1)(d) the natural meaning of its language, nor is it any reason for denying to the concept of the ancillary power its normal constitutional operation.

Finally, the question has to be answered as to why the executive authority vested in the Court by section 16(1)(d) should be considered to be a mere ancillary power. It is suggested that the answer must clearly be that this power is merely ancillary because it is to be exercised only to remedy the occurrence of a distinct legal wrong committed on one or more of the grounds specified in section 5 of the Act.[84]

## 5. CONCLUSIONS

Basically, the conclusions to be drawn from the authorities examined are three in number.

Firstly, the Commonwealth Constitution does not permit the concurrent exercise by any one branch of government of two co-ordinate governmental powers. However, there is nothing in the constitutional distribution[85] of powers made in the Constitution to prevent the annexation of an ancillary power to a different principal power, to be exercised as an incident of the exercise of that principal power.

Secondly, the power to give binding determinations on questions of law, as distinct from the need to make assumptions about the state of the law before making an executive decision, is clearly a part of the judicial power. The power to give binding determinations on questions of law cannot be annexed as an ancillary power to the principal executive power because, quite unlike the need to make assumptions about the law as a step in the making of an executive decision, the power to give binding determinations on the state of the law is never necessary to the making of an executive decision. If an executive decision is not challenged by a person whom it affects, then the result simply is that the administrator's assumption about the state of the law will not be tested by judicial determination, but the

[84] If the Court had, by contrast, been purportedly given this ample power to be exercised as either a principal or an *independent* power, then such a purported investiture would undoubtedly have been void. See *R. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277.

[85] Section 1 of the Commonwealth Constitution vests the legislative power of the Commonwealth in the Commonwealth Parliament; s. 61 thereof vests the executive power of the Commonwealth in the Queen, such power to be exercised on the Queen's behalf by the Governor-General; and s. 71 thereof vests the judicial power of the Commonwealth in courts exercising the federal jurisdiction.

assumption does not thereby become binding upon the person so affected. On the other hand, if an executive decision is challenged by a person whom it affects, then, if the impugnment is made before a body authorised to make a binding determination on the correctness or otherwise of the administrator's assumption of the state of the law, the assumption will be pronounced to be either correct or incorrect. Thus, no matter whether or not the executive decision is challenged by the person whom it affects, it will be unnecessary, for the making of that executive decision, to give to either the administrator himself or a superior administrative body the additional power to make binding determinations on the state of the law. It is precisely because this additional, judicial, power is always unnecessary to the exercise of executive authority that the power to declare the law (as distinct from merely attempting to apply it) can never be made to occupy the position of an ancillary power to the executive authority.

Thirdly, a court exercising the judicial power of the Commonwealth may exercise, but clearly as an ancillary facility only, either legislative or executive power. The exercise of such an ancillary power operates as an incidental exercise of the judicial power of the Commonwealth. Indeed, it is the concept of the ancillary power which makes the doctrine of separation of powers a doctrine that entails three branches of government, and not a doctrine that establishes three governments.