THE DEMISE OF THE SUPERANNUATION COMPLAINTS TRIBUNAL: THE DECISIONS IN *WILKINSON v CARE* AND *BRECKLER v LESHEM*

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[The Full Federal Court has effectively eliminated the review function of the Superannuation Complaints Tribunal with its decisions in Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd *and* Breckler v Leshem. *The majority of the Full Federal Court held that, in its review and determination-making functions, the Tribunal is exercising judicial power in breach of chapter III of the* Australian Constitution. *Following the decision in* Brandy v Human Rights and Equal Opportunity Commission, *the cases reinforce the constitutional difficulties which vex federal tribunals and other non-judicial bodies purporting to resolve disputes between private parties.]*

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I INTRODUCTION

The recent decisions in *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd*[1] and *Breckler v Leshem*[2] have raised the issue of whether an administrative tribunal can determine disputes which are traditionally within the domain of private law.[3] The Full Federal Court held that the Superannuation Complaints Tribunal ('the Tribunal') is exercising judicial power in reviewing trustee decisions by reference to a 'fair and reasonable' standard. Although the Tribunal's investigative and conciliation powers remain intact,[4] this development has serious implications for the superannuation industry[5] and the federal government's retirement incomes policy.

In *Breckler v Leshem* the court (Sundberg J dissenting) held that s 37 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) ('*Complaints Act*') — which contains the Tribunal's review and determination-making powers — is wholly invalid because it purports to confer the judicial power of the Commonwealth on the Tribunal in breach of chapter III of the *Australian Constitution*.[6] The members of the court referred to their reasoning in *Wilkinson v CARE*, which was handed down on the same day.[7]

II BACKGROUND

An understanding of the background to the decision in *Wilkinson v CARE* will assist the reader to fully appreciate its significance. In addition, an overview of certain key concepts places the issues raised by the case in an appropriate context.

1 (1998) 152 ALR 332 ('*Wilkinson v CARE*').

2 (Unreported, Federal Court of Australia, Lockhart, Heerey and Sundberg JJ, 12 February 1998).

3 If this is a valid constraint, it should only affect tribunals constituted under federal enactments, since tribunals constituted under state enactments are not thought to be subject to the limitations imposed by the *Australian Constitution*. But see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').

4 *Acts Interpretation Act 1901* (Cth) s 15A enables invalid provisions of a federal enactment to be severed.

5 It is outside the scope of this article to consider the consequences for trustees who have acted in accordance with the now unconstitutional determinations of the Tribunal, particularly vis-à-vis a disaffected beneficiary who may seek to sue for breach of trust. However, one must remember that remedies for breach of trust are discretionary. In addition, one might argue that there could not be a more apt situation for an application of the court's power to exonerate from personal liability a trustee who has acted honestly and reasonably, and ought fairly to be excused. See, eg, *Trustee Act 1958* (Vic) s 67.

6 The separation of powers under chh I, II and III of the *Australian Constitution* is designed to ensure judicial independence by strictly separating the federal judiciary from the executive and legislative arms of government. Section 71 of the *Australian Constitution* requires the judicial power of the Commonwealth to be exercised by a court within the meaning of s 72. The Tribunal is not a court: *Complaints Act* ss 7 and 8.

7 In this article I will concentrate on the decision in *Wilkinson v CARE* because its judgments have been incorporated in *Breckler v Leshem*. The latter was a case heard on a question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth).

A *The Government's Legislative Scheme*

Traditionally superannuation has been governed by private law. Most superannuation schemes in Australia are operated as trust funds and administered by trustees.[8] Under the law of trusts, a beneficiary of a trust can only challenge the trustee's decision in a court exercising equitable jurisdiction.[9] A court can only review the exercise of a trustee's discretion on limited grounds (unless reasons have been given by the trustee). The grounds are that the trustee failed to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred.[10] Even where these grounds are made out, courts rarely replace the trustee's decision, but remit the discretion to the trustee for re-exercise according to law.

The increasing age profile of the Australian population forced the federal government to implement measures to encourage individuals to support themselves in retirement, rather than rely on the old age pension. In 1992, the *Superannuation Guarantee (Administration) Act 1992* (Cth) was enacted to mandate a minimum level of employer-sponsored superannuation. At the same time concerns were expressed about the adequacy of trust law in protecting the rights of members of superannuation funds.[11] Both the Senate Select Committee on Superannuation and the Australian Law Reform Commission recommended the establishment of an external dispute resolution mechanism for superannuation disputes between fund trustees and members.[12] In particular, the federal government considered that it was inconsistent with its retirement incomes policy for members of superannuation funds to have restricted rights of review in relation to trustee decisions:

> The Government considers that consumers should have an appropriate forum to settle any disputes between themselves and the superannuation funds. To this end, the Government will be working with industry participants to develop a suitable low-cost dispute resolution mechanism. Such a mechanism should raise consumers' confidence in the superannuation industry and increase their willingness to invest in superannuation.[13]

The Superannuation Complaints Tribunal was established under the *Complaints Act* as part of the federal government's legislative scheme for the pruden-

[8] Cf public sector schemes administered under legislative enactment by boards.

[9] The Supreme Court exercises equitable jurisdiction in each State: see, eg, *Supreme Court Act 1986* (Vic) s 29.

[10] *Karger v Paul* [1984] VR 161, 164 recently affirmed in *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* (Unreported, Supreme Court of Victoria, Beach J, 24 December 1997).

[11] See eg, Australian Law Reform Commission, *Collective Investment Schemes: Superannuation*, Discussion Paper No 50 (1992); Commonwealth, Senate Select Committee on Superannuation, *Safeguarding Super* (1992); Lord Browne-Wilkinson, 'Equity and Its Relevance to Superannuation Schemes Today' (Paper presented at the Law Council of Australia 1992 National Superannuation Conference, Canberra, February 1992).

[12] Senate Select Committee on Superannuation, *Safeguarding Super*, above n 11, 143; Australian Law Reform Commission, *Collective Investment Schemes: Superannuation*, above n 11, 113.

[13] The Hon John Kerin MP, Commonwealth of Australia, *Review of Supervisory Framework for the Superannuation Industry*, Press Release, No 73 (20 August 1992) 2.

tial supervision of the superannuation industry.[14] The intention was to provide a mechanism for the review of the decisions of superannuation fund trustees which is 'fair, economical, informal and quick'.[15] The government clearly perceived a public interest in having a 'user friendly' forum to handle superannuation-related disputes.

The other important elements of the legislative scheme are the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*') and the *Superannuation Industry (Supervision) Regulations 1993* (Cth) ('*SIS Regulations*'). This legislation imposes a comprehensive regulatory regime for 'regulated superannuation funds',[16] in reliance on a combination of the federal Parliament's powers under paragraphs 51(xx) and 51(xxiii) of the *Australian Constitution* to make laws with respect to trading or financial corporations and old age pensions respectively.[17] Consequently, the trustee of a regulated superannuation fund must be a constitutional corporation (defined in the *SIS Act* as a trading or financial corporation),[18] unless the sole or primary purpose of the fund is to provide old age pensions, in which case the trustee may be comprised of individuals.[19] Perhaps, in the government's view, its regulation mechanism brings the trustees of regulated superannuation funds into the public domain. In exploring the operation of the Tribunal, however, it becomes evident that private law considerations predominantly apply to the administration of superannuation funds in Australia.

The Insurance and Superannuation Commissioner ('ISC') is responsible for the prudential supervision of regulated superannuation funds under the *SIS Act*.[20] The ISC has extensive regulatory power under that legislation including:

1. The power to apply for an injunction to restrain a trustee from engaging in conduct that contravenes the *SIS Act*.[21] A court can award damages in addition to or in substitution for the injunction.[22]
2. The power to conduct an investigation of a trustee's affairs if it appears that a contravention of the *SIS Act* or *SIS Regulations* may have occurred or be occurring.[23] For the purposes of an investigation, the ISC may impose various requirements on the trustee. If the ISC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under

[14] *Complaints Act* s 6.
[15] *Complaints Act* s 11.
[16] Only 'regulated superannuation funds' can be 'complying funds' under the *SIS Act* and receive tax concessional treatment: *SIS Act* s 42 and *Income Tax Assessment Act 1936* (Cth) s 278.
[17] *SIS Act* s 3(2). The constitutional foundations of the government's legislative scheme are not beyond question, particularly in view of the fact that trust law is state law: David Jackson, 'The *Superannuation Industry (Supervision) Act 1993*: Constitutional Validity' (Paper presented at the Law Council of Australia 1994 Superannuation Conference, Surfers Paradise, February 1994).
[18] *SIS Act* s 10(1).
[19] *SIS Act* s 19.
[20] *SIS Act* s 3(1).
[21] *SIS Act* s 315, especially sub-s (2).
[22] *SIS Act* s 315(11).
[23] *SIS Act* s 263(1).

the *SIS Act*, it may certify that failure to the court and the court may inquire into the case and order the person to comply.[24]

The ISC's regulatory powers under the *SIS Act* relate to the Tribunal in two ways. First, it is a prescribed standard under the *SIS Regulations* that a trustee must not fail, without lawful excuse, to comply with a Tribunal determination.[25] A person who intentionally or recklessly breaches a prescribed standard is guilty of an offence, punishable on conviction by a fine of up to $10,000.[26] If a trustee of a regulated superannuation fund fails to comply with a determination of the Tribunal, the trustee could be prosecuted for an offence. The ISC could also apply for an injunction to restrain the breach or institute an investigation of the trustee's affairs. Thus, the trustee has a strong incentive to abide by the Tribunal's determinations. Second, it is a prescribed standard under the *SIS Regulations* that a trustee of a regulated superannuation fund must inform persons who make complaints of the existence and function of the Tribunal.[27] This requirement is intended to ensure that members are aware of their right to have disputes conciliated and reviewed by the government's alternative dispute resolution body for the superannuation industry.

B *The Tribunal's Powers under the* Complaints Act

The federal government intended the Tribunal to be an administrative review body, specialising in the resolution of superannuation-related disputes.[28] The government has a working model for a 'generalist' administrative review body in the Commonwealth Administrative Appeals Tribunal ('AAT'), which reviews decisions to ascertain whether the decision-maker made the correct or preferable decision on the merits.[29] However, the Tribunal is not a replica of the AAT. While there are some similarities between the two bodies, there are also some notable differences. The most controversial of these differences is the limited review power of the Tribunal.

1 *The 'Fair and Reasonable' Standard*

A unique aspect of the *Complaints Act* is its provision for the review of trustee decisions by reference to a 'fair and reasonable' standard.[30] This is a novel concept, even for the courts. A court exercising equitable jurisdiction might examine whether a trustee's decision is 'reasonable' in the limited sense of ascertaining that there had been a true exercise of discretion in good faith.[31]

24 *SIS Act* s 289.
25 *SIS Regulations* reg 13.17B.
26 *SIS Act* s 34(2).
27 *SIS Regulations* reg 2.41B.
28 Carol Foley makes extensive reference to the parliamentary debates supporting this intent in her paper, 'Commentary: The Government's Perspective' (Paper presented at the Law Council of Australia 1998 Superannuation Conference, Melbourne, February 1998).
29 See, eg, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 ('*Drake*').
30 *Complaints Act* ss 14A, 37, 37A–C.
31 R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (5th ed, 1986) 377.

Similarly, a court exercising supervisory jurisdiction might examine whether the decision of a government official is 'reasonable' in constraining any excess of power.[32] Certainly the substantive 'unfairness' of a decision is not an established basis for judicial intervention.[33]

The 'fair and reasonable' standard has received considerable judicial scrutiny.[34] In *Pope v Lawler*,[35] Nicholson J had regard to the dictionary meanings of the words 'fair' and 'reasonable' and held that 'fair' means substantively 'just, unbiased, equitable and impartial', while 'reasonable' means 'within the limits of reason, not greatly less or more than might be thought likely or appropriate'.[36] This interpretation was affirmed by Sundberg J in *Jevtovic*[37] and Merkel J in *Briffa v Hay*.[38]

The 'fair and reasonable' standard appears in two contexts within the *Complaints Act*, albeit in slightly different forms.[39]

(a) It Is Now the Sole Ground for Review of Trustee's Decisions

Under s 14(2) of the *Complaints Act*, a person[40] can lodge a complaint with the Tribunal that a decision[41] of the trustee of a fund is unfair or unreasonable. Section 14(2), as originally enacted, contained three grounds of complaint:

- that the trustee's decision is in excess of power;
- that the trustee's decision is an improper exercise of power; and

[32] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 ('*Wednesbury*').

[33] In equity, relief is conferred by reference to ordered principle, rather than general notions of 'fairness': *Muschinski v Dodds* (1985) 160 CLR 583, 615–16 (Deane J). In an administrative law context, *procedural* fairness is the relevant issue for the courts: *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

[34] See, eg, *Pope v Lawler* (1996) 41 ALD 127; *National Mutual Life Association v Jevtovic* (Unreported, Federal Court of Australia, Sundberg J, 8 May 1997) ('*Jevtovic*'); *Briffa v Hay* (1997) 147 ALR 226; *Collins v AMP Superannuation Ltd* (1997) 147 ALR 243 ('*Collins v AMP*'); *Clerical Administrative & Related Employees' Superannuation Pty Ltd v Bishop* (Unreported, Federal Court of Australia, Northrop J, 31 July 1997) ('*CARE v Bishop*'); *WE Bassett & Partners Pty Ltd v Doherty* (Unreported, Federal Court of Australia, Northrop J, 31 July 1997) ('*Doherty*'); *Adkins v Health Employees' Superannuation Trust Australia* (Unreported, Federal Court of Australia, Heerey J, 15 August 1997) ('*Adkins*').

[35] (1996) 41 ALD 127.

[36] Ibid 130. I leave to one side the question of whether the 'fair and reasonable' standard in s 37(6) is comprised of two independent tests or one conjunctive test: see, eg, *Pope v Lawler* (1996) 41 ALD 127 (Nicholson J). This case was subject to an appeal, but no formal judgment was delivered because the parties settled after the hearing of the appeal.

[37] (Unreported, Federal Court of Australia, Sundberg J, 8 May 1997).

[38] (1997) 147 ALR 226.

[39] The different form of the standard has given rise to some complexity in interpreting the relevant provisions of the *Complaints Act*. See, eg, *Collins v AMP* (1997) 147 ALR 243, 254–5, where Merkel J expressed the view that the Tribunal must engage in a two-step process to ascertain initially whether a trustee decision is fair and reasonable and, if not, whether the decision is then unfair or unreasonable.

[40] Section 15(1) of the *Complaints Act* prescribes the persons who can make complaints under s 14 — members of regulated superannuation funds and their representatives. In the case of a complaint about payment of a death benefit, a complaint can also be lodged by a person with an interest in the benefit: ss 15(2) and 24A.

[41] Section 4 of the *Complaints Act* 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.

- that the trustee's decision is unfair or unreasonable.

The *Complaints Act* was amended in 1995 to remove the first two grounds because of fear of a constitutional challenge following the decision in *Brandy v Human Rights and Equal Opportunity Commission*.[42] In that case the High Court held that the Human Rights and Equal Opportunity Commission ('HREOC') was exercising judicial power, primarily because amendments to the *Racial Discrimination Act 1975* (Cth) made a registered determination of the HREOC enforceable as an order of the Federal Court. Interestingly, the HREOC also purported to deal with disputes in the private law domain.[43] Janice Nand has identified this factor as the underlying rationale for the *Brandy* decision:

> Most administrative tribunals determine matters between individuals and the federal government whereas the HREOC also had the capacity to determine individual rights. This unusual situation may have resulted in the High Court applying the concept of judicial power more rigorously than in previous cases since the determination of individual rights is traditionally viewed as within the province of the court alone.[44]

Indeed, a similar concern about the Tribunal is evident in the judgments of the Full Federal Court in *Wilkinson v CARE*.

(b) It Limits the Remedy That the Tribunal Can Grant

The Tribunal can only exercise its determination-making power under s 37 for the purpose of eliminating any unfairness or unreasonableness or both.[45] It must affirm the trustee's decision if it is satisfied that it is fair and reasonable in its operation in relation to the complainant[46] in the circumstances.[47]

In practice this means that the Tribunal conducts what might be termed a 'limited merits review'.[48] The Tribunal 'steps into the shoes' of the trustee[49] and addresses the actual trustee decision de novo, based on all of the information before it.[50] In awarding a remedy, however, it does not ask itself whether the trustee's decision was the correct or preferable decision, but rather asks whether the trustee's decision was within a range of decisions which were fair and

[42] (1995) 183 CLR 245 ('*Brandy*'). See also *Superannuation Industry (Supervision) Legislation Amendment Act 1995* (Cth) Explanatory Memorandum, para 171.

[43] Eg, claims between private citizens for compensation due to unlawful discrimination.

[44] Janice Nand, 'Judicial Power and Administrative Tribunals: The Decision in *Brandy v HREOC*' (1997) 14 *Australian Institute of Administrative Law Forum* 15, 36.

[45] *Complaints Act* s 37(4).

[46] In the case of a complaint about payment of a death benefit, the trustee decision must also be fair and reasonable in its operation in relation to other interested parties: *Complaints Act* s 37(6).

[47] *Complaints Act* s 37(6).

[48] In many of the cases cited above n 34, the Federal Court was concerned with prescribing this 'limited merits review' process because the Tribunal, in its early operation, misunderstood its task and attempted to conduct a full merits review by ascertaining the 'correct or preferable' decision.

[49] *Complaints Act* s 37(1) gives the Tribunal all of the powers, obligations and discretions that are conferred on the trustee.

[50] In *Jevtovic* (Unreported, Federal Court of Australia, Sundberg J, 8 May 1997), Sundberg J left open the question of whether the Tribunal could receive fresh evidence.

reasonable. If so, the trustee's decision is affirmed.[51] Such an approach was mandated by Sundberg J in *Jevtovic*[52] and supported by Merkel J in *Briffa v Hay*[53] and Heerey J in *Adkins*.[54] Trustee discretion is particularly amenable to this approach, since a valid exercise of discretion necessarily involves a choice between rational alternatives.[55]

Originally, it was intended for the 'fair and reasonable' standard to act as a 'comfort' to the superannuation industry, in that the Tribunal's power to review trustee decisions would not be too far-reaching, given the traditional trust principles which had hitherto applied.[56] Mindful of the private law nature of superannuation, it was considered that the Tribunal should only have limited powers to review a trustee's decisions.[57]

Arguably, the government decided to confer a 'limited merits review' power on the Tribunal because this is a function which courts do not generally perform.[58] One might infer that this was done to provide members of regulated superannuation funds with a choice of forum. If it is the substantive unfairness or unreasonableness of a decision that is to be examined, the member might lodge a complaint with the Tribunal. If it is a question of legality such as whether or not the trustee acted within power or committed a breach of trust, the member might institute court proceedings. Merkel J acknowledged these different roles in *Briffa v Hay*:

> Accordingly, although the Complaints Act provides important new rights it is not the panacea for righting all wrongs. In particular, the tribunal may not always be an entirely satisfactory vehicle for determining a dispute over a fund member's actual entitlements. That may have been implicitly recognised by the legislature which provided for a review of a complaint to be suspended if there is a proceeding in a court about the [same] subject matter.[59]

The legislative scheme is not for the Tribunal to supplant the court's jurisdiction to supervise trustees, but to supplement it.

51 See, eg, Superannuation Complaints Tribunal Determination 97/137 (18 December 1997) where the Tribunal recognised the possibility of a different decision which might have been fair and reasonable, but nevertheless affirmed the trustee's decision on the basis that it also was fair and reasonable.

52 (Unreported, Federal Court of Australia, Sundberg J, 8 May 1997).

53 (1997) 147 ALR 226.

54 (Unreported, Federal Court of Australia, Heerey J, 15 August 1997).

55 This is true both in equity and in administrative law. In each jurisdiction 'unreasonableness', of such a degree that no reasonable person could have arrived at the decision, may give rise to grounds for challenge: *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 901; *Wednesbury* [1948] 1 KB 223, 230.

56 Commonwealth, *Parliamentary Debates*, Senate, 30 November 1995, 4405 (Senator Watson).

57 In its report, *Safeguarding Super*, above n 11, 12, the Senate Select Committee on Superannuation did not advocate an external dispute resolution body with the unrestricted review powers available to state tribunals.

58 Under ch III of the *Australian Constitution* a federal court cannot perform non-judicial functions unless they are purely ancillary to its judicial functions: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See also *Kable* (1996) 189 CLR 51 where this aspect of the separation of powers doctrine was extended to state courts exercising federal jurisdiction.

59 *Briffa v Hay* (1997) 147 ALR 226, 234.

The concept of review by reference to a 'fair and reasonable' standard has been plagued with difficulty. In *Doherty*, Northrop J said that the words 'fair and reasonable' have overtones of 'palm tree justice'.[60] The 'fair and reasonable' standard has led the judiciary to distinguish between trustee decisions which are discretionary and those which are non-discretionary. In *Collins v AMP*, Merkel J noted:

> The [*Complaints Act*] appears to operate in a relatively straightforward manner in respect of discretionary decisions of trustees but the same cannot be said in respect of non-discretionary decisions.[61]

Consequently he held that, if a trustee's decision in respect of a non-discretionary entitlement is correct as a matter of law, then the decision must also be fair and reasonable within the criteria set out in ss 37(5) and (6) of the *Complaints Act*,[62] whereas the same conclusion cannot be drawn in respect of a trustee's discretion. An exercise of trustee discretion might be correct in law but still operate unfairly or unreasonably in relation to a complainant in the circumstances.

In *CARE v Bishop*[63] Northrop J considered that the 'fair and reasonable' standard restricts the Tribunal's jurisdiction to a review of trustee decisions which are discretionary. In his view, a non-discretionary trustee decision, such as a decision about the interpretation of the trust deed, involves an application of legal principles and does not lend itself to merits review. Therefore, Northrop J held that if the Tribunal could review non-discretionary trustee decisions it would be exercising judicial power.[64] The Full Federal Court in *Wilkinson v CARE* unanimously agreed.

2 *Comparison of the Tribunal with the AAT*

In *Wilkinson v CARE* the Tribunal was compared with the AAT. It is therefore a useful exercise to briefly contrast the two bodies.

The Tribunal has many similarities to the AAT. The *Complaints Act* confers on the Tribunal investigative conciliation and review functions[65] which are initiated by a person lodging a complaint. Under s 27 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') a person whose interests are affected may apply for review. Under both enactments, the review process is initiated by an aggrieved person.

60 *Doherty* (Unreported, Federal Court of Australia, Northrop J, 31 July 1997) 20.

61 *Collins v AMP* (1997) 147 ALR 243, 253.

62 If one accepts this interpretation then, in respect of a non-discretionary decision, the difference between 'fair and reasonable' and 'correct or preferable' is purely one of semantics.

63 (Unreported, Federal Court of Australia, Northrop J, 31 July 1997).

64 Foley, 'Commentary: The Government's Perspective', above n 28, 19–22 argues that judicial power has never been an absolute concept and that to apply an artificially restrictive notion of judicial power to the Tribunal is inappropriate. In the context of *Brandy* (1995) 183 CLR 245, Nand, above n 44, 27 notes that an arbitrary approach is at odds with the flexible concept of judicial power applied by the courts in the last quarter century.

65 *Complaints Act* s 12.

When a complaint is lodged, the Tribunal must investigate the complaint by informing the trustee that a complaint has been made[66] and obtaining all relevant information from the trustee. In the first instance the trustee must provide those documents in its possession or under its control which it considers to be relevant to the complaint, but the Tribunal has power to compel the giving of information and the production of documents.[67] Similar provisions exist in relation to the provision of information and the production of documents by decision-makers under the *AAT Act*.[68] However, trustees need not give reasons for their decisions, although under s 28 of the *AAT Act* a decision-maker may be required to provide a statement of reasons. This difference is explicable by reference to the trust law foundations of superannuation under which it is well established that a beneficiary cannot require a trustee to give reasons,[69] reinforcing the private law origins of superannuation.

The Tribunal has a discretion to 'withdraw' the complaint if it is considered to be trivial, misconceived, vexatious or lacking in substance.[70] Similarly, the AAT has power to dismiss an application if it is satisfied that the application is frivolous or vexatious.[71]

The Tribunal must attempt to conciliate the complaint.[72] If the parties decline to conciliate or the conciliation is unsuccessful, then the complaint proceeds to a review.[73] Under the *AAT Act*, the AAT can refer an application to mediation with the consent of the parties.[74]

Section 36 of the *Complaints Act* provides that the Tribunal, in reviewing a trustee decision, is not bound by technicalities or rules of evidence, is to act speedily having regard to its objectives and the interests of all members of the relevant fund, and may inform itself of any relevant matter as it thinks appropriate. Section 33 of the *AAT Act* provides that AAT proceedings are to be conducted with as little formality and technicality and with as much expedition as statutory requirements and proper consideration permit. The AAT is also not bound by rules of evidence and may inform itself on any matter in such a manner as it thinks appropriate.[75]

For review purposes the Tribunal has all the powers, obligations and discretions that are conferred on the trustee[76] and must make a written determination:

66 *Complaints Act* s 17.
67 *Complaints Act* ss 24–5.
68 *AAT Act* ss 33, 37, 38.
69 See, eg, *Re Londonderry's Settlement* [1965] Ch 918; *Karger v Paul* [1984] VR 161; and, recently, *Wilson v Law Debenture Trust Corporation plc* [1995] 2 All ER 337.
70 *Complaints Act* s 22(3)(b). There is also a discretion to withdraw the complaint if the subject matter of the complaint will be dealt with by another body, has already been dealt with by another statutory body, or could be more effectively or conveniently dealt with by another statutory body: ss 22(3)(c)–(e).
71 *AAT Act* s 42B.
72 *Complaints Act* s 27.
73 *Complaints Act* s 32.
74 *AAT Act* s 34A.
75 *AAT Act* s 33(1)(c).
76 *Complaints Act* s 37(1)(a).

- affirming the decision;
- remitting the matter to the trustee for reconsideration in accordance with the Tribunal's directions;
- varying the decision; or
- setting aside the decision and substituting its own decision.[77]

These provisions are similar to s 43(1) of the *AAT Act*. Both the Tribunal and the AAT must give reasons for their determinations,[78] although the AAT can give its reasons orally in the first instance.

The Tribunal may refer questions of law to the Federal Court, either on its own initiative or at the request of a party.[79] The AAT has the same power.[80] Determinations of both the Tribunal and the AAT can be appealed to the Federal Court on a question of law[81] and an appeal does not affect the operation of the determination.[82]

Of greater import are the differences between the two bodies. We have already seen that the 'fair and reasonable' standard limits the Tribunal's review function both in terms of the basis for review and in terms of the available remedy. In addition, the Tribunal cannot do anything contrary to law or to the governing rules of the fund.[83]

The Tribunal is also subject to various other jurisdictional constraints. For example, it can only deal with a complaint if the matter has been dealt with first under the fund's internal arrangements for handling complaints.[84] It cannot deal with a complaint if court proceedings have been instituted about the same matter.[85] The AAT is not subject to any of these limitations. The basis for review by the AAT is the particular statute governing the decision-maker in question.[86] The *AAT Act* itself does not contain any jurisdictional constraints of the kind found in the *Complaints Act*.

There are also procedural differences between the Tribunal and the AAT. The Tribunal does not conduct oral hearings[87] and there is no right to representation.[88] Review meetings are held in private.[89] By comparison, the AAT may take

77 *Complaints Act* s 37(3).
78 *Complaints Act* s 40; *AAT Act* s 43(2).
79 *Complaints Act* s 39.
80 *AAT Act* s 45.
81 *Complaints Act* s 46; *AAT Act* s 44.
82 *Complaints Act* s 47; *AAT Act* s 44A.
83 *Complaints Act* s 37(5). In *Briffa v Hay* (1997) 147 ALR 226, 240, Merkel J noted that, just as the parties to a superannuation trust are bound by the trust deed, so must the Tribunal be bound. Otherwise a Tribunal determination might operate as a de facto alteration of the trust deed, raising a possible unjust acquisition of property in breach of s 51(xxxi) of the *Australian Constitution*.
84 *Complaints Act* s 19. See also *SIS Act* s 101 which requires the trustee of a regulated superannuation fund to have in place procedures for handling inquiries and complaints.
85 *Complaints Act* s 20. Note also that the Tribunal cannot deal with a complaint if: it is not made within any applicable prescribed period (ss 14(4) and 14(6B)); it relates to the management of the fund as a whole (s 14(6)); it relates to an excluded matter (s 14(5)); or it relates to a decision about a disability benefit made before 1 November 1994 (s 14(6A)).
86 *AAT Act* s 25.
87 *Complaints Act* s 34(1).
88 *Complaints Act* s 23(3).

evidence on oath[90] and compel the attendance of witnesses.[91] There is a right to representation,[92] the opportunity to submit one's case is assured by the *AAT Act*,[93] and AAT hearings are generally public.[94] In this practical sense, the AAT is more 'court-like' than the Tribunal.

AAT determinations are not expressed to be final and conclusive, but Tribunal determinations generally take immediate effect as a decision of the trustee.[95] In *Wilkinson v CARE* this was a factor influencing the court to conclude that the Tribunal makes binding determinations.

3 *Indirect Enforcement of Tribunal Determinations*

The Tribunal has no power to impose penalties for failing to comply with its determinations. However, s 65(1) of the *Complaints Act* requires the Tribunal to report to the ISC any refusal or failure of a trustee to give effect to a Tribunal determination. The ISC's regulatory power under the *SIS Act* might then be employed to compel the trustee to comply with the Tribunal determination.

So while the Tribunal is unable to enforce its own determinations under the *Complaints Act*, effective enforcement can be achieved by virtue of the links between the *Complaints Act* and the *SIS Act*. This indirect means of enforcement is to be contrasted with the enforcement mechanism in *Brandy*,[96] where the HREOC's determinations were directly enforceable once registered in a registry of the Federal Court. In *Wilkinson v CARE* the members of the Full Federal Court held divergent views on whether the enforcement machinery for the Tribunal's determinations indicated an exercise of judicial power.

C *Judicial Power*

A conclusive definition of judicial power is yet to be formulated. The courts have struggled with the overlap between the exercise of judicial power and the exercise of administrative power throughout this century.[97] The problem has been succinctly summarised by the High Court:

> The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the ex-

89 *Complaints Act* s 38. But, by virtue of s 38(2), the Tribunal can direct other persons to be present.
90 *AAT Act* s 40(1).
91 *AAT Act* s 40(1A).
92 *AAT Act* s 32.
93 *AAT Act* s 39.
94 *AAT Act* s 35.
95 *Complaints Act* s 41.
96 (1995) 183 CLR 245.
97 For a comprehensive discussion of this struggle, see Nand, above n 44.

> ercise of judicial power, they may also be elements in the exercise of administrative and legislative power. [98]

Rather than strictly define the concept, the courts have developed various indicia of judicial power to assist them in drawing the line.[99] The making of final and conclusive determinations in deciding controversies between parties is a key feature in the concept of judicial power.[100] Yet it is recognised that both judicial and non-judicial bodies can make final and conclusive determinations.[101] A distinction between a substitutive role and a constitutive role has therefore emerged.[102] The *ascertainment and declaration of existing rights* by application of legal principles and standards is considered to be substitutive and an exercise of judicial power, while the *creation of new rights and liabilities* by reference to either a broad discretion or policy considerations is considered to be constitutive and an exercise of administrative or legislative power.[103]

The courts have acknowledged that both a court and an administrative body can form an opinion about legal rights and obligations, but have held that it is the *object* of the adjudication which characterises their function as judicial or administrative. In deciding that the former Conciliation and Arbitration Commission did not exercise judicial power, the High Court said:

> In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court ... does not ipso facto mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.[104]

It is clearly accepted that non-judicial bodies can perform judicial *functions* without exercising judicial *power*. The Privy Council has noted that an administrative tribunal may act judicially, but still remain an administrative tribunal, as distinguished from a court.[105]

98 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9.

99 In her article, Nand suggests that there is an absence of strong legal theory in the courts' approach to judicial power: Nand, above n 44, 36.

100 See, eg, *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart Parker*').

101 See, eg, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 463–4 (Isaacs and Rich JJ) ('*Alexander*') in relation to arbitral power.

102 Jacob Fajgenbaum and Peter Hanks, *Australian Constitutional Law* (1972) 438–9.

103 *Alexander* (1918) 25 CLR 434; *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140; *Precision Data* (1991) 173 CLR 167, 189–90; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374.

104 *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 ('*Re Ranger Uranium Mines*'); see also *Precision Data* (1991) 173 CLR 167, 188–9.

105 *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 544–5 ('*Shell*').

Recently, there has been an increasing tendency to focus on the presence of an enforcement mechanism as determinative of judicial power. *Brandy*[106] is an example of this trend. There the High Court considered the various indicia of judicial power with particular reference to the enforceability of decisions:

> However, there is one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power.[107]

In *Wilkinson v CARE*, the Full Federal Court was essentially united in its application of the various indicia of judicial power to the operation of the Tribunal, except on the enforceability issue. The enforcement mechanism for the Tribunal's determinations was the point of disagreement between Heerey and Lockhart JJ in the majority and Sundberg J in dissent.

D *Summary*

In *Wilkinson v CARE*, the 'fair and reasonable' standard, the differences between the Tribunal and the AAT, and the nature of the enforcement mechanism for Tribunal determinations are overtly relevant factors in the Full Federal Court's decision that the Tribunal is exercising judicial power. As with *Brandy*, however, the Tribunal's purported adjudication of private law rights is the crux of the decision.[108] It may therefore be difficult to 'cure' the defects highlighted by the case with legislative amendment alone. What might be necessary is a more conclusive means of embracing superannuation within the public domain.

III THE DECISION IN *WILKINSON V CARE*

This case was an appeal from the decision of Northrop J in *CARE v Bishop*[109] to the effect that, in order to avoid exercising judicial power, the jurisdiction of the Tribunal under the *Complaints Act* must be limited to the review of trustees' decisions which are discretionary.[110] The appeal was run in tandem with the Attorney-General intervener case of *Breckler v Leshem*.[111]

A *The Case of Mrs Bishop*

The appeal arose out of a complaint about the decision of the trustee of the Clerical Administrative and Related Employees Superannuation Plan ('the Plan') not to pay an insured benefit upon the death of a Plan member, Mrs Bishop. The

106 (1995) 183 CLR 245.

107 Ibid 286.

108 Jerrold Cripps QC also alluded to this point in his paper, 'The Role of the Superannuation Complaints Tribunal' (Paper presented at the Law Council of Australia 1998 Superannuation Conference, Melbourne, February 1998).

109 (Unreported, Federal Court of Australia, Northrop J, 31 July 1997).

110 A similar decision was made by Northrop J in *Doherty* (Unreported, Federal Court of Australia, Northrop J, 31 July 1997).

111 Because of the potential ramifications of the case, the Attorney-General for the Commonwealth intervened.

insured benefit was provided under a policy with Life Reinsurance of Australasia Limited ('the insurer'). The Plan trustee and the insurer[112] contended that the insured benefit was not payable under either the Plan trust deed or the policy on the basis that the deceased member had been a casual employee and hence had ceased employment on her last day at work, some seven months before she died. Accordingly, she did not qualify for an insured benefit as she had not died in service and was not covered by the policy at the date of her death. This decision was made in spite of an extended definition of 'service', which allowed the employer to declare that an employee continued in 'service' for the purposes of the deed. The member's employer had provided a statutory declaration to that effect.

Upon review, the Tribunal determined that the insured benefit was payable in respect of the deceased member. In reaching its decision, the Tribunal had regard to certain defined terms in the relevant documents, in particular the definition of 'part-time employee' in the policy and the subjective definition of 'service' in the Plan trust deed. The Plan trustee and the insurer appealed the Tribunal's determination to the Federal Court.

B *The Decision of Northrop J*

Northrop J ordered that the Tribunal's determination should be set aside and the matter remitted to the Tribunal for determination according to law. He held that the Tribunal had made an error of law in determining that Mrs Bishop was a 'part-time employee' in terms of the insurance policy because there was no material before the Tribunal to support such a finding. He also held that the Tribunal's determination was the result of an exercise of judicial power.[113] The bases for this ruling were partly an analysis of the function performed by the Tribunal in reviewing trustee decisions of a non-discretionary nature and partly an interpretation of the 'fair and reasonable' standard. Northrop J considered that the trustee decision in question was non-discretionary, requiring the construction of the Plan rules and their application to the facts of the case. As such, the Tribunal's determination was based on the application of legal principles to facts ascertained, one of the indicia of judicial power.

Northrop J also noted that the words 'unfair or unreasonable' in s 14(2) of the *Complaints Act* must be given some meaning.[114] He had regard to the difficulties facing a member of a superannuation fund attempting to challenge the exercise of trustee discretion in a court. He contrasted the constraints imposed on the Tribunal under s 37(6) of the *Complaints Act* with the unconstrained power conferred on the AAT and commented on the 'simplicity of s 43 of the AAT Act' when compared with the 'difficulties and complexities of s 37' of the *Complaints Act*.[115] He therefore held that the 'fair and reasonable' standard could only be

[112] The Tribunal can join the insurer as a party to the complaint: *Complaints Act* s 18(1).
[113] *CARE v Bishop* (Unreported, Federal Court of Australia, Northrop J, 31 July 1997) 25.
[114] Ibid 24.
[115] Ibid 14.

given meaning if the decisions about which complaints may be made under the *Complaints Act* are confined to those containing some discretionary element.[116]

C *The Full Federal Court*

All members of the Full Federal Court agreed that the Tribunal's jurisdiction is limited to reviewing trustee decisions which involve the exercise of discretion.

Heerey J, influenced by the 1995 amendments to the *Complaints Act*, said:

> In my respectful opinion, Northrop J was correct in holding that the Tribunal's jurisdiction is confined to discretionary decisions ... [T]here can be no question of unfairness or unreasonableness where a non-discretionary decision of a trustee is legally correct.[117]

Lockhart J delivered a judgment agreeing with Heerey J in all respects. Sundberg J held that the Tribunal's powers of review are limited to discretionary decisions of trustees, as a matter of statutory construction. He agreed that non-discretionary decisions are either correct or incorrect in law and thus cannot be evaluated against the 'fair and reasonable' standard, especially since s 37(5) precludes the Tribunal from doing anything that is contrary to law or the governing rules of the fund.

Before the Full Federal Court, it was also argued for the respondents that the *Complaints Act* invalidly confers judicial power on the Tribunal in breach of chapter III of the *Australian Constitution*. Heerey and Lockhart JJ upheld this argument with Sundberg J dissenting.

Counsel for the Attorney-General asserted that the Tribunal is an administrative body analogous to the AAT. Like the AAT, the Tribunal stands in the shoes of the primary decision-maker. Like the AAT, the Tribunal must determine issues of law for the purpose of reaching its decisions. Like the AAT, the Tribunal's determinations are subject to appeal on questions of law. Therefore, it was argued, the Tribunal is exercising administrative power, not judicial power. What was overlooked in the Attorney-General's argument is that, unlike the AAT, the Tribunal reviews decisions of private citizens, not decisions of officials within the executive arm of government. This pivotal point did not escape the attention of the Full Federal Court.

1 *The Majority Judgment*

Heerey J (with whom Lockhart J concurred) considered, without a great deal of analysis, that the following factors lead cumulatively to the conclusion that the review power conferred on the Tribunal by the *Complaints Act* is the judicial power of the Commonwealth:

[116] Ibid 24–5. For a stringent criticism of this analysis see Foley, 'Commentary: The Government's Perspective', above n 28.

[117] *Wilkinson v CARE* (1998) 152 ALR 332, 345.

(a) The Parties to a Superannuation Fund Are Governed by Private Law Rather than Public Law

Heerey J rejected the analogy between the Tribunal and the AAT. He considered that the Tribunal is different from a body which is essentially making the same decisions as a government official:

> While superannuation funds today are subject to a complex regulatory regime, the rights and obligations of members, trustees, employers [*sic*] and insurers as between themselves are governed by trust and contract law, enforceable in the ordinary courts. This area is not within the province of administration. It is not concerned with the rights and obligations of individuals or corporations vis-à-vis government like the tax, social security or migration systems. [118]

In his view the Tribunal had been 'inserted' into the area of private law to decide controversies between individuals, an area which had traditionally been the role of the courts. Clearly Heerey J did not consider that the government's extensive regulation of superannuation alters its fundamental private law status. The fact that the Tribunal gives a binding and authoritative decision was also persuasive in his view.[119]

(b) An Individual Can Initiate Proceedings by Bringing a Complaint

Interestingly, Heerey J stated that one of the indicia of the administrative function is that only a governmental body can initiate proceedings.[120] This suggests that Heerey J was troubled by the similarity between the lodgment of a complaint under the *Complaints Act* and the commencement of legal proceedings in a court.

(c) The Tribunal Adjudicates on Claims That Rights Conferred by Law Have Been Breached

It was argued for the appellants that the Tribunal *creates* rights, rather than *ascertains and declares* rights, when it determines that a decision of a trustee is unfair or unreasonable. Heerey J rejected that argument. He stated that it is the *Complaints Act* itself which creates a right for members of superannuation funds not to be adversely affected by decisions of a trustee which are not fair and reasonable, which is 'not a right previously known to trust law'.[121] However, in his opinion, when *applying* this new right to a trustee's decision, the Tribunal is considering present or past facts: '[i]n determining a complaint, the tribunal is adjudicating "a dispute about rights and obligations arising solely from the

[118] Ibid 346.

[119] Ibid.

[120] Ibid. Note that, in *Drake* (1979) 24 ALR 577, the AAT was held to be an administrative body, yet under the *AAT Act* s 27 application for review may be made by any person whose interests are affected.

[121] *Wilkinson v CARE* (1998) 152 ALR 332, 346. This is probably overstating the matter, since not every decision of a superannuation fund trustee is subject to this 'right'. See, eg, *Complaints Act* ss 14(4)–(6): see above n 85 for full details. It might be more accurate to say that the *Complaints Act* creates the right to have *certain* trustee decisions reviewed by reference to a 'fair and reasonable' standard.

operation of the law on past events or conduct"'.[122] In his view, this suggested that the Tribunal is performing a judicial function.

(d) The Tribunal's Function Does Not Involve the Application of Policy Considerations but Rather the Application of Objective Criteria Similar to the Principles and Standards Applied by the Courts

Heerey J appears to be comparing the Tribunal with the Corporations and Securities Panel, a non-judicial body held to be constitutionally valid by the High Court in *Precision Data Holdings Ltd v Wills*.[123] In contrast to the Panel (which applies policy considerations in determining whether corporate conduct is unacceptable), Heerey J considered that a Tribunal determination as to whether a trustee's decision is unfair or unreasonable is similar to the sorts of determinations made by the courts, indicating that the Tribunal is judicial in character.[124]

(e) A Decision of the Tribunal Can Be Enforced by Civil Injunction and Criminal Penalty

While Heerey J acknowledged that the Tribunal cannot enforce its own determinations, he said:

> The legislation at the very least provides effective machinery for the enforcement of valid orders of the tribunal. A trustee faced with an adverse determination of the tribunal cannot ignore it without fear of sanction following as a matter of law from the fact of the determination and its being disobeyed. That is an indicium of judicial power.[125]

He was unmoved by the argument for the Attorney-General that a decision of the Tribunal, unlike a court judgment, is subject to judicial review on traditional administrative law grounds. He referred to the recent case of *R v Wicks*,[126] in which the House of Lords comprehensively considered the circumstances when the validity of an order made by a statutory authority can be impugned as a defence to prosecution for breach of the order. In his view, the scheme of the *Complaints Act* is such as to preclude the lawfulness of a Tribunal determination being challenged in a prosecution under the *SIS Act*. However, he did not regard this point as relevant to the issue of enforceability:[127]

> In any event, it is not an answer to the argument on enforceability to say that some decisions of the Tribunal may be invalid on one or other administrative law grounds and may therefore be ignored — or attacked in collateral proceedings.[128]

122 *Wilkinson v CARE* (1998) 152 ALR 332, 346 (citations omitted).
123 (1991) 173 CLR 167 ('*Precision Data*').
124 *Wilkinson v CARE* (1998) 152 ALR 332, 346–7.
125 Ibid 347.
126 [1997] 2 WLR 876.
127 Cf Nand, above n 44, 30, who points out that this issue is *related* to enforceability because if the merits could be reviewed in collateral proceedings, it would raise the inference that judicial power had *not* been exercised.
128 *Wilkinson v CARE* (1998) 152 ALR 332, 347.

He concluded that the Tribunal is exercising judicial power in reviewing both discretionary and non-discretionary trustee decisions.

2 *The Dissenting Judgment of Sundberg J*

In applying the indicia of judicial power to the Tribunal, Sundberg J's analysis was more detailed.

Sundberg J agreed with Heerey J that, whilst new rights might be created by the *Complaints Act*, the Tribunal applies those rights to the facts of the particular case.[129]

He also concurred that the Tribunal's determination as to whether the decision of a trustee is fair and reasonable involves the application of objective standards which are similar to concepts regularly applied by courts.[130]

Sundberg J considered the question of whether the Tribunal makes binding and conclusive determinations, and noted that, by virtue of s 41(1) of the *Complaints Act*, the Tribunal's determinations come into operation when they are made, and, by virtue of s 41(3), take effect as a decision of the trustee. He further noted that s 47 provides that an appeal to the Federal Court from a determination of the Tribunal does not affect the operation of the determination. He therefore concluded that the combined effect of these sections is to make the Tribunal's determinations binding and conclusive.[131]

Sundberg J addressed the argument for the Attorney-General that the powers of the Tribunal are completely analogous to the powers of the AAT and thus purely administrative. However, in his view, the basic difference between the AAT and the Tribunal is that the Tribunal is given the power to review the decisions of a trustee — a private corporate citizen which is not part of the structure exercising executive power, despite the government's scheme of prudential supervision for the superannuation industry:

> The trustee is not part of any executive continuum. The trustee and the tribunal are not 'successive administrative functionaries'. The tribunal's functions are not 'in aid of the administrative functions of government', for the trustee is not part of the structure of government.[132]

These comments substantiate the inference from *Brandy*[133] that the courts apply a stricter concept of judicial power when the legislature purports to empower a tribunal to determine disputes between parties who are primarily governed by private law.

In substance then, Sundberg J agreed with the conclusions of Heerey J, except on the enforcement issue. He noted that, unlike the HREOC in *Brandy*, the Tribunal has no enforcement powers. After considering the cases of *Alexander*,[134]

[129] Ibid 355.
[130] Ibid 355–6.
[131] Ibid 358–9.
[132] Ibid 357.
[133] (1995) 183 CLR 245.
[134] (1918) 25 CLR 434 where Isaacs and Rich JJ held that the judicial power includes the decision, the pronouncement of judgment and the power to carry that judgment into effect between contending parties.

Rola Company (Australia) Pty Ltd v Commonwealth,[135] *R v Davison*[136] and *Brandy* he said that it is necessary, in order for a tribunal's powers to be judicial, that some mechanism exists for the enforcement of the tribunal's determinations.[137]

Sundberg J then went on to consider the provisions of the *SIS Act* which relate to the Tribunal. He referred to the fact that it is a prescribed standard that the trustee must not fail, without lawful excuse, to comply with an order, direction or determination of the Tribunal, and that intentional or reckless contravention of a prescribed standard is an offence. He also referred to the fact that, under s 315 of the *SIS Act*, the ISC can apply for an injunction to restrain a person from engaging in conduct that constitutes a contravention of the *SIS Act* or *SIS Regulations*, and that a court can award damages either in addition to or in substitution for an injunction.[138] He also noted that s 65 of the *Complaints Act* requires the Tribunal to report to the ISC any refusal or failure of a trustee to give effect to a determination made by the Tribunal, the significance being that the ISC may then conduct an investigation of the trustee's affairs under s 263 of the *SIS Act*.[139]

However, Sundberg J drew a distinction between these means of ensuring compliance with Tribunal determinations and the position under the amendments to the *Racial Discrimination Act 1975* (Cth) in *Brandy*,[140] where the automatic effect of registering the HREOC's determination was that it became enforceable as an order of the Federal Court. The essence of the distinction is that the indirect enforcement machinery in the *SIS Act* involves an independent exercise of judicial power as to whether an order should be made to impose a penalty or grant a remedy:

> A body with power to decide controversies between parties by the determination of rights and duties based upon existing facts and the law does not without more exercise judicial power. In my view *Brandy* establishes that the body must as well have power to enforce its determinations, or there must be provided some other enforcement mechanism *which does not involve an independent exercise of judicial power by some other body*.[141]

He therefore concluded that, in terms of the Tribunal's functions and powers, an essential characteristic of judicial power is absent. In his view, the Tribunal is not exercising judicial power in reviewing discretionary trustee decisions.

[135] (1944) 69 CLR 185, 199 where Latham CJ held that, if a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then all of the attributes of judicial power are plainly present.

[136] (1954) 90 CLR 353 ('*Davison*') where Dixon CJ and McTiernan J held that it was not essential to the exercise of judicial power that the body execute its own decision.

[137] *Wilkinson v CARE* (1998) 152 ALR 332, 358.

[138] Ibid 359.

[139] Ibid 360.

[140] (1995) 183 CLR 245.

[141] Ibid 361 (emphasis added).

D *The Rights of Mrs Bishop*

Ironically, all members of the Full Federal Court agreed with the Tribunal's conclusions that the member had died in 'service' and that the insured benefit was payable. They held that Northrop J had made an error of law regarding the definition of 'part-time employee' in the policy. (As the insurer had indicated at the Full Federal Court hearing that it would not take any point based on that definition, the only issue was the construction of the trust deed.) The court noted that the insured benefit would be recoverable in a court of competent jurisdiction.[142]

IV ISSUES FOR THE HIGH COURT

Not surprisingly, given that a linchpin of the government's legislative scheme has been impaired, the decisions in *Wilkinson v CARE* and *Breckler v Leshem* attracted a flurry of media attention.[143] The same response occurred after *Brandy*[144] was handed down. Without the ultimate power to make binding determinations upon review, the Tribunal's residual investigative and conciliation functions are ineffectual. Further, Australians are unlikely to voluntarily channel savings into a superannuation system that defers access to the funds until retirement and precludes resolution of disputes except through the costly, lengthy and often intimidating court system.[145] Clearly the government must take remedial action.[146] Special leave has been granted to appeal to the High Court.[147] It is hoped that a High Court appeal will clarify some outstanding issues.

A *Enforcement as an Indicium of Judicial Power*

The High Court might be inclined to adopt the opinion of Sundberg J on the issue of enforceability, particularly in light of its comments in *Brandy*:

> The fact that the Commission cannot *enforce its own* determinations is a strong factor weighing against the characterisation of its powers as judicial; though it must be recognised that this is not an exclusive test.[148]

[142] Ibid 343 (Heerey J), 362–3 (Sundberg J). I understand that the Plan trustee and the insurer have accordingly settled the matter.

[143] Stephen Bartholomeusz, 'Court Bombs Super Appeals', *The Age* (Melbourne), 13 February 1998, B1; Phillip Hudson, 'Court Blow to Super Industry', *The Age* (Melbourne), 13 February 1998, 1; Hans van Leeuwen, 'Court Kills Super Complaints Tribunal', *The Australian Financial Review* (Sydney), 13 February 1998, 3; Jill Ferguson, 'Chaos as Super Rule Is Changed', *The Age* (Melbourne), 14 February 1998, 10.

[144] (1995) 183 CLR 245.

[145] Studies show that the level of superannuation contributions mandated under the *Superannuation Guarantee (Administration) Act 1992* (Cth) is unlikely to fully meet the needs of the ageing population: see, eg, Vincent Fitzgerald, *National Saving: A Report to the Treasurer* (1993) 14.

[146] A forum was convened by the Chair of the Senate Select Committee on Superannuation to discuss a workable model for the government's superannuation dispute resolution body: Commonwealth, Senate Select Committee on Superannuation, *Superannuation Complaints Tribunal* (Proof Committee Hansard, 28 April 1998).

[147] Because *Wilkinson v CARE* has been settled (see above n 142), it is only the decision in *Breckler v Leshem* which is on appeal. But see above n 7.

[148] *Brandy* (1995) 183 CLR 245, 257 (emphasis added).

The judgments in *Wilkinson v CARE* squarely raise the degree of connection that must exist between the determinations of an administrative body and enforcement of those determinations before the body will be held to be exercising judicial power.

In *Davison* it was held that a body need not enforce its own determinations to be exercising judicial power.[149] At first glance, this seems to support the view of the majority in *Wilkinson v CARE*. On closer scrutiny, however, the majority judgment ignores two salient points:

1. With a Tribunal determination, enforcement does not automatically follow. The ISC has a discretion whether or not to take some form of enforcement action.
2. Any enforcement proceedings are initiated, not by any of the parties (ie the complainant, the trustee or even the Tribunal) but by a third party altogether (the ISC).

It is therefore questionable whether the authority of *Davison* extends to this situation.

The dissenting judgment appears to address the first point. Sundberg J cites *Brandy* as authority for the proposition that there will only be an exercise of judicial power if the body's determinations are enforceable without any independent exercise of judicial power.[150] The question arising out of his dissent is what form must this 'independent exercise' take?

Sundberg J seems to accept that *any* independent exercise of judicial power will break the nexus between the body's determinations and their enforcement and so prevent the body from exercising judicial power. However, *Brandy* could be limited to the proposition that there must be a de novo review by the court in order to break the nexus. In that case the amendments to the *Racial Discrimination Act 1975* (Cth) provided that a registered determination could not take effect as an order of the court for a period of 28 days, during which the respondent could apply for a review of the determination by the Federal Court. In holding the amendments invalid, the High Court was clearly influenced by the fact that Federal Court review was not a hearing de novo, but merely a re-examination of the HREOC's determination. (The Act did not envisage the admission of new evidence before the Federal Court as a matter of course.) In *Aldridge v Booth*[151] Spender J found that the HREOC was not exercising judicial power because s 82(1) of the *Sex Discrimination Act 1984* (Cth) required the court to satisfy itself that the actions in question were unlawful. Thus the complaint *was* investigated afresh.

Certainly Sundberg J acknowledges that the indirect method of enforcing the Tribunal's determinations under the *SIS Act* does not involve the court in any full inquiry. The court can order the trustee to give effect to the Tribunal's determination where the trustee has failed to do so and the court determines that it is appropriate to do so. There is no re-investigation of the complaint itself. The

[149] *Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).
[150] *Wilkinson v CARE* (1998) 152 ALR 332, 361.
[151] (1988) 80 ALR 1.

indirect enforcement mechanism effected by the links between the *SIS Act* and the *Complaints Act* places the Tribunal's determinations somewhere in between those determinations of a non-judicial body which are only enforceable through judicial action involving a de novo hearing and the determinations of the HREOC in *Brandy*, which were potentially enforceable without any judicial hearing. Thus, the *form* of 'independent exercise of judicial power' becomes relevant.

The less subtle issue raised by the second point also requires resolution. While Sundberg J's dissenting judgment examined the *mode* of enforcement, the majority judgment looked to the *result* — the fact that adverse consequences might flow from refusing to follow a Tribunal determination. The High Court appeal could clarify this basic difference in focus, which has broader ramifications for government in framing legislation to constitute other administrative tribunals.

B *Limited Merits Review*

The Full Federal Court was in complete agreement that the jurisdiction of the Tribunal is confined to discretionary decisions. Even if an appeal to the High Court were successful on the enforcement issue, the superannuation industry would still be left to grapple with the distinction between a trustee decision which is discretionary (and hence within the Tribunal's jurisdiction) and one which is non-discretionary (and thus outside the Tribunal's purview).

Review of a trustee's decision to distribute a death benefit amongst dependants would be within the Tribunal's jurisdiction, as an exercise of trustee discretion. However, even where a trustee decision is substantially discretionary, there are invariably non-discretionary matters to be determined in exercising that discretion. The decision as to who is or is not a dependant is often non-discretionary. Would these preliminary decisions by trustees be outside the Tribunal's jurisdiction, with only the ultimate distribution decision reviewable by the Tribunal? There is authority to the effect that the adjudication of a preliminary question which the adjudicator has no power to enforce, but upon which an exercise of administrative power depends, is not an exercise of judicial power.[152] Nevertheless it is undesirable to superimpose this additional layer of complexity, particularly when there are very few trustee decisions in the superannuation context which are purely discretionary[153] and do not involve any threshold issues of a non-discretionary nature. This aspect of the court's ruling in *Wilkinson v CARE* must therefore be overcome.

The difficulty arises from the way in which the judiciary has approached the 'fair and reasonable' standard in the *Complaints Act*. In considering whether the Tribunal is exercising judicial power, the judiciary has tended to focus on the 'fair and reasonable' standard to the exclusion of the other provisions of the

[152] *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, 654 ('*Ludeke*').

[153] Whether a trustee power is discretionary depends, to some extent, on whether one takes a broad or narrow view of discretion. A useful classification of fiduciary discretions is made in *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587, 1617–18 (Warner J).

Complaints Act. The provisions dealing with the withdrawal of complaints confer similar powers on the Tribunal as the powers conferred on the Commonwealth Ombudsman to refuse to investigate a complaint.[154] This absence of a duty to resolve a complaint is consistent with an administrative function. The informal and private nature of the Tribunal's proceedings is also consistent with the Tribunal as an administrative body. The assimilation of the Tribunal's powers and decisions with those of the trustee also suggests that it has an administrative role.[155] The statutory limitations on the Tribunal's jurisdiction support the contention that the Tribunal is performing a *different* function from the courts. In addition, the legislature *intended* to create an administrative body.[156]

It might be conceded that the 'fair and reasonable' standard is incompatible with a 'full merits review', such as is conducted by the AAT.[157] The 'fair and reasonable' standard can simply be seen as limiting the *scope* of the Tribunal's review. A comparison of the 'limited merits review' power of the Tribunal with the 'full merits review' power of the AAT does not necessarily lead to the conclusion reached by Northrop J and the Full Federal Court.

The Tribunal's 'limited merits review' of a trustee's decision was held to be an exercise of administrative power by Merkel J in *Briffa v Hay*.[158] He considered the distinction between determining rights and duties based on existing facts and law, and creating new rights and obligations, concluding that:

> Furthermore, the very nature of the decision made by the tribunal is clearly administrative. The tribunal does not make or enforce orders as such. ... A determination made under s 37 creates new rights and obligations which are enforceable as a decision of the trustee by reason of the statute but not as a court order or in a manner analogous to a judicial determination ... In my view the tribunal exercises administrative, rather than judicial, power in relation to the decisions reviewed by it. The features which led to an invalid conferral of judicial power in *Brandy* are absent in the present case.[159]

Merkel J was undoubtedly influenced by the absence of enforceability, a key indicium in determining whether or not a body exercises judicial power. The critical point is that, in his view, the 'fair and reasonable' standard was not relevant to that analysis. As the *Complaints Act* is beneficial legislation, he was prepared to place a construction on those words consistent with the Tribunal's administrative function:

> [T]he question for the tribunal under the Complaints Act is not whether it is of the opinion that the trustee's decision was correct as a matter of law or fact. Rather, it is whether the tribunal is satisfied that the trustee's decision in rela-

[154] *Ombudsman Act 1976* (Cth) s 6.

[155] Merkel J noted this point in *Collins v AMP* (1997) 147 ALR 243, 251, citing as authority *Shell* (1930) 44 CLR 530, 541 and also his own judgment in *Briffa v Hay* (1997) 147 ALR 226, 237–9.

[156] Foley, 'Commentary: The Government's Perspective', above n 28, makes this point strongly.

[157] Cf Carol Foley, 'The Nature of the Power of the Superannuation Complaints Tribunal' (Paper presented at the Law Council of Australia 1997 Superannuation Conference, Surfers Paradise, February 1997).

[158] (1997) 147 ALR 226.

[159] Ibid 238–9.

> tion to a member or former member is unfair or unreasonable ... [I]n arriving at a determination the tribunal might form its own views on the legal obligations of the trustee in relation to the decision or refer questions of law to the court ... However, the view of the tribunal or of the court, in respect of those obligations, is not determinative of the issue of unfairness or unreasonableness which the tribunal is to determine or of the compensatory relief the tribunal might grant.[160]

He also refused to limit the Tribunal's jurisdiction to reviewing discretionary trustee decisions because to do so would be inconsistent with the parliamentary scheme of providing a low cost and speedy resolution mechanism and would defeat the whole purpose of the *Complaints Act*.

Again, in *Collins v AMP*,[161] Merkel J interpreted the 'fair and reasonable' standard so as to *secure* the non-exercise of judicial power by the Tribunal. After stating that the Tribunal must affirm as fair and reasonable a non-discretionary trustee decision if satisfied that it is legally correct,[162] he went on to say, 'I would add that, so construed, s 37(6) operates to ensure that ... the Tribunal does not exercise judicial power'.[163]

The approach taken by Merkel J indicates that there is no logical compulsion to find that the Tribunal is exercising judicial power simply because it conducts a 'limited merits review'. Indeed, the fact that the Tribunal may reject a legally correct discretionary decision by a trustee if it is not fair and reasonable (while a court may not) implies that the Tribunal is exercising a non-judicial function.

Contrast the Full Federal Court in *Wilkinson v CARE*, which highlighted the apparent similarity between the 'fair and reasonable' standard and the types of standards applied by the courts in other contexts. Both Heerey J and Sundberg J likened it to the 'reasonable care' standard.[164] Yet, while the 'fair and reasonable' standard may *appear* analogous to other standards applied by the courts, in fact the courts do not entertain this subjective concept in reviewing trustee decisions. To judge the 'fairness' or 'reasonableness' of an exercise of trustee discretion is akin to substituting the court's opinion for that of the trustee. This the courts have declined to do, regarding it as irrelevant whether a court would arrive at the same decision.[165]

This aspect of the court's reasoning is also at odds with prior judicial acknowledgment that administrative bodies can determine similar issues to those determined by the court, depending on the *object* of the adjudication. It is well established that tribunals can interpret and apply law, as long as they do not purport to conclusively determine it.[166] The Full Federal Court's ruling that the Tribunal's review of non-discretionary trustee decisions involves an exercise of

[160] Ibid 234.

[161] (1997) 147 ALR 243.

[162] It is self-evident that a tribunal cannot be empowered to disregard the law. In part, s 37(5) of the *Complaints Act* enshrines this truism.

[163] *Collins v AMP* (1997) 147 ALR 243, 255.

[164] *Wilkinson v CARE* (1998) 152 ALR 332, 347 (Heerey J), 356 (Sundberg J).

[165] See, eg, *Re Londonderry's Settlement* [1965] Ch 918, 936–7 (Salmon LJ).

[166] See, eg, *Re Ranger Uranium Mines* (1987) 163 CLR 656, 666; *Precision Data* (1991) 173 CLR 167, 188–9.

judicial power is curious when a survey of the various determinations of the AAT reveals that the AAT is regularly performing a judicial *function*.

The line distinguishing the 'object of the adjudication' is certainly fine when one compares the Corporations and Securities Panel in *Precision Data*,[167] which was held to be *creating* rights and liabilities in declaring corporate conduct to be unacceptable, with the Tribunal, which is arguably also prescribing the basis for future rights when it determines that a trustee decision is unfair or unreasonable. In *Precision Data* the High Court held that the object of the panel's inquiry and determination was to create a new set of rights and obligations which did not exist antecedently and independently of making its order.[168] One could make a similar observation about the Tribunal; its determinations create rights to benefits or increased benefits, even more so when the Tribunal reviews a trustee's discretionary decision to distribute a death benefit. In such a case, the Tribunal's determination, taking effect as a decision of the trustee, must *create rights* since no person within the class of dependants has a right to the death benefit, but only a right to be considered.[169]

If the *Complaints Act* is considered as a whole,[170] rather than isolating the 'fair and reasonable' standard, it is open to the High Court to find that the Tribunal exercises an administrative function. Alternatively, if the High Court upholds the artificial construction of the 'fair and reasonable' standard preferred by the Full Federal Court, the government might consider legislative amendment to remove the Tribunal's 'limited merits review' function and replace it with a 'full merits review' function, more closely aligned with that of the AAT.[171] This measure would at least eliminate the basis for distinguishing between discretionary and non-discretionary trustee decisions in terms of the Tribunal's review power. However, it is doubtful whether legislative amendment would overcome the inherent difficulty in attempting to apply administrative review to private parties. In my view, this is the obstacle to be surmounted.

C *Public–Private Distinction*

Public law is a system of law enforcing proper performance by public bodies of duties they owe to the public, while private law is the system of law protecting the private rights of individual citizens. The distinction is said to depend on *who* is being protected — the public as a whole or the specific persons entitled to the

167 (1991) 173 CLR 167.

168 Ibid 190.

169 *Gartside v Inland Revenue Commissioners* [1968] AC 553.

170 *Acts Interpretation Act 1901* (Cth) s 15AA requires a purposive approach to statutory interpretation. This is discussed by Foley, 'Commentary: The Government's Perspective', above n 28.

171 George Williams, 'A Blow to the Superannuation Complaints Tribunal', *CCH Australian Super News* (Sydney), 27 February 1998, 3 suggests that another alternative would be to replace the 'fair and reasonable' standard with a set of policy considerations, adopting a model of the Corporations and Securities Panel. He also suggested that the government could secure state cooperation. The government's other options were explored by the Tribunal Chairperson, Neil Wilkinson, in his paper 'The Federal Court's Decision and the SCT: Where to from Here?' (Paper presented at the 1998 Conference of Major Superannuation Funds, Ashmore, Qld, April 1998).

rights in question.[172] Thus public law has a supervisory role, concerned with limiting government power, whereas private law is adjudicative. The 'private–public divide' was acutely noted by the Full Federal Court in *Wilkinson v CARE*.

All members of the court observed that the Tribunal steps into the shoes of a *private decision-maker*, rather than a governmental one. Having regard to the separation of powers doctrine enshrined in the *Australian Constitution*, one might assume that a review body which stands in the shoes of a decision-maker can only be prima facie administrative if the decision-maker forms part of the executive arm of government.[173] For the most part, federal administrative bodies deal with disputes between an individual and a government official. The HREOC was empowered to determine disputes between parties in the private sector, but met its nemesis in the High Court. Yet, prior to *Wilkinson v CARE*, the courts had not openly averted to this distinction in expressing the concept of judicial power.

In a recent commentary on the constitutional law aspects of the case, George Williams criticised the judgment of Heerey J:

> This distinction between public and private decision-making underpinned *Heerey J's* categorisation of the review power of the SCT [ie the Tribunal] as judicial. This is problematic. The nature of the interests at stake in SCT matters, the sums of money involved in the superannuation industry, and the complex regulatory structure created by the Commonwealth to govern the industry mean that the SCT cannot be easily distinguished from a tribunal that reviews government decision-making on pension entitlements under social security legislation. *Heerey J's* finding that the SCT is not concerned with rights such as those under the 'tax, social security or migration' systems is unpersuasive.[174]

In equating superannuation rights with significant public law rights, George Williams demonstrates the public interest in having a specialist tribunal for superannuation-related disputes. There may well be good policy reasons for extending the ambit of public law into the private realm where a sufficient degree of public interest is involved. The government might also argue that, as the compulsory superannuation obligation underpinning its retirement incomes policy covers such a large section of the Australian population, superannuation has become a 'collective' public law matter, rather than an 'individual' private law matter. The issue is whether this has been achieved.

The government did not create a national superannuation scheme administered by a government agency where there could be no doubt about the public nature of the decision-maker. The Full Federal Court's distinction between a private decision-maker and a governmental one is valid because, although *regulated* by a public authority, superannuation funds are *administered* by private trustees who are either companies incorporated under the *Corporations Law* or individuals.

[172] See, eg, Sir Harry Woolf, 'Public Law–Private Law: Why the Divide? A Personal View' [1986] *Public Law* 220, 221.

[173] See, eg, *British Imperial Oil Company v Federal Commissioner of Taxation* (1926) 38 CLR 153, 177 where Isaacs J observed that, '[t]he character of the function often takes its colour largely from the primary character of the functionary'.

[174] Williams, above n 171, 4.

In addition, the Tribunal is not dealing with rights and duties which are purely public. Notwithstanding the government's legislative scheme, the legal system for superannuation contains a mix of private and public features. The ISC as the Tribunal's enforcement body is a feature compatible with superannuation as a public law matter, but the preservation of trust law principles, such as trustee immunity from giving reasons for decisions, demonstrates that superannuation firmly retains its private law roots. Most administrative tribunals consider rights, privileges and liabilities arising out of statute.[175] The *SIS Act* and *SIS Regulations* are not the sole source of the superannuation rights of an aggrieved member, however. Trust law continues to apply,[176] as does the trust deed governing the particular fund.[177] While the Tribunal may be applying a statute-based 'fair and reasonable' standard, it is also adjudicating controversies between subjects concerning property rights, reflecting Griffith CJ's classic statement of judicial power,[178] and could thus be perceived to be encroaching upon private law judicial turf. In analysing this issue, it is therefore important to examine not only the degree to which superannuation has been integrated within a 'public law system', but the source and nature of the power which trustees exercise.[179]

In *Wilkinson v CARE*, the Full Federal Court distinguished between a private decision-maker and a public decision-maker primarily to refute the analogy with the AAT which had been argued by counsel for the Attorney-General, but the distinction also informs the majority's conclusion that the Tribunal exercises judicial power. With the attempted influx of administrative tribunals into the private domain, it would be beneficial for the High Court to state whether the boundary between administrative power and judicial power lies at the threshold of individual rights.

V CONCLUSION

Challenges to the constitutionality of federal tribunals are not a novelty. The constitutional challenge to the Superannuation Complaints Tribunal is, no doubt, partially attributable to the introduction of an unfamiliar 'limited merits review' function represented by the 'fair and reasonable' standard. There may also be

175 Nand, above n 44, 34.

176 The *SIS Act* does not purport to be an exclusive code, although this subject, in itself, is a topic for a separate paper: Rt Hon Sir Leonard Hoffman, 'Equity and Its Role for Superannuation/Pension Schemes in the 90s' (Paper presented at the Law Council of Australia 1994 Superannuation Conference, Surfers Paradise, February 1994); Donald Duval, 'The Government's Objectives with Superannuation Industry (Supervision) Bill 1993' (Paper presented at the Law Council of Australia 1994 Superannuation Conference, Surfers Paradise, February 1994).

177 *SIS Act* pt 6 contains certain trust deed requirements to ensure that the trustee's fiduciary duties cannot be overridden, but otherwise the provisions of the trust deed are not prescribed under the legislation.

178 *Huddart Parker* (1909) 8 CLR 330, 357.

179 See, eg, *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815, which dealt with a different, but related, problem of whether the courts had supervisory jurisdiction over a self regulatory body. In holding that the body had been 'woven into the fabric of government' (to quote Enid Campbell), the Court of Appeal considered both the source and nature of the body's power, and the function which the body performed.

some residual uncertainty surrounding the concept of judicial power, particularly with regard to the manner of enforcing determinations.

In 1985, Colin Howard summarised the dilemma for non-judicial review bodies:

> In a federation the overriding importance of their function as interpreters of the constitution requires that the federal judiciary be entirely independent of the other arms of government. The strict application of this principle entails such inconveniences as the impossibility of creating tribunals with a flexible combination of judicial and non-judicial powers for the regulation of commercial and industrial activities.[180]

Since then there has been a proliferation of tribunals in the government sector, where it is possible to point to the public interest inherent in aggrieved persons having an expeditious and inexpensive right of review.

Whilst there is a compelling argument that an alternative forum for resolving superannuation disputes is also a matter of public interest, the fact remains that superannuation funds are governed by a combination of trust law and statute and administered by trustees who are private parties. Ultimately it is for the High Court to determine whether the private law–public law distinction is a pertinent one and, if so, whether the government has adequately blended the regulated superannuation industry into the public domain, with trustees of regulated superannuation funds effectively performing a public *function*. Only then can it justify a federal administrative body having authority to review trustee decisions.

The demise of the Tribunal demonstrates that courts will guard their traditional role of determining and protecting individual rights, even if the government intends otherwise. Depending on the success of the High Court appeal, the challenge for the government will be to restore the Superannuation Complaints Tribunal to a form which both meets its objectives and accords with the *Australian Constitution*.

[180] Colin Howard, *Australian Federal Constitutional Law* (3rd ed, 1985) 282.