THE END OF THE ROAD FOR THE SUPERANNUATION COMPLAINTS TRIBUNAL

By George Williams*

The Superannuation Complaints Tribunal ("SCT") is a Commonwealth body designed to resolve disputes arising out of decisions made by trustees of superannuation funds in an informal, speedy and cost-effective manner. Under the Superannuation (Resolution Of Complaints) Act 1993 (Cth), the SCT was granted the power to conciliate disputes and to review the decision of a trustee to determine whether the decision was "unfair and unreasonable". In Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd (1998) 152 ALR 332 the Full Federal Court struck down this latter power, leaving the SCT with only the power of conciliation The basis of the decision was that the SCT had been conferred with judicial power in contravention of the Commonwealth Constitution. This article examines the decision in Wilkinson and explores the options available to the Commonwealth in reconstituting the SCT.

1. INTRODUCTION

In *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd*,[1] the Full Federal Court of Australia struck down the power of the Superannuation Complaints Tribunal ("SCT") to review the decision of a trustee of a superannuation fund on the basis that such a decision was "unfair and unreasonable". A majority of the Court found that this power was a judicial power, and that its conferral upon a non-judicial body breached the separation of judicial power achieved by the Australian Constitution. The effect of the decision in *Wilkinson* was to remove the capacity of the SCT to act as an informal, quick and cost-effective means of resolving disputes arising from decisions made by trustees. The decision has left the SCT with only the power to conciliate such disputes. Until steps are taken to reconstitute the SCT such disputes will need to be litigated in the courts.

2. THE LEGISLATIVE SCHEME

The SCT is established by s 6 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth). Under s 7, it consists of a Chairperson, a Deputy Chairperson and not fewer than seven nor more than ten other members. Membership of the SCT is not restricted to lawyers. A person is eligible for appointment under s 8 where "the person is qualified for appointment because of his or her knowledge of, or experience in, matters of kinds in respect of which complaints may be made to the Tribunal".

Section 12 sets out the functions of the SCT. Where a complaint has been made, the SCT must first inquire into a complaint and try to resolve it by conciliation. If the complaint cannot be resolved by conciliation, s 32 requires that the SCT fix a date, time and place for a meeting to review the decision to which the complaint relates. Section 11 estab-

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[1] (1998) 152 ALR 332. The decision in *Wilkinson* was applied in *Breckler v Leshem* [1998] 57 FCA (unreported, 12 February 1998).

lishes that in reviewing a decision, the SCT is not to act as a court but is to adopt a mechanism that is "fair, economical, informal and quick". This is reinforced by s 23 which establishes that ordinarily a complainant should act on his or her own behalf before the SCT, by s 34 which provides that reviews will ordinarily be conducted by way of written rather than oral submissions, by s 36 which states that the SCT "is not bound by technicalities, legal forms or rules of evidence" and "may inform itself of any matter relevant to the review in any way it thinks appropriate", and by s 38 which states that review meetings are to be held in private. The SCT was also designed to be user-friendly. Under s 16, the SCT must take reasonable steps to assist a com-plainant where the complainant needs help to make the complaint or to put it in writing.

As originally enacted, s 14(2) of the *Superannuation (Resolution Of Complaints) Act* allowed a person to make a complaint about the decision of a trustee of a superannuation fund on the basis that the decision: "(a) was in excess of the powers of the trustee; or (b) was an improper exercise of the powers of the trustee; or (c) is unfair or unreasonable". However, the Act was amended in 1995[2] to delete grounds (a) and (b), leaving as the only basis for a complaint that a decision was "unfair or unreasonable". The catalyst for the amendment was the fear that the powers granted to the SCT might be unconstitutional in light of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*[3] (see below).

Section 37 of the *Superannuation (Resolution Of Complaints) Act* sets out the power of the SCT in reviewing a decision of a trustee. It grants the SCT "all the powers, obligations and discretions that are conferred on the trustee", as well as the power to make a determination in writing: "(a) affirming the decision; or (b) remitting the matter to which the decision relates to the trustee, insurer or other decision-maker for reconsideration in accordance with the directions of the Tribunal; or (c) varying the decision; or (d) setting aside the decision and substituting a decision for the decision so set aside". The power to make a determination may only be exercised "for the purpose of placing the complainant as nearly as practicable in such a position that the unfairness, unreasonableness, or both" found by the SCT no longer exists. Under s 40, the SCT must give written reasons for its determination. Section 46 provides that a party may appeal to the Federal Court on a question of law from a determination of the SCT.

The character of the SCT as an independent body composed of legal and non-legal experts set the task of providing a quick, informal and low cost means of resolving disputes arising out of decisions by trustees of superannuation funds is clearly established by the *Superannuation (Resolution Of Complaints) Act*. The intention manifested in the legislation was not to bring about a body with all the formality and expense of a court of law, but to establish a tribunal of an entirely different character. This intent was frustrated when the SCT was found by the Federal Court to have been granted judicial power in contravention of the Commonwealth Constitution.

The *Superannuation (Resolution Of Complaints) Act* does not set out how or whether decisions of the SCT are to be enforced. However, its decisions are enforced indirectly by complementary legislation. Section 31(1)(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) states that standards may be prescribed by regulation and under s 34 that trustees must ensure compliance with such standards or be guilty of an offence. Regulation 13.17B of the Superannuation Industry (Supervision) Regulations 1993 (Cth) provides that a standard applicable to the operation of a regulated superannuation fund is that "the trustee must not fail without lawful excuse, to comply with an order, direction or determination of the Superannuation Complaints Tribunal". Two further provisions of the *Superannuation Industry (Super-*

[2] *Superannuation Industry (Supervision) Legislation Amendment Act 1995* (Cth).
[3] (1995) 183 CLR 245. See *Explanatory Memorandum* to the Superannuation Industry (Supervision) Legislation Amendment Bill, para 171.

vision) Act are relevant. Section 42 provides that the regulated status and the tax advantages of superannuation funds can be lost for contravention of the Act or regulations made thereunder. Section 315 provides for an injunction by the Federal Court to restrain contravention of the Act.

3. THE SEPARATION OF JUDICIAL POWER[4]

The Australian Constitution is based upon a separation of powers. Section 1 of Chapter I vests legislative power in the Parliament; s 61 of Chapter II vests executive power in the Queen; and s 71 of Chapter III vests judicial power in the High Court and in such other federal courts as the Federal Parliament decides to create or invest with federal jurisdiction. The separation between legislative and executive power is not strictly maintained in the Constitution. In providing for a system of responsible government, s 64 states that federal Ministers, that is members of the executive, must sit in the Parliament. One result of this has been that the High Court has provided for the interaction of the legislative and executive arms of government by, for example, allowing the executive to be invested with the power to make delegated legislation such as regulations.[5] On the other hand, the separation of the judiciary from both the legislature and the executive has been strictly enforced by the High Court. It is this separation that has posed significant problems for the Commonwealth in conferring power upon non-judicial tribunals like the SCT.

Judicial power eludes accurate and precise description. This stems from the imprecise nature and scope of the power and the "difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive".[6] Some powers, such as the power to examine witnesses or the power to appoint a new trustee, have a "double aspect",[7] that is they may be characterised as judicial if conferred on a court or non-judicial if conferred on a body that is not a court. The classic attempt at a definition of judicial power is that of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*:

> I am of the opinion that the words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[8]

This, and similar definitions,[9] show that the characteristics and content of judicial power have not proved susceptible to precise definition. Instead, judicial power has a number of indicia, such as that it is performed in a judicial manner, that is with judicial fairness and detachment. However, none of these indicia is by itself decisive. Whether a power can be said to be judicial depends upon the indicia present in the power being weighed up against those which are absent.

The separation of judicial power achieved by Chapter III of the Constitution entails two consequences. As Dixon J recognised in *Victorian Stevedoring and General Contracting Co Pty Ltd*

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[4] Adapted from G Williams, *Human Rights under the Australian Constitution* (forthcoming ed, 1998). See AN Hall, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *Federal Law Review* 13.
[5] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.
[6] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188 (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[7] *R v Davison* (1954) 90 CLR 353, 369 (per Dixon CJ and McTiernan J).
[8] (1909) 8 CLR 330, 357. Also see, for example, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374-375 (per Kitto J).
[9] See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 372-375 (per Kitto J); AR Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (2nd ed, 1998) 530-538.

and Meakes v Dignan,[10] "the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals". Hence, the Constitution requires that:[11]

(1) only Chapter III courts (that is courts recognised by s 71 of the Constitution) be conferred with judicial power; and

(2) Chapter III courts cannot be conferred with power other than judicial power, except where such other power is ancillary or incidental to the exercise of judicial power.

Both limbs were reflected in decisions such as *New South Wales v Commonwealth*[12] and *Waterside Workers' Federation of Australia v JW Alexander Ltd.*[13] In the former case, the High Court held that the vesting of judicial power in the Inter-State Commission,[14] which possesses non-judicial power under s 101 of the Constitution, was unconstitutional. Similarly, in the latter case the High Court found that the conferral of judicial power upon the Commonwealth Court of Conciliation and Arbitration, a body also possessing non-judicial power, was invalid. The latter decision culminated in the decisions of the High Court[15] and Privy Council[16] in *Boilermakers*, in which the conferral of judicial power upon the Court of Conciliation and Arbitration was found to have breached Chapter III of the Constitution. This meant that the Court had been invalidly constituted for 30 years. The Federal Parliament responded to the High Court decision in Boilermakers by legislating to preserve the validity of awards and orders handed down over that period. This legislation has never been challenged. Since *Boilermakers*, the Commonwealth has been careful to vest judicial and non-judicial power over industrial matters in separate bodies. In response to *Boilermakers* the Commonwealth split the Court of Conciliation and Arbitration into a Conciliation and Arbitration Commission (exercising non judicial power) and a Commonwealth Industrial Court (exercising judicial power). A similar distinction is maintained today by the *Workplace Relations Act 1996* (Cth).

Prior to *Boilermakers* the High Court and the Privy Council considered whether under the *Income Tax Assessment Act 1922* (Cth) the Commonwealth could establish a Board of Review to provide administrative review of taxation decisions. The High Court in *FC of T v Munro*[17] and the Privy Council in *Shell Co of Australia Ltd v FC of T*[18] held that judicial power had not been conferred by the Act because the Board had merely been given the power of the Commissioner rather than any other powers or functions.[19] As Isaacs J stated in *Munro*, he could see no reason why Parliament could not "entrust successive administrative functionaries to consider and review assessments, making the final decision the governing factum fixing the taxpayer's liability".[20] Starke J found that the functions of the Board were "in aid of the administrative functions of government".[21] On appeal, in Shell Co, the Privy Council found that the members of the Board "are merely in the same position as the Commissioner himself - namely, they are another administrative tribunal which is reviewing

[10] (1931) 46 CLR 73, 98.
[11] These principles have been restated many times. See, for example, *Gould v Brown* (1998) 151 ALR 395, 454-455 (per Gummow J).
[12] (1915) 20 CLR 54.
[13] (1918) 25 CLR 434.
[14] See M Coper, "The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission" (1989) 63 *Australian Law Journal* 731.
[15] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[16] *Attorney-General (Commonwealth) v The Queen* [1957] AC 288.
[17] (1926) 38 CLR 153.
[18] [1931] AC 275.
[19] Cf the earlier decision of the High Court in *British Imperial Oil Co v FC of T* (1925) 35 CLR 422 in which it held that a precursor to the Board of Review, the Board of Appeal, had been invalidly conferred with judicial power.
[20] (1926) 38 CLR 153, 177.
[21] Ibid 212.

the determination of the Commissioner who admittedly is not judicial, but executive".[22]

There have been suggestions that the strict separation required by *Boilermakers* might be relaxed.23 In any event, Boilermakers did not completely stifle the creation of non-judicial bodies with adjudicative like power and the decisions as to the Board of Review remain good law. In cases such as *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*,[24] as to the Trade Practices Tribunal, and *Precision Data Holdings Ltd v Wills*,[25] as to the Corporations and Securities Panel, non-judicial tribunals have been found to be validly constituted on the basis that they exercise administrative rather than judicial power.26 Precision *Data* is the most recent decision in which the High Court has upheld the powers conferred upon a tribunal. It illustrates more effectively than the pre-*Boilermakers* decisions relating to the Board of Review where the modern High Court will allow some scope in the conferral of adjudicative like power. In *Precision Data* the Court based its decision upon the following principles:

> if the ultimate decision [of the Tribunal] may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power ...
>
> if the object of the adjudication [of the Tribunal] is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.[27]

The High Court applied these principles to hold that the Corporations and Securities Panel had been granted administrative rather than judicial powers. The Court took into account a range of factors in reaching this decision. It took note of the fact that only the Australian Securities Commission can institute proceedings before the Corporations and Securities Panel and that, in applying for a declaration, the Australian Securities Commission is not seeking the vindication of any right or obligation. In addition, in making a determination the Corporations and Securities Panel must take account of the policy-based Eggleston principles set out in the *Corporations Law*.[28] The Corporations and Securities Panel was found to apply such criteria so as to create a new set of rights and obligations, that is rights and obligations which did not exist antecedently and independently of the making of the orders.

Precision Data demonstrated that it is possible for the Commonwealth to confer adjudicative like power upon non-judicial tribunals. Nevertheless, it is clear that *Boilermakers* remains good law, and that the vesting of non-judicial tribunals with adjudicative power can be taken too far. The continuing impact of *Boilermakers* was apparent in the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission.*[29] In that case, the High Court struck down 1992 and 1993 amendments to the *Racial Discrimination Act* 1975 (Cth) that made determinations of a non-judi-

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[22] [1931] AC 275, 298 (per Lord Sankey (for their Lordships)).
[23] *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (per Barwick CJ), 102 (per Mason J). See PH Lane, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 *Australian Law Journal* 6.
[24] (1970) 123 CLR 361.
[25] (1991) 173 CLR 167.
[26] See GFK Santow and G Williams, "Taking the Legalism Out of Takeovers" (1997) 71 *Australian Law Journal* 749.
[27] (1991) 173 CLR 167, 189.
[28] *Corporations Law*, s 732. See G Williams, "The Corporations and Securities Panel - What Future?" (1994) 12 *Company & Securities Law Journal* 164, 169-171.
[29] (1995) 183 CLR 245.

cial body, the Human Rights and Equal Opportunity Commission, enforceable.[30] As amended, s 25ZAA of the *Racial Discrimination Act* allowed determinations of the Human Rights and Equal Opportunity Commission to be registered in the Federal Court. Thereupon, under s 25ZAB a determination was to have effect "as if it were an order made by the Federal Court" unless the respondent applied to that Court for review. In such a case the Court, under s 25ZAC, "may review all issues of fact and law" and "make such orders as it thinks fit", but "new evidence" could not be adduced except by leave of the Court. This scheme was unanimously held to be unconstitutional, Mason CJ, Brennan and Toohey JJ finding that "so much of the Act as provides for the registration and enforcement of a determination is invalid".[31] The basis of the Court's decision was that the power to make enforceable orders, a judicial power, could not be granted to a non-judicial body. The case demonstrated the difficulties for the Commonwealth in seeking to establish non-judicial tribunals to resolve human rights complaints. In *Fourmile v Selpam Pty Ltd,*[32] a decision handed down by the Full Federal Court the day after its decision in *Wilkinson, Brandy* was followed to strike down the enforcement mechanism provided for determinations of the National Native Title Tribunal. That mechanism was indistinguishable from that considered in *Brandy*.

The unanimous decisions of the High Court in *Precision Data* and *Brandy* provide guidance as to which powers can, and cannot, be conferred upon a non judicial tribunal. The former case demonstrates that such bodies can be granted adjudicative like power so long as such power is not to be exercised in the same manner as it would be by a court. Hence, a power of adjudication may not be judicial where it is to be applied according to commercial or other policy principles, and so as not to vindicate existing rights but to create future rights. On the other hand, the latter case shows that the power to make enforceable orders, a judicial power, cannot be granted to a body also exercising administrative powers. *Brandy* showed that the Constitution prevents the Commonwealth from giving a tribunal the power to make enforceable determinations, thereby greatly limiting, perhaps in many cases even compromising, the effectiveness of such bodies.

4. THE SEPARATION OF JUDICIAL POWER AND THE SCT

In *Briffa v Hay,*[33] Merkel J of the Federal Court found that the SCT exercised administrative rather than judicial powers and thus that the powers conferred upon the SCT did not breach the Constitution. He stated:

> The Tribunal does not make or enforce orders as such. By its determination it can affirm or vary a decision of the trustee, make a decision in substitution for that of the trustee in exercise of the trustee's powers or remit the matter back to the trustee with directions ... 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 particular, a varied or substituted decision of the Tribunal is deemed to be a decision of the trustee.[34]

The next opportunity to consider the validity of the powers conferred upon the SCT arose in *Wilkinson*. That matter arose out of a complaint made by Mr Daryl Bishop to the SCT that there was payable to him, as personal representative of his late wife, a "Member's Insured Benefit" under a superannuation scheme called the Clerical Administrative and

[30] *Sex Discrimination and other Legislation Amendment Act 1992* (Cth); *Law and Justice Legislation Amendment Act 1993* (Cth).
[31] (1995) 183 CLR 245, 264.
[32] (1998) 152 ALR 294.
[33] (1997) 147 ALR 226.
[34] Ibid 238-239. Merkel J subsequently applied this reasoning in *Collins v AMP Superannuation Ltd* (1997) 147 ALR 243.

Related Employees Superannuation Plan. Mr Bishop's complaint was upheld by the SCT. On appeal to the Federal Court, this was set aside by Northrop J, who found that the determination of the SCT amounted to the exercise of a judicial power in contravention of the Constitution. Northrop J declined to follow the decision of Merkel J in *Briffa v Hay.*

An appeal was lodged from the judgment of Northrop J to the FulI Federal Court. A majority of the Full Court in *Wilkinson* dismissed the appeal and struck down the power of the SCT to review a decision made by a trustee of a superannuation fund on the basis that such a decision was "unfair and unreasonable". Heerey J, with whom Lockhart J agreed, found that the SCT, in contrast to bodies such as the Corporations and Securities Panel, had been invalidly conferred with judicial power. The majority finding was based upon the cumulative effect of the following:[35]

- The SCT's function is different from that of a body such as the Administrative Appeals Tribunal, which makes essentially the same decision as a Government official. While the super annuation industry is subject to complex statutory regulation, the rights and obligations of members, trustees, employees and insurers as between themselves are governed by trust and contract law and are enforceable in the ordinary courts. Heerey J stated that the review power of the SCT "is not concerned with the rights and obligations of individuals or corporations vis-a-vis government like the tax, social security or migration systems".
- The SCT's jurisdiction is enlivened by the complaint of an individual under s 14, whereas one of the indicia of administrative, as opposed to judicial, power is that only a governmental body can initiate proceedings.
- The SCT does not create new rights, but adjudicates on claims that rights conferred by law have been breached.
- The SCT's function does not involve the application of policy considerations as "fairness and reasonableness" are objective criteria similar to these applied in other contexts by courts.
- The Superannuation Industry (Supervision) *Act* provides effective machinery for the enforcement of determinations by the Tribunal whereby a decision of the Tribunal can be enforced by civil injunction and criminal penalty. It is irrelevant that the SCT does not do the actual enforcing or that its determination takes effect as a decision of the trustee.

In dissent, Sundberg J found that the SCT did not exercise judicial power. This was despite his finding that: (1) "the tribunal considers the trustee's decision (a past event) and asks whether in its oper-ation to the complainant it is unfair or unreasonable (the statutory criterion)";[36] (2) the determinations of the Tribunal as to the "unfair and unreasonable" standard involve objective standards rather than broad considerations of fairness; and (3) the SCT's powers are not "completely analogous"[37] to those of the Administrative Appeals Tribunal because unlike the Administrative Appeals Tribunal and the former Board of Review, which provide a mechanism for review of the decisions of an executive officer within an executive framework, the SCT is given the power to review the decisions of a private trustee. Sundberg J's dissent rested upon his conclusion that a key component of judicial power was absent in the case of the SCT. He stated:

> 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

[35] (1998) 152 ALR 332, 345-347.
[36] Ibid 355.
[37] Ibid 356.

> 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.[38]

Sundberg J held that although the *Superannuation Industry (Supervision) Act* does not provide for a full inquiry before a court can order a trustee to give effect to a determination of the SCT, the court must still engage in an independent exercise of judicial power involving the exercise of a discretion as to whether a mandatory order should be made, and if so on what terms. This meant that the fact situation in *Brandy* could be distinguished and that the SCT had not been conferred with judicial power.

The majority reasoning in *Wilkinson* can be criticised on two bases. First, the dissent of Sundberg J showed that the conclusion that the SCT had been granted judicial power was by no means obvious. It also showed just how little scope the majority had been prepared to afford the Commonwealth in the creation of a tribunal to bring about the resolution of disputes. To some extent, this was a consequence of the strict approach taken in recent High Court decisions, particularly *Brandy*,[39] to the separation of judicial power. However, Sundberg J demonstrated that Brandy could be distinguished as the enforcement of SCT determinations does not clearly fall within the *Brandy* fact situation given that there is an opportunity for review by a court prior to the enforcement of a determination by the SCT. This conclusion is supported by the strong policy reasons for allowing the Commonwealth to establish an alternate means of resolving disputes in fields such as the superannuation industry via the creation of tribunals.

Secondly, an important foundation of the majority decision was that the SCT could be distinguished from a like body, the Administrative Appeals Tribunal. Like the Board of Review, the Administrative Appeals Tribunal has the power to review decisions made by Commonwealth decision-makers and has been held to exercise administrative rather than judicial power,[40] whereas the SCT was granted the power to review decisions made by non-government trustees. This distinction between public and private decision-making underpinned Heerey J's categorisation of the review power of the SCT 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, say, 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. In any event, it is difficult to see that the separation of judicial power achieved by the Constitution can support a distinction between public and private decision-making. To this point the focus of whether a power is a judicial one has been upon how the power is to be exercised and its scope, rather than upon the subject matter, or interests, upon which the power operates.

5. THE OPTIONS AFTER *WILKINSON*

Wilkinson leaves the SCT with only the capacity to act as a conciliator between parties, this not being an exercise of judicial power. However, this can no longer be backed up by the threat of a review of the trustee's decision should the conciliation break down. Accordingly, the role of the SCT in the superannuation industry has been greatly weakened. In the wake of *Wilkinson*, and in the absence of constitutional change, the Commonwealth now

[38] Ibid 361.
[39] See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
[40] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 584-585 (per Bowen CJ and Deane J).

has four main options, none of which could be described as attractive.

First, the Commonwealth could leave the SCT as it is, that is retaining the power to conciliate, but lacking the power to adjudicate disputes and adjust interests. In this form, the SCT would be largely ineffective to meet the challenge of resolving disputes arising from the decisions of trustees of superannuation funds. Many of these disputes would be left to be resolved in the courts, or perhaps by an industry based dispute resolution body supported by voluntary compliance.

Secondly, the Commonwealth could appeal the decision in Wilkinson to the High Court. The Commonwealth has already decided to seek special leave to appeal from the Federal Court decision. Certainly, the dissent of Sundberg J in Wilkinson is a strong basis from which to argue that the SCT does not exercise judicial power, and it is arguable that the distinction drawn by Heerey J between the SCT and the Administrative Appeals Tribunal is flawed. Despite this, the strictness with which the High Court has applied the separation of judicial power in decisions such as *Brandy* makes it questionable whether such an appeal would succeed. There is also the risk that a failed appeal in the High Court would not only entrench the restrictive approach taken by the majority in *Wilkinson*, but perhaps an even narrower view of what powers the Commonwealth is capable of conferring upon tribunals. The decision of the High Court in *Gould v Brown*,[41] handed down ten days before *Wilkinson*, showed in a similar context that there are at least three judges on the High Court, Gaudron, McHugh and Gummow JJ, who continue to take a strict view of the boundaries established by Chapter III of the Constitution. Hayne and Callinan JJ, as well as Gleeson CJ, have yet to be tested. Even if a High Court appeal were to fail, one option open to the Court might be to declare the enforcement provisions of the *Superannuation Industry (Supervision) Act* invalid, and to sever these from the Act, rather than to hold invalid the provisions of the *Superannuation (Resolution of Complaints) Act* which grant the SCT the power to make determinations. In the absence of any power of enforcement it is difficult to see that ss 14(2) and 37 of the *Superannuation (Resolution of Complaints) Act* could confer judicial power. This approach would be supported by s 15A of the *Acts Interpretation Act 1901* (Cth).[42]

Thirdly, the Commonwealth could reconstitute the SCT so as to avoid breaching the separation of judicial power achieved by the Constitution. This was attempted in the amendments made to the *Superannuation (Resolution of Complaints) Act* in 1995 (see above). However, the decision in *Wilkinson* demonstrated that the amendments were inadequate. Further steps need to be taken to reduce the likelihood that the powers granted to the SCT are judicial in nature. The Commonwealth might look to the operation of the Corporations and Securities Panel, upheld by the High Court in *Precision Data*, which makes determinations not according to objective criteria such as that a decision was "unfair and unreasonable", but by applying the explicit pol-icy formulations set out in the *Corporations Law*. *Precision Data* also showed the need for a Tribunal to create future rights, and not to make determinations as to existing rights and obligations. Following this analogy, it would be possible for the Commonwealth to give the SCT adjudicative power. However, it would be unable to give the SCT the power to enforce its decisions. This is a fundamental weakness of this option. The Commonwealth can create bodies such as the SCT and the Human Rights and Equal Opportunity Commission as forums for the resolution of disputes, but it cannot give such bodies the power to make their decisions binding. The power of enforcement lies solely with the courts.

More radical means of reconstituting the SCT

[41] (1998) 151 ALR 395.

[42] This provision states: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

exist that would allow the SCT to be given an enforcement power. The problem with the SCT lies in the fact that, as a manifestation of the Commonwealth power, the Constitution prohibits the SCT from being conferred with federal judicial power. However, in *R v Bernasconi*,[43] the High Court found that the Commonwealth's use of its Territories power in s 122 of the Constitution is not checked by the separation of judicial power.[44] This means that under the territories power the Commonwealth can establish non-judicial bodies that exercise judicial power. By taking advantage of this, the Commonwealth could reconstitute the SCT as, say, a body based in the Australian Capital Territory that might then be given application in each State by a law of the Parliament of that State.[45] This is how the Corporations Law is structured, where a Commonwealth law for the Australian Capital Territory is given effect across Australia by an application law passed by each State Parliament. A danger in this course is that although *R v Bernasconi* remains the law, there have been suggestions by members of the High Court that the case might be overturned and the separation of judicial power extended to the Commonwealth in legislating for the Territories.[46]

A further way of reconstituting the SCT that would allow the SCT a power of enforcement would be for the Commonwealth to concede that it is unable, consistent with the Constitution, to create an effective SCT and to encourage the States to legislate to create a new SCT. It has been held that the separation of judicial power is not entrenched at the State level and thus that there is nothing to prevent a State from vesting judicial power in a non-judicial tribunal.[47] However, this course would transfer important responsibility for the superannuation industry to the States, and leave open the possibility of differences emerging between States. The regulatory structure of the superannuation industry is complex enough without the emergence of different legislative standards between the States.

Fourthly, the Commonwealth could create a new lower level of the Federal Court structure (or confer such power upon judicial registrars), which would act as Federal Magistrates Courts. Such courts could take over the work of bodies such as the SCT and the Human Rights and Equal Opportunity Commission. However, this would compromise the benefits available from a tribunal hearing by independent, usually non legal, experts. The SCT "is not bound by technicalities, legal forms or rules of evidence", whereas a court would observe exactly these requirements. Moreover, the *Superannuation (Resolution Of Complaints) Act* states that the SCT must carry out its task in a way that is "fair, economical, informal and quick". A new court would be unlikely to fulfill this brief.

[43] (1915) 19 CLR 629.

[44] Griffith CJ stated that: "Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories" ((1915) 19 CLR 629, 635). See also *Spratt v Hermes* (1965) 114 CLR 226, 243-245 (per Barwick CJ).

[45] See Santow and Williams, above n 26, where a like proposal is made in relation to reconstituting the Corporations and Securities Panel.

[46] *Kruger v Commonwealth* (1997) 146 ALR 126; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42.

[47] *Clyne v East* (1967) 68 SR(NSW) 385; *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations* [1986] 7 NSWLR 372; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

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