

Chapter 11

State Tribunals and the Federal Judicial System

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I Introduction

Courts and tribunals perform different and distinct roles in adjudicating disputes. The powers and functions of courts and tribunals, and their modes of operation, differ markedly,¹ and deliberately so. The potential advantages of tribunals over courts include cheapness, accessibility, freedom from technicality, expedition, and expert knowledge of their particular subject.² It can therefore be expected that governments would entrust certain types of matters to tribunals, rather than courts, because there are thought to be advantages in having those matters dealt with outside the court system.

However, as is well known, Ch III of the Constitution constrains the ability of the Commonwealth Parliament to achieve all of its policy objectives for federal tribunals. For example, a Commonwealth law cannot validly provide for decisions of federal tribunals resolving claims of racial discrimination to be registered in a court and enforced as a court order.³ The purported ability to register the federal tribunal's decision is an invalid conferral of judicial power on a federal administrative body. That result reduces the utility of having federal tribunals resolve claims of this sort, because the tribunal's decision requires a separate court proceeding to be enforceable.⁴ Federal constitutional

* Robin and John both taught me at the Australian National University, and I worked as Robin's research assistant for several years. I have chosen this topic in recognition of Robin's leading writing on tribunals in Australia.

1 Robin Creyke, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45, 52; Robin Creyke, 'Tribunals and Access to Justice' (2002) 2 *Queensland University of Technology Law and Justice Journal* 64, 68.

2 Robin Creyke, 'Tribunals: Divergence and Loss' (2001) 29 *Federal Law Review* 403, 404.

3 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (*Brandy*).

4 See Elizabeth Henderson, 'Trials, Tribunals and Tribulations: *Brandy v Human Rights and Equal Opportunities Commission*' (1995) 17 *Sydney Law Review* 581, 587-8, describing the reasons for enacting the registration provisions.

The reasoning in *Brandy* applies to any Commonwealth tribunal decision which involves ruling on existing rights, if the tribunal's jurisdiction does not depend on the consent of the parties. By contrast, industrial tribunals arbitrating disputes do not exercise judicial power because their decisions create new legal rights: see *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 (the Court). Equally, private arbitrators do not exercise judicial power because their authority derives from the consent of the parties reflected in the arbitration agreement: see *Construction, Forestry and Mining Union v Australian Industrial Relations Commission* (2001) 203 CLR 645, [31] (the Court).

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