



## Précis Paper

### Brandy v Human Rights and Equal Opportunity Commission (HREOC) (1995) 183 CLR 245 - More than 20 Years Later

A discussion of the seminal High Court decision of *Brandy v Human Rights and Equal Opportunity Commission (HREOC)* (1995) 183 CLR 245 and its impact on the vesting and exercise of judicial power by administrative bodies.

#### Discussion Includes

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- Before the High Court
- The situation prior to the amendments to the *Racial Discrimination Act 1975* (Cth)
- The relevant amendments to the *Racial Discrimination Act 1975* (Cth)
- What was the intention of the Commonwealth Parliament in enacting these amendments to the *Racial Discrimination Act 1975* (Cth)?
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- Positive effects of *Brandy v HREOC* generally

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### Brandy v Human Rights and Equal Opportunity Commission (HREOC) (1995) 183 CLR 245 - More than 20 Years Later

1. In this edition of BenchTV, Gary Corr (Barrister – Sir Owen Dixon Chambers, Sydney) and Stephen Lawrence (Barrister – Black Chambers, New South Wales) discuss the seminal High Court decision of *Brandy v Human Rights and Equal Opportunity Commission (HREOC)* (1995) 183 CLR 245 and its impact on the vesting and exercise of judicial power by administrative bodies.

#### Background to the case

2. Gary Corr first met Harry Brandy, for whom he acted in *Brandy v Human Rights and Equal Opportunity Commission (HREOC)* (1995) 183 CLR 245 ("*Brandy v HREOC*"), through the Aboriginal Legal Service. Mr Brandy was university-educated and had spent considerable time in the army, being a Vietnam veteran.
3. At the time Mr Corr met Mr Brandy, Mr Brandy, who was of Aboriginal background, was working for the Department of Aboriginal Affairs (which later became known as ATSIC), where his supervisor was a person by the name of John Bell. Mr Bell was not of Aboriginal background. Mr Brandy formed the view that Mr Bell had a somewhat patronising attitude towards Aboriginal people.
4. Mr Brandy had continuing fights with Mr Bell. In one particular heated exchange, Mr Brandy referred to Mr Bell as a "white c\*\*\*". Mr Bell took exception to this and complained to his employer, ATSIC, who did nothing. Mr Bell then complained to the Human Rights and Equal Opportunity Commission (HREOC), claiming that he had been racially vilified.
5. Mr Bell's complaint progressed to a hearing before HREOC heard by Ron Castan, who was well-experienced with both the law and Aboriginal people, having appeared for Eddie Mabo in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Mr Castan handed down a determination to the following effect:
  - (i) stating that Mr Bell had been racially vilified and that ATSIC had done nothing about it;
  - (ii) ordering Mr Brandy to pay \$2,500 to Mr Bell;
  - (iii) ordering ATSIC to pay \$10,000 to Mr Bell;
  - (iv) ordering Mr Brandy to apologise to Mr Bell.

#### Before the High Court

6. Although Mr Brandy did not mind so much the compensation order against him, he refused to apologise to Mr Bell. Consequently, Mr Brandy attended on the Aboriginal Legal Service, subsequent to which Mr Corr ultimately ended up appearing for him before the High Court. Though the matter had been sent to appeal in the Federal Court, Mr Corr and Solicitor-General Gavin Griffith, who became involved in the matter very early on, thought it preferable that the matter go straight to the High Court for a determination as to whether HREOC's holding against Mr Brandy was unconstitutional.
7. As such, a few months later, Mr Corr and Mr Griffith appeared for Mr Brandy before the full High Court bench arguing that HREOC's decision against Mr Brandy was unconstitutional. The entire issue was whether there had been an investiture of judicial power in an administrative, non-judicial, body - in this case, HREOC. Although the Constitution does not expressly provide for a separation of powers, from all of the references to the judiciary contained in Chapter III of the Constitution, the High Court has established a great deal of law stating that judicial power can only be exercised by the judiciary (hence the many references in various cases to "Ch III Courts"). There have also been a number of cases which have said that an administrative body may be exercising something that looks like the exercise of judicial power but is not, because a lot of administrative bodies do have to operate in a judicial manner.
8. A full bench of the High Court decided that there had in fact been judicial power vested in HREOC, which was not a Chapter III court, and therefore the legislation vesting HREOC with this judicial power, the *Racial Discrimination Act 1975* (Cth) was invalid. Although there were two groups of judges (one of four and one of three) handing down separate decisions, they were in agreement on this point. All seven judges were therefore in agreement that there had been an improper investiture of judicial power in HREOC.

#### The situation prior to the amendments to the *Racial Discrimination Act 1975* (Cth)

9. Prior to the amendments to the *Racial Discrimination Act 1975* (Cth) that were in question in *Brandy v HREOC*, the general situation was that the Act contained provisions that protected people from discrimination by providing them with the capacity to go to a tribunal and seek relief in respect of that discrimination, however, the Act did not give tribunals the power to grant an enforceable remedy. Tribunals had no power, for example, to order compensation, or do anything that might grant a substantive remedy.

#### The relevant amendments to the *Racial Discrimination Act 1975* (Cth)

10. In response to some judicial prompting, the Commonwealth Parliament moved to pass amendments to the Act to give HREOC, in effect, judicial power, allowing it, for example, to

order compensation, or to order parties in disputes to do certain things. This was the amendment to the Act that was put in question in *Brandy v HREOC*.

11. Parliament was aware of the problem created for the separation of powers by vesting administrative bodies such as tribunals with judicial power. The way they tried to get around this problem was to make HREOC determinations registrable with the Federal Court, and if there was no appeal on these determinations, they would then become enforceable as an order of the Federal Court. Rather than a tribunal exercising judicial power, this was portrayed more as a tribunal inserting something into the Federal Court.

What was the intention of the Commonwealth Parliament in enacting the amendments to the Racial Discrimination Act 1975 (Cth)?

12. The amendments to the Act were intended to provide people with a quick, easy means of obtaining and enforcing remedies for racial discrimination or discrimination on the grounds of sex. However, in Mr Corr's view, while these amendments bestowed HREOC with powers that may have seemed to be a good idea at the time, if the High Court had found in HREOC's favour in *Brandy v HREOC*, there may have been a proliferation of tribunals making determinations about citizens' rights, both as between citizens, and between citizens and the State, which would ultimately pose violation to the separation of powers. Despite its limited nature, the separation of powers is one of the few protections of civil rights that exists in Australia, and it should not be whittled down.

An argument advanced by the Commonwealth

13. One of the arguments advanced by the Commonwealth in *Brandy v HREOC* was that the amendments to the Racial Discrimination Act allowed a person who lost in HREOC to apply to the Federal Court to set aside the HREOC order/determination that had been registered with the Court. While this would provide the person with the opportunity to access a court, this provision needs to be viewed in light of the access to justice issues existing in Australia – not everybody has the means or capacity to access a court, and not everybody who might have been the subject of an unfavourable HREOC judgment or ruling would have the wherewithal to access the Federal Court. As such, the Commonwealth's argument was soundly rejected by the High Court judges in *Brandy v HREOC*.

Has the decision in *Brandy v HREOC* generated much subsequent litigation in this area?

14. In the years following *Brandy v HREOC*, several people have approached Mr Corr for advice on constitutional matters, to almost all of whom Mr Corr has had to say that their case had no merit whatsoever.

15. *Brandy v HREOC* is considered a "bright, shining light" in terms of jurisprudence in Australia. A remarkable thing about constitutional law is that one tends not to see a repeat of the same material; because the Commonwealth Attorney-General's Department and parliamentary drafters are aware of the problem, they will not make the same mistake twice. Therefore, the problem that was present in *Brandy v HREOC* has not arisen again.
16. Although there have been a number of cases since *Brandy v HREOC* that have purported to raise the same issue (*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, involving superannuation; *Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2, involving takeovers; and *Luton v Lessels* [2002] HCA 13 ("*Luton v Lessels*"), concerned with the operation of a child support agency. In all of those cases), the High Court did not look at the rights of the citizen as they were at the time of the application of the law to them, but rather, was concerned with the creation of rights in the future. In *Luton v Lessels*, for example, there was a determination that a person in future would be liable for payment of child support to the child support agency, who would then pass it on to the person who had applied for it. It did not relate to any obligation that had existed prior to that time. The fact that these cases were concerned with future, rather than existing, rights, differentiated them from *Brandy v HREOC*, and were why these cases were not decided in the same way as that seminal case.

#### What of State tribunals?

17. State tribunals are in a different position to those of the Commonwealth, as there does not exist the separation of powers under the State Constitutions as there does in the Commonwealth. Mr Corr has appeared in a number of cases concerning State tribunals, and has found the separation of powers argument to be inapplicable to them.

#### The impact of the decision in *Brandy v HREOC*

18. There seem to be two important practical effects of the decision in *Brandy v HREOC*:
  - (i) The decision has limited both the creation of other tribunals and the corraling of more and more disputes into tribunals. As a practicing lawyer who appears regularly in both tribunals and courts, Mr Lawrence notes that this is a favourable effect, as he considers the quality of justice in tribunals to be lesser, as there is generally less capacity to cross-examine witnesses, there is not as strict an application of the rules of evidence, and in many and various respects, tribunals just do not provide the same quality of justice as do courts.
  - (ii) The decision pre-empted the creation of the Federal Circuit Court of Australia. This was because the decision created a legal status quo where

the Commonwealth Parliament was not able to corral such matters into tribunals and therefore saw the need to create a new subordinate Federal Court.

#### The "new administrative law" of the 1970s and 80s

19. In the 1970s and 80s, there was what is known as the "new administrative law", which led to a number of major advances in administrative law, namely: freedom of information legislation; the *Administrative Decisions (Judicial Review) Act 1977* (Cth); the Ombudsman, etc. These advances saw a move towards tribunals and, in effect, informality in the hearing of complaints. The Administrative Appeals Tribunal (AAT) was established during this time. The AAT was supposed to act in an informal manner, was not bound by the rules of evidence, and could inform itself in various ways.
20. Although Mr Corr at the time tended to support this move towards tribunals and informality, his views have changed with time, seeing the value in formality and observance of the rules of evidence. He is of the opinion that free-ranging inquiries such as those carried out by tribunals, create a lot of difficulties for all persons concerned, and that putting decision-making in the hands of the courts is a far more efficient way of achieving justice.

#### Judicial integrity

21. In further support of formality, Mr Corr argues that when judges are appointed, almost all of them take their judicial oath properly, and try to uphold their obligations as judges properly. Even though there is the usual range of human experience and capabilities present in judges, they tend to do their job properly, and in many cases go against the political views they may hold or have once held.
22. An example of this is the major constitutional case of *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, where Dixon J and various other judges of the High Court held that the Menzies Government could not enact legislation banning the Communist party. Although Dixon J was a quite conservative person who had previously been Robert Menzies' pupil master, in spite of his own political leanings, his Honour properly applied the law, as judges tend to do. This is one of the few things preserving civil rights in Australia, and needs to be protected, and continue to be protected.

#### Legal significance of *Brandy v HREOC* going forward

23. Perhaps the most significant legal effect of *Brandy v HREOC* flows from its definition of judicial power and its statement, in very clear terms, that where a controversy between

parties is resolved by an enforceable order, where that order is based on the adjudication of pre-existing facts and law, that is an exercise of judicial power. Though this principle had already been set down in previous cases, it was distilled in *Brandy v HREOC*. The clarity with which this decision was stated is why we have not seen any cases like it since it was handed down, and Mr Corr expects that we never will again.

What is the current situation in relation to complaints of racial vilification and sexual discrimination?

24. The Human Rights Commission (HRC) has since been established as the successor body to the HREOC. As a consequence of *Brandy v HREOC*, the HRC does not exercise judicial power, and there is no longer a situation where the orders of the HRC are transmogrified into binding judicial orders through a process of Federal Court registration.
25. The HRC carries out a number of important functions. It is heavily involved in policy and research and the receipt and mediation of disputes, but it no longer has a function involving the exercise of judicial power. Now claims in respect of racial discrimination and the like (such as the Andrew Bolt litigation) are being advanced in the federal courts, and where there is to be a binding and conclusive determination of a dispute of that nature, it takes place in a Chapter III court exercising the federal judicial power of the Commonwealth.
26. Does this make it more difficult for people who have been vilified or discriminated against to seek redress? There is certainly an argument that one of the flow-on effects of *Brandy v HREOC* has been higher legal costs and inefficiency, because these types of matters have been corralled into Chapter III courts, which operate with all of the formality and strictures of Chapter III courts.
27. However, in some senses this argument can be illusory, as many tribunals, particularly Commonwealth tribunals, also operate with a degree of formality. In Mr Lawrence's experience, processes or actions in tribunals do not necessarily tend to be quick. Mr Corr is in agreement with this, arguing that if there were a significant determination by a tribunal, parties might take advantage of the appeal provisions regardless, so that there would in effect be a double hearing of the matter - one in a tribunal and one in a court - contradicting the argument that things would be more speedily dealt with through a tribunal process. A single determination is more likely if the dispute is resolved before a Chapter III court.

In practical terms, what was the immediate effect of the *Brandy v HREOC* decision on Mr Brandy?

28. HREOC'S determination against Mr Brandy was set aside and could not be enforced against him.



29. Not long after, Mr Brandy accepted a redundancy payment from ATSIC, and moved north close to Grafton, where he bought a lavender farm. He said that "getting away from Canberra" was one of the best things he ever did in his life. So, arguably the decision in *Brandy v HREOC* has had a positive effect for him.

Positive effects of *Brandy v HREOC* generally

30. According to Mr Corr, one of the positive things that has come out of *Brandy v HREOC* is this: although lawyers tend to keep within their own narrow specialities – criminal lawyers only look at criminal law, administrative lawyers only look at administrative law, etc - with a bit of lateral thinking, lawyers may be able to achieve a good outcome for their client.
31. In Mr Lawrence's view, there is much policy merit in *Brandy v HREOC*: it ensures that where there is a dispute between citizens, or a dispute between a citizen and the State, and where binding and enforceable orders are sought in respect of that dispute, that people's rights are maintained and protected through that dispute being resolved in a Chapter III court with all of the protections that go along with that.
32. Further, one of the most positive aspects of *Brandy v HREOC* for Mr Lawrence is the ground-breaking precedent it created through very humble roots. Many of the great constitutional cases are concerned with litigants of great resources and large entities litigating in their interests, however, *Brandy v HREOC* is a dispute between two men working in ATSIC, one of them unhappy with a HREOC determination, and sometime after was able to have his case argued before the High Court and to create a most important precedent. To Mr Lawrence as a practicing lawyer, this carries the message that, "don't think that your relatively perhaps unimportant case doesn't raise the most important of issues".

## **BIOGRAPHY**

### Gary Corr

Barrister, Sir Owen Dixon Chambers, Sydney

Gary was called to the NSW Bar in 1993. Prior to this, he worked for the Commonwealth Attorney-General's Department and the Legal Section of the Department of the Prime Minister and Cabinet. In 2002, Gary was appointed as a Crown Prosecutor and returned to the private Bar in 2016. His main areas of practice include Criminal Law and Administrative and Constitutional Law.

### Stephen Lawrence

Barrister, Black Chambers, New South Wales

Stephen was admitted as a lawyer in 2002 and called to the NSW Bar in 2015. Before coming to the Bar, he gained experience as a Legal Officer for the Commonwealth Attorney-General's Department in the International Crime Branch as well as Prosecutor for the Office of the ACT Director of Public Prosecutions. Stephen primarily practices in Administrative Law, Appellate, Commission and Inquiries, Criminal Law and Intentional Torts.

## **BIBLIOGRAPHY**

### Focus Case

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

### Benchmark Link

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### Judgment Link

[\*Brandy v Human Rights and Equal Opportunity Commission \(HREOC\)\* \(1995\) 183 CLR 245](#)

### Cases

*Mabo v Queensland (No 2)* (1992) 175 CLR 1  
*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83  
*Attorney-General (Cth) v Alinta Ltd* [2008] HCA 2  
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*Australian Communist Party v Commonwealth* (1951) 83 CLR 1

### Legislation

*Racial Discrimination Act 1975* (Cth)  
*The Constitution*  
*Administrative Decisions (Judicial Review) Act 1977* (Cth)