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Matthew Sier

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Abstract

This article examines whether s 45 of the Administrative Appeals Tribunal Act 1975 (Cth) breaches Ch III of the Constitution. In response to any suggestion that it does, this article argues that the role of the Federal Court under s 45 is analogous to its role in conducting judicial reviews of, and 'appeals' from, AAT decisions. The article then turns to examine whether this analogy holds when the referring body is not quasi-judicial in nature, but rather closely linked to the political functions of government.

Keywords

section 45, s 45, referral of question of law, chapter III, Australian constitution

DOES SECTION 45 OF THE ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975 (CTH) BREACH CHAPTER III OF THE AUSTRALIAN CONSTITUTION?

MATTHEW SIER*

ABSTRACT

This article examines whether s 45 of the Administrative Appeals Tribunal Act 1975 (Cth) breaches Ch III of the Constitution. In response to any suggestion that it does, this article argues that the role of the Federal Court under s 45 is analogous to its role in conducting judicial reviews of, and 'appeals' from, AAT decisions. The article then turns to examine whether this analogy holds when the referring body is not quasi-judicial in nature, but rather closely linked to the political functions of government.

I INTRODUCTION

Section 45 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the 'AAT Act') provides the Administrative Appeals Tribunal (the 'AAT') with a power to refer questions of law to the Federal Court. Moreover, it confers jurisdiction on the Federal Court to answer those referred questions of law.

The chief constitutional concern surrounding s 45 of the AAT Act is that, when answering an AAT referral, the Federal Court may not be exercising federal judicial power, in breach of Ch III of the *Constitution*. To date, there has been limited commentary on the constitutionality of this provision.

This article commences by looking at the operation and effect of s 45. It then turns to consider the relationship between referrals from the AAT, as a non-judicial body, and referrals from a court. This is an important enquiry because authorities suggest that a court's answering of a referred question of law will only constitute an exercise of judicial power where the question arises in the context of judicial, not administrative, proceedings. As the AAT does not exercise federal judicial power, nor judicially

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determine rights, it is arguable that answers given by the Federal Court under s 45 do not involve the exercise of federal judicial power.

This article rejects the proposition that s 45 does not involve an exercise of federal judicial power. Any argument that s 45 breaches Ch III of the *Constitution* implies that other relationships between the AAT and the Federal Court also breach Ch III — in particular, judicial review of, and ‘appeals’ from AAT decisions. This is problematic, because judicial review and AAT ‘appeals’ are widely regarded as being constitutional. This article argues that judicial review and AAT ‘appeals’ share three key characteristics with the answering of a question of law under s 45: First, the Federal Court is limited to answering a ‘question of law’; second, that answer is binding on the AAT; and third, proceedings are remitted to the AAT when required. As judicial review and AAT ‘appeals’ involve the exercise of judicial power, if the Federal Court’s answering of AAT referrals is unconstitutional, this must be because of a characteristic not shared among the three mechanisms. The only relevant difference is that s45 referrals can occur before the AAT makes a decision. However, it will be argued that this difference should not determine s 45’s constitutionality.

The article then argues that s 45 promotes the purposes underpinning the Australian separation of judicial power, at least as much as judicial review and ‘appeals’ do. It would be unsatisfactory if s 45 were to be struck down on the basis that it breaches Ch III, when it enhances, or at least does not detract from, the purposes underpinning Ch III. Along with good practical arguments supporting s 45, there are no good policy reasons to support the conclusion that it is unconstitutional. Of course, if s 45 is unconstitutional, desirability alone will not save it. However, it does not follow that desirability cannot affect constitutionality.

Finally, while the analogy between s 45, judicial review and AAT ‘appeals’ suggests that s 45 is not unconstitutional, this argument does not necessarily extend to all analogous federal referral mechanisms. In this regard, this article considers referrals of questions of law from the Aboriginal Land Commissioner to the Federal Court.¹ While the AAT and the Aboriginal Land Commissioner are both executive bodies, their roles are significantly different. On the one hand, the AAT reviews executive decisions. The ALC, however, provides advice to the executive regarding the granting of certain land rights. Rather than being functionally equivalent to judicial review and ‘appeals’, the ALC example may actually require the Federal Court to exercise a power that is ‘incompatible’ with the independence and impartiality of the

¹ As provided for by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 54D.

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judiciary. This is an important distinction to be discussed as referral mechanisms have proliferated within different levels of the federal executive government.²

II JUDICIAL V ADMINISTRATIVE REFERRALS – AN UNSTABLE ANALOGY

A Overview of s 45

Section 45 of the AAT Act contains three operative provisions.

Section 45(1) states that:

The Tribunal may, of its own motion or at the request of a party, refer a question of law arising in a proceeding before the Tribunal to the Federal Court of Australia ...

There are no statutory guidelines for the exercise of the AAT's discretion to refer under s 45(1). However, the AAT has previously considered whether a referral will involve an argument suitable for the Federal Court,³ whether the Federal Court's answer ought to determine the issue between the parties,⁴ whether the referral will cause detrimental financial consequences for a party,⁵ and whether the referral could cause improper delay in the AAT proceedings.⁶ Procedurally, a statement of facts should accompany the question of law,⁷ as the Court must be provided with a proper factual basis upon which to make its decision'.⁸ Where a party has already 'appealed'

² See for example the *Copyright Act 1968* (Cth) s 161; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 54D; *Defence Force Discipline Appeals Act 1955* (Cth) s 51; *Freedoms of Information Act 1982* (Cth) s 55H; *Paid Parental Leave Act 2010* (Cth) s 259; *Corporations Act 2001* (Cth) s 659A; *Road Safety Remuneration Act 2012* (Cth) s 95. See also the *Charter of Human Rights and Responsibilities 2005* (Vic) s 33 for an example of a power given to a state tribunal to refer questions of law to the Victorian Supreme Court. However, this article is limited in its discussion to federal statutes.

³ *R v Industrial Court (SA); Ex parte Hunkin* [1934] SASR 208, 210; *The Taxpayer and Commissioner of Taxation* [2006] AATA 429, 5.

⁴ *Ibid.*

⁵ *NT88/800 and Commissioner of Taxation* [1989] AATA 552.

⁶ *Walsh and Commissioner of Taxation* (2012) 130 ALD 200, 209.

⁷ *Re Dunstan and Comcare* (2012) 130 ALD 370, 424 citing *Hepples v Commissioner of Taxation* (1992) 173 CLR 492.

⁸ *Meilak v Commissioner for Superannuation* (1991) 28 FCR 315, 322. Not only is this a procedural requirement, but it is also a constitutional one: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 354–60 ('*Bass*').

a question of law via s 44 of the AAT Act, it is unlikely a referral will also be granted.⁹ Such considerations ensure referrals 'occur only in exceptional circumstances that justify the guidance of the court'.¹⁰

AAT Deputy President Forgie has suggested that there are two issues worthy of referral:

One is an issue which the Tribunal has jurisdiction to consider but is of such complexity that it transcends the normal range of issues considered... Such an issue might be a constitutional issue ... The other sort of issue concerns questions that precede the existence of the Tribunal's jurisdiction ...¹¹

In *Director-General of Social Services v Chaney*, Fisher J pointed out that referrals concerning preliminary jurisdictional issues might mean that 'hours are not spent preparing a case that might not be accepted by the Tribunal'.¹²

Under s 45(2) of the AAT Act, the Federal Court has

jurisdiction to hear and determine a question of law referred to it [under s 45(1)] and that jurisdiction shall be exercised by that Court constituted as a Full Court.

Under s 45(3), answers to referred questions of law are binding on the AAT:

Where a question of law ... has been referred to the Federal Court of Australia ... the Tribunal shall not, in that proceeding:

- (a) give a decision to which the question is relevant while the reference is pending; or
- (b) proceed in a manner, or make a decision, that is inconsistent with the opinion of the Federal Court of Australia on the question.

The underlying purpose of s 45 is to ensure that the AAT 'makes decisions which are correct in law ... to finally resolve a matter'.¹³ However, s 45 does not provide a means of supervising the way in which the AAT carries out a review.¹⁴

⁹ *Mohinder Singh and Administrative Appeals Tribunal* [2014] AATA 460, [15]–[16].

¹⁰ Australian Government Solicitor, *Express Law: Amendments to the AAT Act* (20 May 2005) (available online) <<http://www.ags.gov.au/publications/express-law/el21.htm>>.

¹¹ *Re Lower and Comcare* (2003) 74 ALD 547, 556.

¹² (1980) 47 FLR 80, 107.

¹³ Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 34.

¹⁴ *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28, 45 [61] (Gyles J).

B *Patmore v Independent Indigenous Advisory Committee*

Patmore v Independent Indigenous Advisory Committee provides a useful demonstration of the effectiveness of s 45.¹⁵ In this case, the AAT was asked to review several decisions of the Independent Indigenous Advisory Committee that operated to exclude certain persons from the Indigenous Electors Roll. A person not on the Roll was prohibited from voting in the Tasmanian Indigenous Regional Council elections. During AAT proceedings, challenges were raised regarding the validity of parts of the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Rules 1990*, which contained detailed provisions regarding the compilation of the Roll. On the day the AAT was notified, the question of validity was referred to the Federal Court.

The following day, the Court sat to determine this question, finding that the challenged parts of the Rules were valid.¹⁶ The referral delayed the AAT hearing by one day.¹⁷ For the parties in *Patmore*, time was of the essence, given the proximity of the AAT review decision (18 October 2002) and the Election (12 November 2002).

Without resort to s 45, the outcome in *Patmore* could have been different. The AAT would have risked legal error, and any challenge to this would have had to wait until after the AAT made a decision.¹⁸ Given that the Federal Court sets a performance goal to resolve 85% of cases within 18 months,¹⁹ it is certainly conceivable that any challenge may not have received judicial attention until after the Election.

Additionally, s 45 is an efficient mechanism.²⁰ Although efficiency is an ambiguous concept,²¹ here it refers to 'fair outcomes achieved in the most efficient way possible, usually without resort to formal dispute resolution processes'.²² A decision will be efficient if it produces an outcome of 'fairness, justice and economy'.²³ *Patmore* demonstrates that s 45 provides a unique method of dealing with the question of law, circumventing often lengthy and expensive avenues of judicial review and 'appeals'.

¹⁵ (2002) 71 ALD 706.

¹⁶ *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559.

¹⁷ (2002) 71 ALD 706, 707.

¹⁸ As to why, see section 2 of this article.

¹⁹ Federal Court of Australia, 'Annual Report: 2011–2012' (14 September 2012) 16.

²⁰ Note the term 'efficiency' is given a separate meaning later in this article.

²¹ Ronald Sackville, 'The Limits of Judicial Review of Executive Action: Some Comparisons Between Australian and the United States' (2000) 28(2) *Federal Law Review* 315, 318.

²² Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012) 43 ('ARC Report 2012').

²³ *Re The Australian and Department of Families, Community Services and Indigenous Affairs* (2006) 92 ALD 179, 199.

In this sense, s 45 enhances the 'quality, efficiency and effectiveness of government decision making' in the Australian administrative law framework.²⁴

In terms of administrative law theory, s 45 fits in well with the 'green light', as opposed to the 'red light' view of administrative law. The 'red light' view sees administrative law effectively 'righting the wrongs occasioned by maladministration'.²⁵ The 'green light' view recognises that 'administrative law is to facilitate the operations of the state rather than curb them'.²⁶ Judicial guidance pursuant to s 45 sidesteps unnecessary 'tension' between the executive and judiciary often witnessed in judicial review.²⁷ Arguably, the referral mechanism increases public confidence in 'prompt and efficient decision-making', which is integral to good administration,²⁸ providing the AAT with an opportunity to be 'clear about the legal authority for making the decision'.²⁹ As former Federal Court Judge and AAT President Garry Downes points out:

The effectiveness of the Tribunal's review process is crucial to its successful operation ... It is the presence of predictable, high-quality decision-making which facilitates earlier consensual resolution.³⁰

The ability to deal with applications quickly and fairly is imperative, especially given that the AAT has grown considerably since it was established in 1976.³¹ As Downes noted in 2008, the tribunal 'has jurisdiction under some 400 Acts and other legislative instruments. In the last financial year, the Tribunal received more than 8,500 applications'.³²

²⁴ ARC Report 2012, above n 22, 41.

²⁵ Mark Elliot, *Beatson, Matthews, and Elliot's Administrative Law Text and Materials* (Oxford University Press, 4th ed, 2011) 5.

²⁶ Michael Head, *Administrative Law: Context and Critique* (Federation Press, 2nd ed, 2008) 15.

²⁷ Justice McHugh, 'Tensions Between the Executive and the Judiciary' (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002).

²⁸ *Baker v Secretary, Department of Social Security* (1991) 23 ALD 305, 306 (Davies J).

²⁹ Roger Wilkins, 'Issues for Decision-Makers' (Speech delivered at AAT/ACT Bar Association Seminar 'The obligation to assist: model litigants in AAT Proceedings', National Museum of Australia, Canberra, 26 August 2009).

³⁰ Garry Downes, 'Making The AAT More Relevant — Reflections On Its 30th Anniversary' (2008) 59 *Australian Institute of Administrative Law Forum* 67, 69.

³¹ *Ibid*, 67.

³² *Ibid*.

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It is interesting to consider s 45 in light of the Administrative Review Council's recent support for a 'Jurisdictional Limits Model' within Australian administrative law.³³ This model focuses on providing administrative decision-makers with direct and specific advice on their jurisdictional boundaries. While discussion of this model warrants an article of its own,³⁴ s 45 embodies a similar idea of preventing, rather than curing, legal error.

C *Constitutional Dimensions*

However, despite the effectiveness of s 45, the constitutional concern is that the Federal Court fails to exercise judicial power when answering a referred question of law. In addressing this issue, it is important to establish the circumstances in which the Federal Court exercises constitutional jurisdiction and the limitations imposed upon the exercise of that power by Ch II of the Constitution.

1 *Jurisdiction*

Identifying whether the Federal Court has constitutional jurisdiction consists of two enquiries.³⁵ First, the jurisdiction of the court³⁶ must be referable to one of the nine heads of jurisdiction in ss 75 and 76 of the *Constitution*.³⁷ In relation to s 45(2) of the AAT Act, the key head of jurisdiction is likely to be s 76(ii): a matter arising under 'any laws made by the Parliament'.³⁸ A matter will 'arise under a law made by Parliament' if the 'right or duty in question ... owes its existence to federal law or depends upon federal law'.³⁹ *Patmore* is an example of a case in which jurisdiction arose under s 76(ii) in the context of s 45(2) of the AAT Act. This was because the validity of the right to be included on the voting Roll stemmed from a federal statute, the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). More generally it has been noted that 'where a Court is simply interpreting a Commonwealth law, it is

³³ *ARC Report 2012*, above n 22, 195–200.

³⁴ See Roger Wilkins and Bronwen McGee, 'Judicial Review: A Jurisdictional Limits Model' (2013) 72 *Australian Institute of Administrative Law Forum* 20.

³⁵ Meaning 'authority to decide': *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377. See also *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 569–70 [62]–[63].

³⁶ Which Parliament has the power to define: *Constitution s 77(i)*.

³⁷ *Abebe v Commonwealth* (1999) 197 CLR 510, 525–26 ('*Abebe*').

³⁸ If a constitutional question were referred, s 76(i) of the *Constitution* would also be appropriate.

³⁹ *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581.

difficult to imagine ... that interpretation will not involve a right or duty arising under a federal law'.⁴⁰

The second element of federal jurisdiction requires that the Federal Court only exercise jurisdiction in relation to a 'matter'. Although the High Court has grappled with this concept, a 'matter' is generally understood to be the determination of rights, duties, liabilities and obligations in a legal proceeding.⁴¹ For a 'matter' to exist, there must be a 'justiciable controversy',⁴² capable of being quelled by an exercise of federal judicial power.⁴³

Problematically, however, it has been recognised that the jurisdictional requirement of a determination of rights — operating through the 'matter' requirement—is synonymous with the core characteristic of federal judicial power, creating a 'conflation of power and jurisdiction'.⁴⁴ It is not the aim of this article to dwell on this issue. The analytical approach taken here is to focus on whether there has been a determination of rights through an exercise of judicial power by the Federal Court when answering an AAT referral.⁴⁵ Accordingly, if an answer under s 45 does not involve an exercise of federal judicial power, this may also be interpreted to mean that jurisdiction under s 45(2) has not been conferred with respect to a 'matter'.⁴⁶

⁴⁰ James Stellios, *The Federal Judicature: Chapter III of the Constitution, Commentary and Cases* (LexisNexis Butterworths, 2010) 313.

⁴¹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–6 ('*Re Judiciary*').

⁴² Geoffrey Marshall, 'Justiciability' in A G Guest (ed), *Oxford Essays in Jurisprudence: First Series* (Clarendon Press, 1961) 269. See also *Birdon Pty Ltd v Houbon Marine Pty Ltd* (2011) 197 FCR 25, 65 [170] (Keane CJ, Rares and Buchanan JJ) and the citations therein.

⁴³ *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372, 405–6 (Gaudron and Gummow JJ) ('*Re McBain*'). 'Judicial power of the Commonwealth' may be narrower than 'judicial power', although this is not entirely clear: *Re McBain* (2002) 209 CLR 372, 404–5. But see *Boilermakers'* (1956) 94 CLR 254, 274–5.

⁴⁴ See generally James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 117–19.

⁴⁵ Seemingly this was the preferred analytical approach in *Momcilovic v R* (2011) 245 CLR 1 ('*Momcilovic*'). See also Will Bateman, 'Federal Jurisdiction in State courts: An Elaboration and Critique' (2012) 23 *Public Law Review* 246, 251.

⁴⁶ See the overlap of these concepts: *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610–11 (Gaudron J) cited in *Re McBain* (2002) 209 CLR 372, 405.

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2 *Judicial power*

Chapter III of the *Constitution* commands a complete separation of judicial power from the executive and legislative powers.⁴⁷ The Commonwealth Parliament cannot 'infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71'.⁴⁸ The judicial branch of government 'must be' separated from the other branches of government.⁴⁹ As a Ch III Court, the Federal Court can only exercise powers that are judicial or incidental thereto.⁵⁰

It has been said that judicial power is a 'flabby notion',⁵¹ which has 'defied precise definition'.⁵² Some powers are judicial simply as a matter of history, although s 45 is not such a power.⁵³ Incidental judicial powers are those powers 'necessary or proper to render ... [judicial power] effective'.⁵⁴ They include the making of rules of court,⁵⁵

⁴⁷ *The Waterside Workers' Federation v J W Alexander* (1918) 25 CLR 434 ('*Alexander's Case*'). Sections 1, 61 and 71 of the *Constitution* give effect to the doctrine of the separation of powers by separately vesting the legislative, executive and judicial powers of the Commonwealth: *Wilson v Minister for Aboriginal and Torres Strait Island Affairs* (1996) 189 CLR 1, 10–11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) ('*Wilson*').

⁴⁸ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505–6 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁴⁹ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 (Gleeson CJ, Gummow, Hayne, and Heydon JJ).

⁵⁰ *R v Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 affirmed by A-G (Cth) v R; *Ex parte Australian Boilermakers' Society* (1957) 95 CLR 529 (PC) ('*Boilermakers*').

⁵¹ P H Lane, *A Manual Of Australian Constitutional Law* (Lawbook, 6th ed, 1995) 186. In *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 210–11, Starke J noted: 'the limits of the legislative, the executive and the judicial powers of the Commonwealth are nowhere defined. A strict division is... impossible, and we find more and more, as a matter of practical government, a mingling of functions'. In *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 it was further noted: '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'.

⁵² *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 553.

⁵³ See, e.g. *R v Davison* (1954) 90 CLR 353, 368. For a power to be judicial on a historical basis, it should generally have been regarded as 'peculiarly appropriate for judicial performance' by 1900: *R v Davison* (1954) 90 CLR 353, 382 affirmed in *Saraceni v Jones* (2012) 246 CLR 251, 256 (Gummow J).

⁵⁴ *Boilermakers'* (1956) 94 CLR 254, 278.

⁵⁵ See *R v Davison* (1954) 90 CLR 353.

or committing a person for trial.⁵⁶ It is unlikely that s 45 involves an incidental judicial power because answers given by the Federal Court under this section do not assist with the exercise of judicial power—they merely answer questions of law for the purposes of administrative proceedings.⁵⁷

At the ‘heart’ of judicial power,⁵⁸ is the ‘the power of a sovereign authority to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property’.⁵⁹ The ‘unique and essential’ function of judicial power is quelling such controversies by ascertaining facts, applying the law and exercising, where appropriate, judicial discretion.⁶⁰ The judicial ‘function’ pertains to determining a dispute inter-partes as to the existence of a right or obligation in law and in applying the law to the facts as determined.⁶¹ Conversely, an executive decision that ‘exposes an individual to a risk of conviction, or the imposition of a penalty, is not an adjudication of rights and liabilities, and therefore not an exercise of judicial power’.⁶²

⁵⁶ *R v Murphy* (1985) 158 CLR 596, 613–14.

⁵⁷ As the majority noted in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 31 (Gleeson CJ, Gummow, Hayne, and Heydon JJ): ‘a committal proceeding is an administrative function conducted by a judicial officer...The relationship between committal proceedings and trial is such that they are part of the controversy which the trial ultimately determines’.

⁵⁸ Chief Justice Robert French, ‘Essential and defining characteristics of courts in an age of institutional change’ (2013) 23 *Journal of Judicial Administration* 3, 8. See also Tom Spencer, ‘An Australian Rule of Law’ (2014) 21 *Australian Journal of Administrative Law* 98, 108.

⁵⁹ *Huddart, Parker & Co. Pty. Ltd. v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

⁶⁰ *Fencott v Muller* (1983) 152 CLR 570, 608 cited in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 20 [43]. See also *R v Davison* (1954) 90 CLR 353, 369.

⁶¹ *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 358. See also *Slaveski v The Queen* [2012] VSCA 48, [107]. In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258–9 (Mason CJ, Brennan & Toohey JJ) the Court noted a determination will be ‘binding and authoritative’ where there is an ‘immediate enforceable liability’. Chief Justice French has explained the judicial function in terms of a ‘simple model of syllogistic reasoning’ which involves the following steps: (1) Determining the principle of law as the major premise; (2) Ascertaining the facts; (3) Applying the principle of law to the facts as found to determine rights or liabilities; (4) Awarding remedies where necessary to give effect to the rights or liabilities determined: Honourable RS French, ‘Executive toys: judges and non-judicial functions’ (2009) 19 *Journal of Judicial Administration* 5, 13.

⁶² *Attorney-General (NT) v Emmerson* [2014] HCA 13, [61]. The conferral on an administrative body, such as the AAT, of the function of forming opinions about existing legal rights is not in breach of Ch III of the *Constitution* where that opinion is no more than a step in the

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The High Court has identified the 'object' of the judicial process as the 'final determination of the rights of parties to an action'.⁶³ As the Court said in *D'Orta-Ekenaike v Victoria Legal Aid*:

To adopt the language found in the cases considering Ch III of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies ... No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy.⁶⁴

Furthermore, in *In re Judiciary and Navigation Acts*, the High Court held that the conferring of jurisdiction on it to give an 'advisory opinion' on a proposed federal law's validity would not involve an exercise of federal judicial power.⁶⁵ The Court held that such a power would not involve a 'matter', and thereby an exercise of federal judicial power, and was 'divorced from any attempt to administer the law'.⁶⁶

Momcilovic v R ('*Momcilovic*') reinforces the above principles. In this case, the High Court held that the power of the Victorian Supreme Court to issue a 'declaration of inconsistent interpretation' in federal jurisdiction⁶⁷ was not an exercise of judicial power⁶⁸ or incidental thereto.⁶⁹ A 'declaration' was given after Supreme Court proceedings and was designed to promote a human rights 'dialogue' with the Victorian Parliament. However, the declaration had no impact on the resolution of the justiciable controversy; it did not determine the rights of the parties, and was thus missing the core characteristic of judicial power.⁷⁰

administrative body arriving at its ultimate decision: *Re Cram; Ex parte Newcastle Wallsend Coal Pty Ltd* (1987) 163 CLR 140, 149.

⁶³ *Bass* (1999) 198 CLR 334, 355–6.

⁶⁴ (2005) 223 CLR 1, 17.

⁶⁵ *Re Judiciary* (1921) 29 CLR 257, 265–6.

⁶⁶ *Ibid.*

⁶⁷ *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) s 36(2).

⁶⁸ *Momcilovic* (2011) 245 CLR 1, 65 (French CJ), 241 (Bell J), 93 (Gummow J), 123 (Hayne J), 185 (Heydon J), 222 (Crennan and Kiefel JJ).

⁶⁹ *Momcilovic* (2011) 245 CLR 1, 66 (French CJ), 97 (Gummow J), 123 (Hayne J), 157 (Heydon J).

⁷⁰ Will Bateman and James Stellios, 'Chapter III, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 18. For further discussion on *Momcilovic*, see Bruce Chen, 'Making sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the Charter of Human Rights and Responsibilities Act 2006' (2013) 74 *Australian Institute of Administrative Law Forum* 64.

D *An Argument for Section 45's Unconstitutionality*

Stellios has suggested that the Federal Court does not exercise federal judicial power when answering questions of law referred to it by non-judicial bodies.⁷¹ In reference to a 2008 referral from the Copyright Tribunal (which has a referral mechanism almost identical to s 45), Stellios asked: Given 'that the Tribunal does not exercise Commonwealth judicial power, and that answers given by the Full Court would not resolve a justiciable controversy ... how could it be said that the Full Federal Court was exercising Commonwealth judicial power in answering these questions?'⁷² In a later article, Stellios noted:

As the High Court continually reminds us ... tribunals are not courts and do not resolve justiciable controversies. The proceedings before tribunals or decision-makers who conduct merits review 'are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation' ... in each case, the court is giving an opinion on a question of law to an administrative decision-maker.⁷³

In supporting this point, Stellios distinguishes referrals from judicial and non-judicial bodies, noting that the case of *Mellifont v A-G (Q)* ('*Mellifont*')⁷⁴ and other subsequent cases support this distinction.⁷⁵

⁷¹ Stellios, above n 40, 507; Stellios, above n 44, 124–5.

⁷² Stellios, above n 40, 507.

⁷³ Stellios, above n 44, 125 (citations omitted).

⁷⁴ *Mellifont v A-G (Q)* (1991) 173 CLR 289 ('*Mellifont*').

⁷⁵ Stellios, above n 44, 124–5. Although Stellios relies on authority in the context of the Refugee Review Tribunal, that authority has been held to be as equally applicable to the AAT. See *Re Issa and Australian Community Pharmacy Authority* (2012) 128 ALD 631, [26]. As concerns the general nature of tribunals, see *NABE v Minister for Immigration and Multicultural & Indigenous Affairs* [2004] 144 FCR 1, 18 [58] (Black CJ, French and Selway JJ). As concerns the position of parties before the AAT, see *Re Confidential and Commissioner of Taxation* (2012) 127 ALD 353, 382 [125] citing *Saunders v Federal Commissioner of Taxation* (1988) ATC 4349, 4356 that '[before the AAT] provision is made for there to be "parties" to the proceedings...but in a reference such as this the parties are not adversaries in the strict sense, and any argument they present constitutes material which assists the Tribunal in deciding what decision should be made'. In *Watson v Federal Commissioner of Taxation* (1999) 96 FCR 48, [34] it was said 'thus proceedings before the AAT are fundamentally different from court proceedings. Unlike a court, the AAT is exercising powers of an inquisitorial nature to endeavour itself to ascertain the truth, or at any rate to arrive at the correct or preferable decision. The AAT does not proceed on any assumption of equality between adversarially opposed parties'. In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91, 111 – 12

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In *Mellifont*, the High Court held that answers given by the Court of Criminal Appeal to questions of law arising from Mellifont's trial constituted an exercise of judicial power because:

Such answers ... are given as an integral part of the process of *determining* the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved. Once this is accepted ... it follows inevitably that the giving of the answers is an exercise of judicial power because the seeking and the giving of the answers constitutes an important and influential, if not decisive, step in the *judicial determination of the rights and liabilities* in issue in the litigation.⁷⁶

The emphasised parts of this excerpt demonstrate a focus on the connection between the giving of answers and a judicial determination of rights.

Burmester has highlighted that the 'fundamental point' in *Mellifont* was that the answering of referred questions enabled the Court of Appeal to correct an error of law in the course of judicial proceedings,⁷⁷ and that it was 'that characteristic ... that stamps them as an exercise of judicial power'.⁷⁸ This 'fundamental point' has been reinforced in later cases.⁷⁹

Momcilovic appears to affirm *Mellifont* in that answers to referred questions of law only constitute an exercise of judicial power when the answers are directed at judicial proceedings. Pursuant to s 33 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), one of the ways in which a 'declaration' might be made is following a 'question of law' that has been referred by a lower court or tribunal to the Supreme Court. In *Momcilovic*, French CJ reinforced the point that it is those answers to

affirming *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5: 'Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the AAT is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it'.

⁷⁶ *Mellifont* (1991) 173 CLR 289, 303 (emphasis added).

⁷⁷ Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System*, (Melbourne University Press, 2000) 227, 239.

⁷⁸ *Mellifont* (1991) 173 CLR 289, 305.

⁷⁹ See, e.g. *DPP (SA) v B* (1998) 194 CLR 566, 576 (Gaudron, Gummow, Hayne JJ); *Re McBain* (2002) 209 CLR 372, 409 (Gaudron and Gummow JJ). In assessing whether a Ch III court exercises judicial power, it has recently been affirmed that 'a critical consideration is whether the judgment of the court was delivered in a matter forming part of a justiciable controversy between the parties': *Letten v Templeton* [2014] FCAFC 131, [19] (Davies J).

questions of law 'arising in proceedings before a trial court' that constitute an exercise of the judicial function.⁸⁰ His Honour went on to say that the answers given by a court may 'properly be viewed as an incident of the judicial process'.⁸¹ This makes sense as the answers given assist a lower court to exercise judicial power. Crennan and Kiefel JJ made comments to the same effect.⁸² But where does this leave us when it is a non-judicial body referring the question of law?

There is a 'necessary distinction to be drawn between the Court's exercise of the judicial power of the Commonwealth and the Tribunal's exercise of the administrative power of the Commonwealth'.⁸³ While the AAT has many of the 'trappings of litigation',⁸⁴ it does not exercise federal judicial power,⁸⁵ nor does it have the power to resolve a 'justiciable controversy'.⁸⁶ Any attempt by the Parliament to confer such power on the AAT is unconstitutional.⁸⁷ As Downes J has noted, 'the Administrative Appeals Tribunal is not a court. It does not exercise the judicial power of the Commonwealth. It is an administrative decision-maker. It exercises the executive power of the Commonwealth'.⁸⁸ As concerns the position of the parties before the AAT:

The Tribunal is not placed in the position of an adjudicator required to form a view on which of two competing views it prefers: that of the person aggrieved by the decision or that of the decision-maker. In deciding the correct or preferable decision, its decision may reflect

⁸⁰ *Momcilovic* (2011) 245 CLR 1, 63.

⁸¹ *Ibid*, 64.

⁸² *Ibid*, 233.

⁸³ *Sullivan and Civil Aviation Safety Authority* [2013] AATA 425, [29].

⁸⁴ Allan Hall, 'Judicial Power, the Duality of Functions and the AAT' (1994) 22 *Federal Law Review* 13, 15. However, note the Court's comments about the similarities between tribunals and Courts with respect to 'acting judicially': *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 65, 68–9 (Bowen CJ and Deane J).

⁸⁵ *Re Ego Pharmaceuticals Pty Ltd and Minister for Health and Ageing* (2012) 125 ALD 588, 601 [36]; *Re Rent to Own (Aust) Pty Ltd and Australian Securities and Investment Commission* (2011) 127 ALD 141, 149 [40]; *Re Confidential and Commissioner of Taxation* (2012) 127 ALD 353, 382 [125]; *James v Comcare* (2011) 125 ALD 418; *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28, [62] (Gyles J); *Drake v Minister of Immigration and Ethnic Affairs* (1979) 24 ALR 577, 584–5; *Glennan v Commissioner of Taxation* (2003) 77 ALR 1195, 1199. But see Peter Cane, 'Merits Review and Judicial Review: The AAT as Trojan Horse' (2000) 28(2) *Federal Law Review* 213 who argues that as a matter of *function* the AAT does exercise federal judicial power.

⁸⁶ Stellios, above n 44, 125.

⁸⁷ *Alexander's Case* (1918) 25 CLR 434.

⁸⁸ *Shi v Migration Agents Registration Authority* (2007) FCAFC 59, [35].

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neither of the competing views. That aspect of the Tribunal's task necessarily shapes the task of the parties. That of the decision-maker, for example, is not to adjudicate upon whether it is able to defend the decision it made but to assist the Tribunal to reach the correct or preferable decision. The same is no less true of the task of the person aggrieved by the decision'.⁸⁹

As Lane has noted, 'it is not the process, but the end product, the *decision* that has been highlighted' that is determinative of whether there has been an exercise of judicial power.⁹⁰ Under s 45, the 'end product' is a not a judicial decision, and it is not made through an exercise of judicial power. Fisher has commented that an exercise of jurisdiction that is not directed to the final determination of the rights of a party is not an exercise of judicial power.⁹¹ Given that the AAT cannot conclusively settle a dispute about existing rights and duties, because this is an exclusively judicial function,⁹² the answering of questions under s 45 cannot give rise to the final determination of parties' rights.⁹³ Additionally, the High Court has held that non-judicial bodies create rather than determine rights.⁹⁴

The case of *Federated Saw Mill v James Moore and Sons Pty Ltd* ('*Federated Saw Mill*') should also be noted.⁹⁵ In this case, the High Court held that answers given to questions referred from the then Commonwealth Court of Conciliation and Arbitration (the 'CCCA') constituted an exercise of judicial power. We now know that the CCCA is a non-judicial body, hence this case would appear to be authority for the view that s 45 is constitutional. However, Stellios distinguishes *Federated Saw Mill* on the basis that when that decision was handed down, it was not yet established that the CCCA could not exercise judicial power.⁹⁶ Therefore, Stellios argues that 'there would be a determination of rights and liabilities once the answers

⁸⁹ *VCA and Australian Prudential Regulation Authority* [2008] AATA 580, [124] citing *Re Mann and Capital Territory Health Commission (No. 2)* (1983) 5 ALN N368 cited in *Re Wertheim and Department of Health* (1984) 7 ALD 121, 154.

⁹⁰ Lane, above n 51, 192; Asaf Fisher, 'A Comment on Professor Leslie Zines' Paper 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22(3) *Bond Law Review* 187, 189.

⁹¹ Fisher, above n 90, 189.

⁹² Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 247.

⁹³ See *Bass* (1999) 198 CLR 334, 357–8.

⁹⁴ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5.

⁹⁵ *Federal Saw Mill, Timberyard and General Woodworkers Employees' Association of Australasia v James Moore and Sons Pty Ltd* (1909) 8 CLR 465 ('*Federated Saw Mill*').

⁹⁶ Stellios, above n 40, 119.

were returned' to the CCCA.⁹⁷ Thus, like in *Mellifont*, the answers in the context of *Federated Saw Mill* were directed at a controversy that was to be resolved by an exercise of judicial power.

E *Contrary Dicta*

1 *Mason CJ: O'Toole v Charles David*

Notwithstanding the argument above, Mason CJ in *O'Toole v Charles David Pty Ltd* expressed dicta to the contrary.⁹⁸ In *O'Toole*, the High Court considered whether the Full Federal Court exercised judicial power when answering a question of law referred from a single judge of the Federal Court.⁹⁹ Mason CJ suggested that:

Courts answering questions stated by arbitrators have no jurisdiction to make an award ... so it is natural to speak of the answers as 'advisory or consultative only'. But this is not to say that the answers to such questions constitute an advisory opinion proscribed by this Court in *In Re Judiciary* ... An advisory or consultative opinion given by a court in the context of proceedings actually in train before a court, tribunal or arbitrator *is an exercise of judicial power* ...¹⁰⁰

For Mason CJ, it was unnecessary to differentiate this conclusion based on whether the referring body was judicial or non-judicial; it was satisfactory that there were 'proceedings in train'. But what did Mason CJ mean by the term 'proceedings'? For example, could 'proceedings' involve an application to a Minister (another executive body) for an immigration visa? This is not clear. Nonetheless, Lane has suggested — on the basis of Mason CJ's comments — that the Federal Court exercises judicial power when it is given jurisdiction to hear and determine a question of law referred to it by the non-judicial Copyright Tribunal.¹⁰¹

Conversely, in *O'Toole*, Dawson J saw the nature of the proceedings from which the question arose as an important factor in determining whether the answering body was exercising judicial power. His Honour suggested that in order for there to be an exercise of judicial power in answering referred questions, the questions had to be referred from 'a matter on foot'.¹⁰² Recalling that a 'matter' is a justiciable controversy, Dawson J's opinion differs from Mason CJ, because tribunals and

⁹⁷ Ibid.

⁹⁸ *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 (*O'Toole*).

⁹⁹ As seen above, however, *Mellifont* later decided that answers to referrals from judicial bodies constitute an exercise of judicial power.

¹⁰⁰ *O'Toole* (1991) 171 CLR 232, 244 (emphasis added).

¹⁰¹ Lane, above n 51, 195.

¹⁰² *O'Toole* (1991) 171 CLR 232, 302.

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arbitrators neither entertain justiciable controversies nor ‘matters’. It would seem, given the courts comments in *Mellifont* (and later cases), that Dawson J’s position aligns with the current state of the law.

2 *Kiefel J: ATC v South Bank*

In *ATC v South Bank*, Kiefel J was the only Judge to specifically comment on the constitutionality of s 45.¹⁰³ In obiter, her Honour saw no issue in extending the *Mellifont* reasoning to a referral from the AAT.¹⁰⁴ Although Kiefel J did not look to the nature of the referring body, as was the emphasis in *Mellifont*, her Honour was of the opinion that ‘a reference under s 45 of the AAT Act would involve the exercise of judicial with respect to a ‘matter’’.¹⁰⁵ The thrust of her Honour’s reasoning was that because the AAT, under s 45(3) of the AAT Act, is statutorily prohibited from making a decision contrary to the answers of the Federal Court, ‘this would go a long way to allaying concerns as to whether [answers] would be influential in the determination of the parties’ rights’.¹⁰⁶ However, it is important to recall that in *Mellifont* it was not just that answers had to be influential in the determination of rights. Rather, the answers were influential in a *judicial* determination of rights. While Kiefel J shows a willingness to stretch the principle enunciated in *Mellifont*, this point is yet to be taken up by other members of the court.

F Conclusion

In summary, current authority would appear to favour the view that, when the Federal Court answers an AAT referral, it exercises a non-judicial, non-incident power and breaches Ch III of the *Constitution*. However, it has also been noted that no court has substantively ruled that s 45 is unconstitutional and there is dictum to the contrary. While this argument may appear overly technical – perhaps even a case of ‘doctrinal basket weaving’¹⁰⁷ – legal technicality has, of late, dominated the

¹⁰³ *Australian Trade Commission v South Bank Corporation* (2000) 104 FCR 116 (*ATC v South Bank*).

¹⁰⁴ This case concerned interim judicial review, not a s 45 referral. In this regard see *Military Rehabilitation and Compensation Commission v Administrative Appeals Tribunal* [2005] FCA 442.

¹⁰⁵ *ATC v South Bank* (2000) 104 FCR 116, 124.

¹⁰⁶ *Ibid* 124–5.

¹⁰⁷ Leslie Zines, ‘The Present State of Constitutional Interpretation’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads – Essays in Constitutional Law* (Federation Press, 2000) 224, 238.

High Court.¹⁰⁸ However, for the purposes of this article there is an even more pressing question: If s 45 is unconstitutional, what implications (if any) might this have for other AAT-Federal Court relationships?

III JUDICIAL REVIEW AND 'APPEALS' – A FUNCTIONAL EQUIVALENT

To recap, under s 45 the Federal Court provides an answer to a 'question of law'. These answers are then remitted to, applied by, and binding upon the AAT. The argument that s 45 is unconstitutional is based upon the fact that the AAT is a non-judicial body. Importantly, however, all these characteristics underlie judicial review of, and 'appeals' from, decisions of the AAT. For example, in judicial review, the Federal Court has power to give an 'order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to directions as the court thinks fit'.¹⁰⁹

In this article, it is argued that the referral mechanism in s 45 is functionally equivalent to judicial review of, and 'appeals' from, AAT decisions. It is further argued that the fact that the AAT may be yet to make any decision prior to a referral does not mean that the Federal Court exercises non-judicial power or gives a constitutionally proscribed 'advisory opinion'.¹¹⁰

A Foundations of Judicial Review

While judicial review was originally a product of the common law,¹¹¹ the Federal Court's competence to engage in this process is now derived solely from statute.¹¹² At the Federal Court's conception, judicial review was foreshadowed as a 'very

¹⁰⁸ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 90.

¹⁰⁹ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(1)(b).

¹¹⁰ For general discussion on the problems surrounding 'advisory opinions' in federal jurisdiction, see Helen Irving, 'Advisory Opinions, The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105.

¹¹¹ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation and Governance* (Oxford University Press, 2nd ed, 2012) 38.

¹¹² Mark Aaronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 3rd ed, 2004) 25.

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significant part of the jurisdiction of the new court'.¹¹³ Parliament has vested the Federal Court with judicial review jurisdiction under three provisions.¹¹⁴

1 Source of Jurisdiction

First, subject to minor exceptions,¹¹⁵ s 39B(1) of the *Judiciary Act 1903* (Cth), 'vests in the Federal Court the entirety of the jurisdiction which s 75(v) confers on the High Court'.¹¹⁶ To attract this jurisdiction, a party must be seeking one of the mentioned writs against an 'officer of the Commonwealth'. Secondly, s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) provides judicial review jurisdiction in matters 'arising under any laws made by Parliament'. Jurisdiction under s 39B(1A)(c) is noticeably broader than that under s 39B(1).¹¹⁷ Thirdly, the Federal Court has judicial review jurisdiction under s 8(1) of *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act'). To attract this jurisdiction, there must have been a 'decision' of an 'administrative character' that was 'made under an enactment'.¹¹⁸

2 Purpose of Judicial Review

Judicial review is concerned with keeping decision-makers within the limits of their jurisdiction, providing a safeguard for the individual against the abuse of public power.¹¹⁹ It is a means of 'ensuring accountability of officials for the legality of their actions',¹²⁰ and is 'neither more nor less than the enforcement of the rule of law over executive action'.¹²¹ There is a focus on ensuring that powers are exercised in the manner, and for the purpose, for which they are conferred.¹²² It is well established in

¹¹³ Robert French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 123, 150 citing Commonwealth, *Parliamentary Debates, Senate*, 27 October 1972, 2725.

¹¹⁴ Via the *Constitution* s 77(i).

¹¹⁵ *Judiciary Act 1903* (Cth) ss 39B(1B), 39(1C) and 39B(1EA).

¹¹⁶ *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 181.

¹¹⁷ *ARC Report 2012*, above n 22, 57.

¹¹⁸ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

¹¹⁹ Lord Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 7th ed, 2013) 11.

¹²⁰ *ARC Report 2012*, above n 22, 3.

¹²¹ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70. See also *Sagar v O'Sullivan* (2011) 278 ALR 456; *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 44–53; *SZGUW v Minister for Immigration and Citizenship* [2009] FCA 321; *Lansen v Minister for Environment and Heritage* [2008] FCAFC 189; *Griffith University v Tang* (2005) 221 CLR 99.

¹²² James Spigelman, 'The Integrity Branch of Government' (2004) 78(11) *Australian Law Journal* 724, 730.

Australia that an administrative decision-maker is not entitled to decide its own jurisdictional limits.¹²³

However, judicial review is 'not intended to take away from authorities the powers and discretions ... vested in them by law and to substitute the courts as the bodies making the decisions'.¹²⁴ Although it is a fuzzy line,¹²⁵ judicial review proceedings are limited to the 'legality' of a decision as opposed to the 'merits' of a decision.¹²⁶ Judicial review is not aimed at deciding whether a decision, made within jurisdiction, was preferable or correct, unlike the role of merits review before the AAT.¹²⁷ Unlike a merits review body, a superior court exercises judicial power in issuing constitutional writs,¹²⁸ and likewise by granting remedies under s 16 of the ADJR Act.¹²⁹

B 'Appeals': Section 44

As well as its judicial review jurisdiction, the Federal Court has jurisdiction to hear and determine 'appeals' on questions of law from the AAT.¹³⁰ In practice, s 44 remains the primary means of seeking review of AAT decisions,¹³¹ and its existence is well supported.¹³² Appeals are heard in the Court's original jurisdiction,¹³³ and unlike an appeal from a judicial body, 'appeals' from AAT decisions are not by way

¹²³ *Enfield City v Development Assessment Commission* (2000) 199 CLR 135, 155. Only courts can authoritatively decide whether or not an administrative decision was legally valid or effective: *Seymour v Migration Agents Registration Authority* (2006) 215 FCR 168, 198 [127] (Rares J) citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505–6 [75]–[76], 513–14 [104]. Cf. *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597, 605 [13] (Gleeson CJ), 614–15 [51] (Gaudron and Gummow JJ), 618 [63] (McHugh J). See also *Chevron USA Inc. v Natural Resources Defence Council* (1984) 467 US 837.

¹²⁴ Cane and McDonald, above n 111, 39.

¹²⁵ See generally Cane, above n 85, 215–17.

¹²⁶ Sackville, above n 21, 315–16.

¹²⁷ See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 629.

¹²⁸ *Rola Company (Australia) Pty Ltd v Federal Commissioner of Taxation* (1945) 69 CLR 185, 204. The High Court has acknowledged the link between the remedies in s 75(v) of the *Constitution* and the concept of the judicial function. 'An essential characteristic of the judicature provided for in Chapter III is that it declares and enforces the limits of the power conferred by statute upon administrative decision makers': *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668.

¹²⁹ See, e.g. *Kamha v APRA* (2005) 88 ALD 620, 638. The purpose of the ADJR Act is, of course, remedial: *Secretary, Department of Foreign Affairs v Boswell* (1992) 108 ALR 77, 87.

¹³⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

¹³¹ *ARC Report 2012*, above n 22, 120.

¹³² *Ibid*, 123.

¹³³ Dennis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 3rd ed, 2013) 289.

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of rehearing and the Court has no power to substitute its decision for that of the AAT.¹³⁴ A mixed question of fact and law is not a question of law within the meaning of s 44 of the AAT Act.¹³⁵ While the difference between a question of law within s 44 and an error of law as a ground of judicial review is not entirely clear, the concepts inextricably overlap.¹³⁶ This is particularly evident as a 'question of law' under s 44 includes the interpretation of federal statutes, the enunciation of principles of common law or equity, the breach of any duty and the grounds of review in s 5 of the ADJR Act.¹³⁷

Pearce states that the power of the Federal Court to hear 'appeals' from the AAT is a valid exercise of judicial power.¹³⁸ Ultimately, 'appeals' under s 44 are functionally the same as judicial review.¹³⁹ Moreover, the power to remit a matter to the AAT is a constitutionally valid one.¹⁴⁰ In this regard, it is argued that the Federal Court's role under s 45 is extremely similar to that which it undertakes in judicial review and 'appeals'. In each case the Federal Court hears only questions of law, it remits the matter to the AAT, and the Court's decision binds the AAT. What then is the difference in these three contexts? This is an especially pertinent question given that 'an appeal on a question of law under s 44(1) is of the same character as the subject matter of a reference of a question of law to the Court under s 45 of the Act'.¹⁴¹ If the Court's function under s 45 is unconstitutional, it must be because of a characteristic not shared with judicial review and 'appeals'.

The only relevant difference between judicial review, on the one hand, and a referral under s 45, on the other, is that the latter can occur prior to the AAT making any decision. However, as will be demonstrated, the absence of a final decision does not mean that the Federal Court fails to exercise federal judicial power and instead gives an 'advisory opinion'. Indeed, one of the key judicial review remedies, prohibition, is

¹³⁴ Pearce, above n 133, 316.

¹³⁵ *Comcare v Etheridge* (2006) 149 FCR 522, 527 (Branson J).

¹³⁶ *ARC Report 2012*, above n 22, 123.

¹³⁷ *Ibid*, 123 citing *Tuite v Administrative Appeals Tribunal* (1993) 40 FCR 483, 484.

¹³⁸ Pearce, above n 133, 289 citing *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 4 ALD 575. See also *Minister for Immigration and Multicultural Affairs v Thiagarajah* (2000) 199 CLR 343, 356–7.

¹³⁹ Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 131 citing *BTR plc v Westinghouse Brake and Signal Co (Aust) Ltd* (1992) 26 ALD 1, 7.

¹⁴⁰ Pearce, above n 133, 316 citing *AB v Federal Commissioner of Taxation* (1998) 157 ALR 510.

¹⁴¹ *Comcare v Etheridge* (2006) 149 FCR 522, 527; *National Australia Bank Ltd v Georgoulas* (2013) 217 FCR 382, 390–1 (Perry J).

solely concerned with preventing, rather than curing, illegality.¹⁴² Before expanding on this point, a brief point should be noted concerning referrals under s 161 of the *Copyright Act 1968* (Cth).

C Comparison

1 *Post-Decision Referrals: Appeal equivalent*

Apart from one special feature, s 161 of the *Copyright Act 1968* (Cth) is identical to s 45 of the AAT Act; s 161 is designed to allow referrals both before and after the Tribunal makes a final decision.¹⁴³ If the answer by the Court is inconsistent with the Tribunal's earlier opinion on the legal question, the Tribunal is obliged to remake its decision consistently with the Federal Court's opinion.¹⁴⁴ It is suggested that there is no real difference between a 'post-decision referral' and a statutory 'appeal' or judicial review. A decision is made, a party submits that there was a legal error, the Federal Court answers this legal question, and, if necessary, the Tribunal remakes its decision according to judicial directions.

The importance of raising this point relates to Stellios' concern that, in the case of *Copyright Agency Limited v State of NSW*,¹⁴⁵ answers provided by the Federal Court to the Copyright Tribunal were not an exercise of federal judicial power.¹⁴⁶ Importantly, however, the questions in that case were referred after the Tribunal heard submissions and made findings.¹⁴⁷ This in itself may have been the reason the High Court did not see fit to consider whether the Federal Court exercised judicial power. Because the questions were answered after the Copyright Tribunal decision, the Federal Court was, for all intents and purposes, conducting a proceeding equivalent to an 'appeal'.

With this in mind, as a matter of constitutionality, what is it that changes when, like in *Patmore*, the AAT has yet to make a final decision before the referral occurs?

¹⁴² Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 776.

¹⁴³ *Copyright Act 1968* (Cth) s 161(2).

¹⁴⁴ *Ibid*, 161(5).

¹⁴⁵ (2008) 233 CLR 279.

¹⁴⁶ Stellios, above n 40, 507.

¹⁴⁷ *Copyright Agency Limited v New South Wales* (2007) 159 FCR 213, 216.

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2 *Pre-Decision Referrals*

The requirement that there be a ‘decision’ is the ‘linchpin’ of judicial review under the ADJR Act.¹⁴⁸ The constitutional writs, on the other hand, are triggered by ‘jurisdictional error’, which will occur if a ‘decision-maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do’.¹⁴⁹

In the ADJR Act context, the *Australian Broadcasting Tribunal v Bond* doctrine states that a reviewable decision ‘will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact calling for consideration’.¹⁵⁰

It is not entirely clear what the word ‘decision’ means under s 44 of the AAT Act. On one view, it takes on the same meaning as that in the ADJR Act.¹⁵¹ However, it may be broader than this, especially where a ‘considerable saving of time and cost may be effected by avoiding the necessity of a long and complex hearing’.¹⁵²

In *Australian Broadcasting Tribunal v Bond* (‘*Bond*’), Mason CJ’s interpretation of the word ‘decision’ arose from textual considerations, as well as a fear that a broad interpretation might create a ‘fragmentation of the processes of administrative decision making’ and would adversely affect the ‘efficiency of the administration process’.¹⁵³ As Cane notes, Mason CJ’s worry was that allowing preliminary issues to be reviewed would in turn ‘allow the processes of administration to be interrupted and delayed for illegitimate purposes’.¹⁵⁴ It is not particularly compelling that a similar worry exists in relation to s 45. As was demonstrated at the start of this article, the AAT imposes a strict filter on referrals.

3 *Text and Policy—Not Constitutionality*

However, while the interpretation of the word ‘decision’ focuses on statutory text, and efficiency, there does not appear to be any authority that a ‘decision’ is a constitutional requirement for the Federal Court to conduct judicial review. This article further argues that a referral before an AAT ‘decision’ does not turn the

¹⁴⁸ *Griffith University v Tang* (2005) 221 CLR 99, 117.

¹⁴⁹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141. See generally, *Craig v State of South Australia* (1995) 184 CLR 163.

¹⁵⁰ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason CJ).

¹⁵¹ See generally, Pearce, above n 133, 292.

¹⁵² *Bogaards v McMahon* (1988) 80 ALR 342, 348–9.

¹⁵³ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337.

¹⁵⁴ Cane, above n 139, 223.

Federal Court's answers into an 'advisory opinion' or suggest that the Federal Court is not exercising federal judicial power. As noted earlier, a question of law is answered in a concrete context, with a requirement that facts are provided upon referral. In *Bass v Permanent Trustee Co Ltd*, the High Court observed that it is generally referrals without facts that will constitute a proscribed 'advisory opinion'.¹⁵⁵ Even then, in terms of court-to-court referrals, the recent decision of *DPP (Cth) v JM* demonstrates that it is constitutionally permissible for questions of law to be referred to a higher court before the beginning of a trial and before the referring court makes any decision at all.¹⁵⁶

In addition, prohibition, a core judicial review remedy, can be sought to prevent an 'actual or threatened excess of power'¹⁵⁷ at a time when the decision-maker has 'not reached a final or otherwise quashable decision'.¹⁵⁸ In the same way, the issuing a writ of prohibition by the Federal Court under s 45 can prevent the AAT from making a legally incorrect decision. The statutory remedies available under judicial review support this contention, as a party can apply to the Court for a review of 'conduct that is proposed to be engaged in for the making of a decision'.¹⁵⁹ The Federal Court can make an order 'directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties'.¹⁶⁰

D Conclusion

In summary, it is hard to see how s 45 differs from judicial review and 'appeals', notwithstanding the potential absence of a 'decision' upon referral. This suggests that the Federal Court exercises judicial power under s 45 in the same way as it does in judicial review and AAT 'appeals'. At the very least, it has been demonstrated that the non-judicial nature of the AAT does not affect the constitutionality of judicial review and 'appeals'. In this section, the analysis has approached s 45 from the perspective of what the Federal Court does, rather than the nature of the AAT as the referring body. This is because, when the constitutionality of judicial review and 'appeals' is assessed, the analytical focus is often on what the answering body is doing — giving a binding, legal answer. It is difficult to see why the focus should be any different in respect of s 45.

¹⁵⁵ See *Bass* (1999) 198 CLR 334, 355.

¹⁵⁶ (2013) 250 CLR 135.

¹⁵⁷ *Aronson and Groves*, above n 142, 781; *Sydney Water Corp Limited v Industrial Relations Commission of NSW* (2004) 61 NSWLR 661, 675.

¹⁵⁸ *Ibid*, 776.

¹⁵⁹ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(b).

¹⁶⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(b).

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IV FORM AND FUNCTION—AN UNNECESSARY INCONVENIENCE?

In support of the arguments advanced above, this section approaches s 45 from a policy perspective. It is argued that s 45 promotes the key purposes underpinning the Australian separation of judicial power in the same way that judicial review and AAT ‘appeals’ do. Ultimately, striking down s 45 would not only undermine several key assumptions behind judicial review and ‘appeals’, but would also represent an undesirable triumph of form over function.

The final part of this section examines the Aboriginal Land Commissioner (ALC) referral mechanism in s 54D of the *Aboriginal Land Rights (Northern Territory) 1976* (Cth). While what the AAT does is practically (but not technically) the same as a court, the ALC is a Ministerial advisory body. The article concludes with some speculation as to what is different, as a matter of constitutionality, in this context.

A Promotion of Chapter III's purposes

A number of judicial decisions have incorporated the ‘inherently purposive nature of the separation of judicial power’, into considerations of a legislative scheme’s constitutionality.¹⁶¹ This has been witnessed in the Supreme Courts of the United States¹⁶² and Canada,¹⁶³ and one Australian commentator recently suggested that the case of *Attorney-General (Cth) v Alinta*,¹⁶⁴ may have been decided on the basis that the ‘Takeovers Panel did not undermine the purposes of Chapter III’.¹⁶⁵

However, there are two preliminary problems when examining s 45 with respect to purposes behind the Australian separation of judicial power. First, a dominant purpose is unclear, particularly given British and American constitutional influences.¹⁶⁶ Reasons for separation include maintaining the federal compact,¹⁶⁷ liberty protection,¹⁶⁸ efficiency,¹⁶⁹ upholding the rule of law and,¹⁷⁰ to those ends,

¹⁶¹ Peter Gerangelos, *The Separation of Powers and Legislative Interference with the Judicial Process* (Hart Publishing, 2009) 30.

¹⁶² *Commodity Futures Trading Commission v. Schor*, 478 US 833 (1986).

¹⁶³ Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 246.

¹⁶⁴ (2008) 233 CLR 542.

¹⁶⁵ Jesse Kennedy, ‘Arbitrate This! Enforcing Foreign Arbitral Awards and Chapter III of the Constitution’ (2010) 34(2) *Melbourne University Law Review* 558, 592.

¹⁶⁶ Gerangelos, above n 161, 32–3.

¹⁶⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 368.

¹⁶⁸ *Wilson* (1996) 189 CLR 1, 12.

¹⁶⁹ Nicholas Barber, ‘Prelude to the Separation of Powers’ (2001) 60 *Cambridge Law Journal* 57.

¹⁷⁰ *Abebe* (1999) 197 CLR 510, 560.

maintaining the independence and impartiality of the judiciary.¹⁷¹ Secondly, there is no way of telling what purposes a given court would consider dominant. Nonetheless, what can be said is that s 45 advances the same purposes that underpin judicial review and AAT ‘appeals’.

1 *The Rule of Law and ‘Efficiency’*

Just as in judicial review and ‘appeals’, the function of the Federal Court under s 45 enhances the ‘rule of law’. The ‘rule of law’ is a concept that underpins the Australian legal system,¹⁷² and upon which the *Constitution* is framed.¹⁷³ Although somewhat ambiguous,¹⁷⁴ it is used here on two levels. The first is that ‘that all authority is subject to, and constrained by, law’.¹⁷⁵ Gleeson CJ noted that ‘judicial review of administrative action is a familiar example of the application of the rule of law’ as ‘the essence of what is involved is to compel those invested with governmental power to exercise such power according to law’.¹⁷⁶ Although s 45 does not ‘compel’ the AAT to refer a question of law, once a question is answered before the Federal Court, the AAT is bound by those answers.

The second is that s 45, judicial review and ‘appeals’, all increase the clarity of the law that the AAT must apply.¹⁷⁷ This is a central tenet to the ‘rule of law’. As Raz has stated:

¹⁷¹ *Boilermakers’* (1957) 95 CLR 529, 540–1 (PC).

¹⁷² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) affirmed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 540. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103].

¹⁷³ *Kaur & Ors v Minister for Immigration* [2014] FCCA 2154, [88].

¹⁷⁴ Jeffrey Staton, ‘Rule-of-law concepts and Rule-of-law models’ (2012) 33(2) *The Justice System Journal* 1, 1. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72], 24–5 [76] (McHugh and Gummow JJ); *Western Australia v Ward* (2002) 213 CLR 1, 392 [963] (Callinan J). Michael Kirby, ‘The Rule of Law Beyond the Law of Rules’ (2010) 33 *Australian Bar Review* 195. The rule of law is, of course, a ‘fuzzy and controversial conception’ *Plaintiff M61/2010E v Commonwealth of Australia* [2010] HCATrans 218 (in argument) (Heydon J).

¹⁷⁵ Murray Gleeson, ‘Courts and the Rule of Law’ (Speech delivered at The Rule of Law Series, Melbourne University 7 November 2001).

¹⁷⁶ *Ibid.*

¹⁷⁷ Chapter III gives practical effect to the rule of law: *South Australia v Totani* (2010) 242 CLR 1, 156 citing *Thomas v Mowbray* (2007) 233 CLR 307, 342. See also Andrew Inglis Clark, ‘The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia’ (1903) 17 *Harvard Law Review* 1, 18.

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The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.¹⁷⁸

There is a common thread among the three facilities (s45, judicial review and ‘appeals’). All are ‘means by which executive action is prevented from exceeding the powers and functions assigned’.¹⁷⁹ Further, all assist decision makers by providing answers that are correct in law.

Section 45 also promotes the ‘efficiency’ rationale for separating judicial power. ‘Efficiency’ in this context refers to distributing government functions to those branches best suited to deal with them, with allocations that best protect and promote liberty.¹⁸⁰ Functions are conferred according to ‘institutional competence’.¹⁸¹ For example, ‘it is not the province of the courts when reviewing executive conduct to make their own evaluation of the public good or to substitute their assessment of the social or economic advantage of a decision’.¹⁸² Such considerations are best suited to the political branches of government.¹⁸³ Conversely, answering legal questions is well suited to the Federal Court, because the judiciary’s role is to ‘declare and enforce’ legal rules.¹⁸⁴ Just like judicial review and ‘appeals’, s 45 places the function of interpreting, declaring and enforcing legal rules with the Federal Court and evidently within the ambit of its institutional competence. Although the AAT, may ‘form an opinion about the validity of legislation and ... act on the basis of that opinion’,¹⁸⁵ because it is the AAT that actually makes the referral, this indicates that the question is outside the AAT’s competence. Kirby J has observed that ‘judges are members of a

¹⁷⁸ Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) 214.

¹⁷⁹ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

¹⁸⁰ Barber, above n 169, 65. See also *Re Woolley; Ex parte Applicants M276/2000* (2005) 225 CLR 1, 24–8 (McHugh J).

¹⁸¹ See Chris Fox-Lent, ‘By the Courts, for the Bar: Judicial Exemption of Lawyers from the Scope of Consumer Protection Laws’ (2013) 37 *New York University Review of Law and Social Change* 513.

¹⁸² Priyanga Hettiarachi, ‘The Sacred and the Profound: Judicial Review of Rights, Proportionality and Deference to Executive Conduct’ (2007) 29 *Australian Bar Review* 223, 238.

¹⁸³ For similar reasons, it is not appropriate for a court to decide whether organisation rules are ‘tyrannical’ or ‘oppressive’: *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* (1957) 100 CLR 277, 305–6 (Kitto J). See also *Momcilovic* (2011) 245 CLR 1, [403] (Heydon J).

¹⁸⁴ Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 279; ‘What is a question of law’ (2014) 43 *Australian Tax Review* 68, 72.

¹⁸⁵ *ACN 092 138 442 Pty Ltd (In Liquidation) and Commissioner of Taxation* [2013] AATA 690, [22].

trained profession ... ascribed capacities of analysis and discipline in decision-making superior to those possessed by ... members constituting statutory tribunals'.¹⁸⁶

2 *Independence and Impartiality of the Judiciary*

In respect of the purposes underpinning the separation of judicial power, judicial independence and impartiality is not the end goal.¹⁸⁷ However:

ensuring independence and impartiality reflects both the republican objectives of dispersal of power among the branches and ensuring judicial power is exercised independently, and the federalist position that requires an independent and impartial arbiter to determine the delineation of federal and State powers.¹⁸⁸

Judicial independence and impartiality were strong themes in the Australian Convention Debates.¹⁸⁹ Further, the *Guide to Judicial Conduct* notes that 'the principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government'.¹⁹⁰ Further, the *Guide* stresses that there must be an 'appropriate distance ... between the judiciary and the executive, bearing in mind the frequency with which the Executive is a litigant before the courts'.¹⁹¹

In the light of Stellios's concern that, under s 45, 'the court is giving an opinion on a question of law to an administrative decision-maker',¹⁹² it is necessary to examine whether, as a question of independence and impartiality, the answering of referred questions of law engages the Federal Court in the provision of an 'advisory opinion'.

¹⁸⁶ *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 498.

¹⁸⁷ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 10.

¹⁸⁸ Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers*' and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 280.

¹⁸⁹ Stellios, above n 40, 67–72.

¹⁹⁰ Australian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (2nd ed, 2007) 4.

¹⁹¹ *Ibid.* As was said in *Mistretta v United States* 488 US 361, 407 (1989): 'the legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action'. See also *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522.

¹⁹² See section IID of this article.

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As a matter of function, it was earlier demonstrated that, if the Federal Court gives an 'advisory opinion' under s 45, then it must be doing so in judicial review and 'appeals'. Further, as a matter of policy, it is difficult to argue that s 45 has the potential to undermine the independence and impartiality of the judiciary in the same way as 'advisory opinions' might do.

Discussing *Re Judiciary*, the Privy Council in *Boilermakers'* said that 'it 'has been thought by many to be an unwise practise to try to anticipate judicial decisions extra-judicially by obtaining opinion or advice of the judges, the reasoning being that it is regarded as tending to sap their independence and impartiality.¹⁹³ Gummow J has argued that 'advisory opinions' 'have the potential to deplete the capital of the judicial branch of government',¹⁹⁴ a concern shared by Professor Zamir.¹⁹⁵ However, Professor Zines has pointed out that in the Canadian Supreme Court, where advisory opinion schemes are permissible, the

so called 'sapping' of independence has gone on for well over a century and a quarter ... [yet] no objective observer could deny that the Canadian Court is seen as being as independent and impartial as the High Court of Australia, with 'the capital of the judicial branch' unaffected.¹⁹⁶

Likewise, any suggestion that the answering of a question of law under s 45 'saps' the Federal Court of its independence and impartiality would imply that a similar kind of 'sapping' goes on within judicial review and 'appeals'. No-one questions the independence and impartiality of the Federal Court in those contexts.

It is thus argued that the correlation between s 45, judicial review and 'appeals', as a question of separation of judicial power policy, reinforces the functional analogy developed earlier. Given this commonality, it is argued that it would be unsatisfactory if s 45 were held not to involve an exercise of federal judicial power, especially recalling that judicial review and 'appeals' do. However, as the next section demonstrates, functional similarity and desirability will not save s 45 if it unconstitutional.

¹⁹³ *Boilermakers'* (1957) 95 CLR 529, 541.

¹⁹⁴ *Grollo v Palmer* (1995) 184 CLR 348, 391.

¹⁹⁵ Zamir, *The Declaratory Judgment* (Stevens & Sons, 1962) 47.

¹⁹⁶ Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22(3) *Bond Law Review* 156, 164.

B *Form v Function*

1 *Form*

As Professor Appleby recently argued,¹⁹⁷ the strict application of Ch III principles has often outweighed practical policy arguments, and caused significant inconveniences in:

- The administration of justice in Commonwealth administrative tribunals;¹⁹⁸
- The administration of justice in State administrative tribunals;¹⁹⁹
- The co-operative cross-vesting schemes where a Federal Court can exercise State jurisdiction;²⁰⁰
- Military justice;²⁰¹ and
- Human rights protection.²⁰²

Other commentators have noted Ch III rigidity in the areas of:

- The development of efficient problem-solving courts;²⁰³
- The supervision of coercive powers legislatively conferred upon the executive;²⁰⁴ and
- The creation of a 'Trans-Tasman Court'.²⁰⁵

Writing about the High Court's limiting of co-operative Federal-State cross-vesting in *In Re Wakim, Ex parte McNally*,²⁰⁶ Gerangelos noted that 'considerations relating to

¹⁹⁷ Appleby, above n 188.

¹⁹⁸ Appleby, above n 188, 274–5 citing *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

¹⁹⁹ Appleby, above n 188, 276–7 citing *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85.

²⁰⁰ Appleby, above n 188, 277–8 citing *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

²⁰¹ Appleby, above n 188, 278–9 citing *Lane v Morrison* (2009) 239 CLR 230.

²⁰² Appleby, above n 188, 279–80 citing *Momcilovic* (2011) 245 CLR 1. See also Sascha Morell 'Vasiljkovic v Commonwealth of Australia (2007) 29(2) *Sydney Law Review* 321, citing *Vasiljkovic Commonwealth* (2006) 227 CLR 614.

²⁰³ James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, Is Three a Crowd?' (2011) 35(2) *Melbourne University Law Review* 394.

²⁰⁴ Justice Mark Weinberg, 'Australia's Anti-Terrorism Legislation — Is there a Boilermakers Spanner in the Works?' (FCA) [2007] *Federal Judicial Scholarship* 1, [182].

²⁰⁵ Saunders, above n 187, 24.

²⁰⁶ (1999) 198 CLR 511.

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important policy issues ... and [the] enhanced operation of legal administration were ... irrelevant in light of the need to maintain a strict separation ...²⁰⁷ The words of Burger CJ, while provided in the US context, neatly capture a dominant strand of thinking in Australian Ch III jurisprudence: The 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution'.²⁰⁸

2 *Function*

However, the examples above only capture a small part of Australia's Ch III jurisprudence. Form has not always defeated function. A wider survey of Ch III jurisprudence indicates that the High Court has a split personality between form and function, vacillating between the two approaches. Gerangelos suggests that the High Court's Ch III jurisprudence 'reveals a flexible, eclectic approach ... [along] with the more strictly formalist legal analysis, as exemplified by *Boilermakers*'.²⁰⁹ Indeed, one only has to recall the first exception of *Boilermakers*: a court exercising federal jurisdiction may exercise non-judicial 'incidental' powers. Examples of these functions were given earlier and this exception is clearly predicated on the basis of utility.

The case of *Abebe v Commonwealth* represents a strong example of the High Court being flexible in the face of strict Ch III rules.²¹⁰ In this case, Parliament had created a bespoke system of judicial review for unsuccessful visa applicants. However, this review scheme omitted several traditional judicial review grounds. Mr Abebe argued that this breached Ch III because jurisdiction was only granted to hear part of a 'matter'. However, the majority disagreed, and Gleeson CJ and McHugh J noted that the *Constitution* is an 'instrument of government', where one should consider the 'practical problems for the administration of federal law' in ascertaining whether a particular legislative scheme breaches Ch III.²¹¹ Their Honours acknowledged that

²⁰⁷ Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist Functionalist Debate' (2005) 8(1) *Constitutional Law and Policy Review* 1, 7. This is one of few articles on the formalist/functionalist debate in Australia. Contrast the vast array of literature in this area flowing from the United States. See, e.g. Peter Strauss, 'Formal and Functional Approaches to Separation of Powers Questions – A Foolish Inconsistency?' (1987) 72 *Cornell Law Review* 488.

²⁰⁸ *Immigration and Naturalization Service v Chadha* (1983) 462 US 919, 944. The 'strict approach of the High Court' was recently noted in *Steven James Lewis v Chief Executive Department of Justice and Community Safety* (2013) 280 FLR 118, 167.

²⁰⁹ Gerangelos, above n 207, 4.

²¹⁰ *Abebe* (1999) 197 CLR 510.

²¹¹ *Ibid*, 531–2.

although practical consequences of invalidity cannot alter constitutional meaning, they may 'throw light' on the interpretation of the *Constitution*. Professor Zines has noted that 'the emphasis of the judgement ... [was] against imposing rigidity and in favour of having regard to practicality'.²¹²

Furthermore, the *persona designata* doctrine, which permits Federal Court judges to undertake certain non-judicial functions, is underpinned by 'a consideration of contemporary needs',²¹³ as well as the purposes underpinning the separation of judicial power.²¹⁴ Additionally, the 'chameleon doctrine' exemplifies flexibility in Ch III doctrinal jurisprudence. Under this doctrine, a conferred function or power may be of a 'chameleon-like nature which takes its colour from the character' from the body given the function.²¹⁵ Bennett QC argued in *Thomas v Mowbray* that this broad exception has 'taken almost all of the sting' out of *Boilermakers*'.²¹⁶ One common thread among these examples is that desirability, usefulness, and correlation with the separation of judicial power purposes seem to have been persuasive when considering constitutionality.

In the opinion of Professor Zines, 'a change of attitude and approach is taking place [away from narrow constitutional views], even if it is not always clear what will be substituted for old principles and doctrines that have been weakened and undermined'.²¹⁷ Similarly, Gerangelos points out that while *Boilermakers*' is still authoritative, the High Court has carved out exceptions without undermining the significant purposes of maintaining the rule of law and an independent and impartial judiciary.²¹⁸

Although a number of constitutional scholars have advocated overruling *Boilermakers*', the High Court has not done so.²¹⁹ However, even operating within this limitation, s 45 can survive. The striking down of s 45 would represent another unsatisfying example of form defeating function, and adding another point to Appleby's list above.

²¹² Zines, above n 92, 607.

²¹³ *Wilson* (1996) 189 CLR 1, 25.

²¹⁴ *Ibid*, 19.

²¹⁵ *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 552.

²¹⁶ Transcript of Proceedings, *Thomas v Mowbray* [2007] HCATrans 76 (20 February 2007) (in argument) (Bennett QC).

²¹⁷ Zines, above n 92, 611.

²¹⁸ Gerangelos, above n 161, 37.

²¹⁹ Saunders, above n 187, 13.

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However, while there may be many reasons supporting the conclusion that s 45 is constitutional, different conclusions may be reached in respect of other federal referral mechanisms.

V REFERRALS FROM THE ABORIGINAL LAND COMMISSIONER

Notwithstanding the suggested analogy between judicial review, AAT 'appeals' and s 45, it is acknowledged that this analogy may not be so strong in the context of other federal referral mechanisms. To recap, the strength of the analogy is that in each of these situations, the Federal Court answers a question of law, which binds the AAT with remittals to the AAT. The analogy was furthered by the fact that s 45 does not undermine the purposes behind separating judicial and executive power, but in fact promotes them in the same manner as judicial review and AAT 'appeals' do.

However, as concerns other federal referral mechanisms, if the analogy weakens, this may mean the Federal Court fails to exercise federal judicial power in answering those referrals. To be clear, this would not be because the referring body does not itself judicially determine rights, or exercise judicial power. Rather, it would be because of the nature of the non-judicial power that the referring body exercises. This in turn may change the nature of the referral mechanism.

A Section 54D Referrals

Section 54D(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALR Act') provides an interesting point of comparison with s 45 of the AAT Act. Under s 54D(1), the Aboriginal Land Commissioner (ALC) may refer a question of law arising in an 'application being made ... by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land ...'²²⁰

However, unlike the AAT's position under s 45, the nature of the non-judicial power that the ALC exercises when making a referral is different to that which the AAT exercises. The ALC is a Ministerial advisory body, rather than an independent merits review tribunal.²²¹ In a land application under the ALR Act, referrals assist the ALC with its role under s 50(1)(a) of the ALR Act:

²²⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 50(1)(a).

²²¹ As to the function of the ALC compared to the Federal Court, see *Mary Yarmirr & others v Northern Territory of Australia & others* (1997) 74 FCR 99, 103: 'This is a proceeding in the Federal Court of Australia in which the applicants seek the exercise of the judicial power of the Commonwealth. Whereas the Aboriginal Land Commissioner's function is to determine the existence of traditional Aboriginal ownership...of claimed land and if found, to make recommendations to the relevant Minister concerning the granting of such land, the Court in the exercise of its jurisdiction under the Native Title Act is

- to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and
- to report his or her findings to the Minister and ... to make recommendations to the Minister for the granting of the land or any part of the land ...

One weakness with the analogy developed in respect of s 45 is that under s 45 of the AAT Act, Federal Court answers bind the final decision-maker upon remittal. However, although under s 54D of the ALR Act, the Federal Court answers bind the ALC,²²² the ALC is not the decision-maker in respect of a land grant, and indeed, in respect of the rights creation. While the ALC hears the land claim application, it does not decide it. Rather, the ALC makes factual findings and recommendations to the Minister and for a land grant to occur:

- First, there must be a recommendation from the ALC in favour of a grant;²²³
- Second, the Minister must be satisfied that some or all of the Land should be granted to one or more land trusts to be held for the benefit of relevant Aboriginals;²²⁴
- Third, the Minister must have established the relevant land trust;²²⁵
- Fourth, the Crown must have acquired any alienated estates or interest;²²⁶ and
- Finally, the Minister 'shall ... recommend to the Governor-General that a grant of an estate in fee simple in that land be made to that Land Trust'.²²⁷

Does this weaken an analogy between s 54D, judicial review and 'appeals'? On one view, it does not because the Federal Court is doing exactly the same thing as it does in judicial review and 'appeals', that is, giving a binding answer to a question of law,

required to make a determination as to whether or not native title exists in relation to a particular area of land or waters and if so to determine, inter alia, the nature of such rights and interests'.

²²² Ibid, s 54D(3).

²²³ Ibid, s 11(1)(a).

²²⁴ Ibid, s 11(1)(b).

²²⁵ Ibid, s 11(1)(c).

²²⁶ Ibid, s 11(1)(d).

²²⁷ Ibid, s 11(1)(e).

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which arises from a particular set of facts.²²⁸ However, on another view, it may be argued that the Federal Court is being recruited into the administrative process to such an extent that the answering of a referred question is actually ‘incompatible’ with the Federal Court’s judicial function. In *Wilson*, the majority held that assisting the executive government might be so far from an exercise of judicial power, that it might actually be ‘incompatible’ with the independence and impartiality of the court.²²⁹

Of course, *Wilson* does not apply to a Federal Court. The current test in *Boilermakers’* does not separate judicial and non-judicial power on the basis of ‘incompatibility’.²³⁰ However, the *Wilson* case, and the principles therein, provide a useful doctrinal peg in determining the limits on the nature of a permissible referral mechanism. Although the notion of ‘incompatibility’ was derided early in Australian constitutional history as ‘vague and unsatisfactory’,²³¹ it has been championed as a replacement to the *Boilermakers’* test.²³² Professor Zines has argued that under an incompatibility doctrine, ‘the mind is directed ... to the reasons for having a separation of powers rather than to the issue of mere classification’ of a particular power or function.²³³

If a referral mechanism were to be impugned by the *Wilson* principles, it may be argued that the Federal Court has stepped away from conducting equivalent judicial review and into the realms of performing a separate function. Burmester QC has noted that *Wilson* suggests it is ‘probably incompatible with judicial power to confer any ... ‘opinion’ function on judges as designated persons’.²³⁴ Could the same be said about an ‘opinion’ function conferred on the Federal Court? As argued above, the answer in respect of the AAT should be ‘no’. However, a ‘yes’ answer may be more likely in terms of ALC referrals. There is clearly a difference in the position certain

²²⁸ See, e.g. *Aboriginal Land Rights (Northern Territory) Act 1976 and the Alcoota Land Claim No. 146* (1998) 82 FCR 391.

²²⁹ For further discussion on the constitutional limits on Ch III judges see: The Honourable Justice Michael Barker, *On Being a Chapter III Judge* (Sir Ronald Wilson Lecture 2010); Hon RS French, ‘Executive toys: judges and non-judicial functions’ (2009) 19 *Journal of Judicial Administration* 5.

²³⁰ Separating judicial and non-judicial power under *Boilermakers’* is due to the ‘structure of the constitution and the exhaustive definition of judicial power in Chapter III’: Gerard Carney, ‘Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers’ (1997) 13 *Queensland University of Technology Law Journal* 175, 190.

²³¹ *Boilermakers’* (1957) 95 CLR 529, 542.

²³² See, e.g. Zines, above n 92, 298–9.

²³³ Zines, above n 92, 299.

²³⁴ Burmester, above n 77, 236.

bodies occupy in the executive hierarchy. As was noted in *Re Becker and Minister for Immigration and Ethnic Affairs*:

The legislature clearly intends that the Tribunal [the AAT], though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive ... Its function is to decide appeals, not to advise the Executive.²³⁵

B The Wilson Problem

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,²³⁶ Federal Court Judge Jane Mathews was nominated by the Minister for Aboriginal and Torres Strait Islander Affairs to prepare a report in order to enable the Minister to make a declaration in relation to a 'significant Aboriginal area'. The issue was whether the conferral of this function breached the *persona designata* doctrine. Under this doctrine, no non-judicial function can be conferred on a Ch III judge that is 'incompatible either with judge's performance of his or her judicial functions, or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power'.²³⁷

As part of preparing the report, Mathews J was to provide opinions on 'questions of law' to the Minister. The majority of the Court held that the function of a reporter, when given to a Federal Court judge, diminished the 'public confidence in the integrity of the judiciary' as well as the capacity of Mathews J to 'perform her judicial functions with integrity'.²³⁸ In finding 'incompatibility', the Court said that the incompatibility doctrine's purpose 'is to protect effectively the independence of Ch III judges from the political branches of government as a guarantee of liberty and as a buttress to public confidence in the administration of justice by Ch III courts'.²³⁹ The majority held that:

A report is no more than a condition precedent to the exercise of the Ministers power to make a declaration. The function of the reporter ... is not to be performed by way of an independent review of an exercise of the Minister's power. It is performed as an integral part of the process of the Minister's exercise of power. The performance ... places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made

²³⁵ (1977) 1 ALD 158, 161 cited with approval in *Wilson* (1996) 189 CLR 1, 18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

²³⁶ (1996) 189 CLR 1.

²³⁷ *Grollo v Palmer* (1995) 184 CLR 348, 364–5.

²³⁸ *Wilson* (1996) 189 CLR 1, 16.

²³⁹ *Ibid.*

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and shorn of the usual judicial protections, in a position equivalent to that of a ministerial advisor.²⁴⁰

The majority also held that Mathews J was performing a role that was 'political in character'.²⁴¹ In a separate judgment, Gaudron J held that the function of a 'reporter', if performed by a Judge, gave 'the appearance that the judge is acting, not in any independent way, but as the servant or agent of the Minister'.²⁴² Does s 54D place the Federal Court 'firmly in the echelons of administration', akin to a Ministerial advisor? This is a tricky question, but the Court may have provided some guidance in other parts of the majority judgement.

The majority also stressed that it was constitutionally permissible for a Federal Court Judge to sit on the AAT or to preside over a Royal Commission. The Court pointed out that those positions were 'performed independently' of the executive government.²⁴³ However, commentators have argued that this may have 'owed more to the practical impossibility of unwinding years of judicial involvement than to a principled distinction'.²⁴⁴ Gavan and Kennett suggest that 'the logic of the decision in *Wilson's* case is ... difficult to reconcile with some functions that have hitherto been performed by judges with minimal controversy and general beneficial results'.²⁴⁵ Sherman makes a similar point in respect of Federal Court judges presiding over Royal Commissions,²⁴⁶ highlighting Gaudron J's position that:

whether or not a function gives or is capable of giving the appearance that there is unacceptable relationship between the judiciary and other branches of government is a question that has to be answered both by reference to functions that have, historically, been carried out by judges in their capacity as individuals ... and by a consideration of contemporary needs.²⁴⁷

It is particularly interesting to note the Court's acknowledgement that a Federal Judge is constitutionally permitted to assist in independent merits review,²⁴⁸ but that

²⁴⁰ Ibid, 18–19 (citations omitted) (emphasis added).

²⁴¹ Ibid, 19.

²⁴² Ibid, 26.

²⁴³ Ibid, 18.

²⁴⁴ Gavan Griffith and Geoffrey Kennett, 'Judicial Federalism' in Brian Opeskin & Fiona Wheeler, *The Australian Federal Judicial System* (Melbourne University, 2000) 37, 51.

²⁴⁵ Ibid.

²⁴⁶ Tom Sherman, 'Should Judges Conduct Royal Commissions?' (1997) 8 *Public Law Review* 1, 5–9.

²⁴⁷ *Wilson* (1996) 189 CLR 1, 25.

²⁴⁸ Ibid, 17–18. *Williams v Minister for Immigration and Border Protection* [2014] FCA 674, [67] (Mortimer J).

a Federal Judge is constitutionally prohibited from assisting a Minister directly in the making of a political decision.

For the same reasons, could this be interpreted and extended to argue that it is constitutionally permissible for a Federal Court to assist in independent merits review through a referral under s 45, as opposed assisting the Minister in assessing an Aboriginal land claim through a referral under s 54D? There is certainly scope to develop this argument. At the very least, viewed alongside *Wilson*, s 54D provides significant food-for-thought regarding the limits on referral mechanisms within federal jurisdiction.

A clearer indication of an 'incompatible' referral mechanism might be if a referral came directly from a federal Minister.²⁴⁹ Then, it might be argued that the Federal Court would be directly substituted into the position of Jane Mathews, mirroring the problem in *Wilson*.

C Conclusion

In concluding this section, it is reiterated that there are powerful reasons to analogise judicial review, AAT 'appeals' and s 45 of the AAT Act. However, it is acknowledged that this analogy might not extend to all federal referral mechanisms, especially where the referring body is not quasi-judicial in nature, like the AAT. The AAT is practically, although not technically, the same as a court and its position is practically, although not technically, indistinguishable from that of a court. Neither is true of the Aboriginal Land Commissioner.

VI CONCLUSION

The answer to the question posed in the heading of this article turns on whether the Federal Court exercises federal judicial power when answering a referral under s 45 of the AAT Act. At its core, judicial power is concerned with the final determination of the rights of a party. In terms of s 45, however, this creates a problem because the AAT does not finally determine a party's rights. In this sense, the Federal Court's answers are not directed at resolving a justiciable controversy.

However, this article has contended that the nature of the power the Federal Court exercises under s 45 is indistinguishable from that which it exercises when conducting judicial review and AAT 'appeals'. In all three instances, the Federal Court answers questions of law only, all involve remittals to the AAT, and the answers given by the Federal Court bind the AAT. It is hard to see how the Federal

²⁴⁹ Such a function does appear in state legislation: *Fundraising Act 1998* (Vic) s 37.

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Court's function under s 45 is distinguishable. Ultimately, these mechanisms are three legs of the same stool.

In terms of constitutional interpretation, it is also necessary to recognise the importance of applying the separation of judicial power principles with reference to context. As Rae-Else Mitchell J once remarked:

[T]he wisdom of separation of powers in the field of industrial relations has little relevance to one problem which the Founding Fathers hardly considered, namely the scope of administrative action and for the integration of administrative and judicial power.²⁵⁰

Ultimately, federal referral mechanisms similar to those discussed in this article will continue to spread.²⁵¹ As they do, administrative and constitutional lawyers may begin to explore the range of constitutional issues involved. This article has suggested one analytical approach to allow s 45 of the AAT Act to exist within the current constitutional framework. Additionally, through examining s 54D of the ALR Act, this article has offered a tentative speculation as to what changes, as a matter of constitutionality, where a referring body advises, rather than supervises, the federal executive government.²⁵²

²⁵⁰ Rae Else-Mitchell, 'Introduction' in *Essays on the Australian Constitution*, Else-Mitchell, R (ed) (Lawbook, 1961) xxxi.

²⁵¹ See, e.g. the *Road Safety Remuneration Tribunal Act 2012* (Cth) s 95.

²⁵² Although beyond the scope of this article, as a final point, drawing a distinction between 'supervising' and 'advising' may not be a simple task. See, for example, Adrian Vermuele, 'Second Opinions and Institutional Design' (2011) 97(6) *Virginia Law Review* 1435 who suggests characterising judicial review as a method of gaining a secondary opinion on an administrative decision.