

conclusion that as the statute did not contain clear words excluding the supervisory jurisdiction of the Courts to make declarations, he had power to deal with the matter. On the merits of the appeal he upheld the decision of the National Insurance Commissioner. It is significant that this was a case where the decision of the Commissioner was challenged not on the score of defect of jurisdiction but on the score of error of law within jurisdiction and in a situation where the writ of *certiorari* would have been available but for the lapse of time.

The attitude of Australian Courts forms a sharp contrast. There has been considerable use of the remedy of declaratory judgment where the legislation of the Commonwealth Parliament or of State Parliaments has been challenged on the score of constitutional invalidity. It seems that the remedy could also be used in the case where a purely executive act is challenged on the score of *ultra vires*. However it has not been employed in the case of a challenge to the judicial or quasi-judicial decisions of an administrative tribunal, whether on the basis of lack of jurisdiction or non-jurisdictional error of law, and what authority there is would seem to deny the possibility of its use in such circumstances.<sup>19</sup>

E. I. SYKES

*Matters referred to the Commonwealth Parliament by the Parliament of a State.*

S. 51 (xxxvii) of the Commonwealth Constitution empowers the Commonwealth Parliament to make laws with respect to "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

In an article in the University of Western Australia Annual Law Review,<sup>1</sup> the late Professor Anderson discussed four difficulties raised by this provision, as follows:

- (1) Can matters be referred to the Commonwealth Parliament in general terms?
- (2) Is the legislative power over referred matters exclusive to the Commonwealth Parliament?

19. e.g. *Toorcoomba Foundry Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 545 at 571.

1. 2 Univ. of W.A. Ann. Law. Rev. (1951) p. 1.

- (3) Does a reference enable the Commonwealth Parliament to legislate unhampered by restrictions on State constitutional power derived from sources other than the Commonwealth Constitution?

- (4) Is a reference, once made, irrevocable by the State?

By reason of the High Court decision in *Graham v. Paterson*<sup>2</sup> Professor Anderson was able to answer the second question in the negative, i.e. the legislative power over referred matters is not exclusive to the Commonwealth Parliament. The recent decision of the High Court in *The Queen v. Public Vehicles Licensing Appeal Tribunal of Tasmania, Ex parte Australian National Airways Pty. Ltd.*<sup>3</sup> now makes it possible to answer the first question in the affirmative and sheds some light on the fourth question.

In this case the State Act under review was the *Commonwealth Powers (Air Transport) Act* 1952 of Tasmania, s. 2 of which provided: "The matter of air transport is referred to the Parliament of the Commonwealth for a period commencing on the date on which this Act commences and ending on the date fixed, pursuant to section three, as the date on which this Act shall cease to be in force, but no longer." S. 3 provided: "The Governor may at any time, by proclamation, fix a date on which this Act shall cease to be in force, and this Act shall cease to be in force accordingly on the date so fixed."

It was argued before the High Court that the Tasmanian Act did not fulfil its purpose because under s. 51 (xxxvii) the power to be referred by a State to the Commonwealth must be simply a power to enact a law precisely set out in all its detail in the State Act. In other words a State could not refer to the Commonwealth a matter in general terms such as "air transport." However this argument was rejected by the High Court. It seems now to be clearly established, therefore, that a State Parliament can refer a matter to the Commonwealth Parliament in general terms.

The chief argument before the High Court, however, was that the Tasmanian Act did not fulfil its purpose because s. 51 (xxxvii) contemplates a "once for all" reference and not a reference limited in time such as that attempted by the Tasmanian Act. This argument was also rejected by the High Court. The Court, in its joint judgment, said that "There is no reason to suppose that the words 'matters referred' cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor in Council and consists in the fixing of a date by proclamation."<sup>4</sup>

2. (1950) 81 C.L.R. 1.

3. (1964) 37 A.L.J.R. 503.

4. *Ibid.*, pp. 507-8.