COMMENTARIES

Mr E. WILLHEIM*

We are indebted to Professor Campbell for a thorough, scholarly resumé of the authorities on the exercise of judicial power. Her paper, if I may say so, will be a most valuable tool of reference for a long time to come.

It is, as Professor Campbell has reminded us, apt that we look at this subject, technical though it may be, early in this seminar since, in the Australian federal context, any choice between judicial and administrative tribunals must be made against those very special constitutional constraints relating to the conferral and exercise of the legislative, executive and judicial powers of the Commonwealth. I propose, with a view to being provocative and stimulating discussion, to open up a couple of areas where, as I see it, the traditional constitutional theories no longer seem to me to be working.

I propose to concentrate not so much (as I think Professor Campbell did) on the sorts of powers that can be given to the federal courts but rather on the place of federal tribunals, particularly the Administrative Appeals Tribunal, in a constitutional sense in the judicial or the executive arms of government. Already, Lindsay Curtis, (*supra* p. 1) speaking of course in a much broader constitutional context, has linked the AAT with the judicial tribunals. Professor Whitmore took issue and preferred to see the AAT in an administrative or executive context. Clearly, both analyses have elements of truth. But it seems to me that each analysis gives rise to constitutional difficulty and it is this difficulty that I want to explore.

Let us look, first, at the notion of the AAT as a judicial type tribunal. It is perhaps trite, but very important, to note that a large proportion of the day to day jurisdiction of the AAT involves the construction of the statutes of the Commonwealth. So most of the AAT's customs jurisdiction is concerned with the construction of the Customs Tariff Act. The superannuation jurisdiction is concerned with the construction of the Commonwealth's superannuation legislation. The rapidly expanding social security jurisdiction, which Mr Lanigan mentioned, involves the construction of a Commonwealth Act which almost rivals in complexity the income tax legislation.

What is a tribunal like the AAT doing when it construes legislation of this kind? In the era immediately post the *Boilermakers' Case* (1957) 95 C.L.R. 529, most lawyers would probably have said that the Tribunal was performing the functions of the court, that it was purporting to exercise, and probably exercising unconstitutionally, the judicial powers of the Commonwealth. But we are, I think, now beginning to understand that it is not only the courts that determine and apply the law. The junior clerk in the Department of Social Security who considers an application for a social security benefit must himself reach a decision whether the application

* LL.B. (Syd.), LL.M. (A.N.U.); Senior Assistant Secretary, Commonwealth Attorney-General's Department. The views expressed are the personal views of the author and do not necessarily reflect those of the Department in which he serves.

falls or whether it does not fall within the relevant statutory criteria. He must interpret and apply the law. That is, of course, part of the administrative process. It is in that sense that the AAT also interprets and applies the law. But the Tribunal does not conclusively determine the law in the sense in which that is done by the courts. So we lawyers feel able to say, since it remains constitutionally necessary to characterise its function, that its function is administrative rather than judicial. And as lawyers we persuade ourselves that any doubts about the validity of the Tribunal's exercise of this function are saved by the provisions for the AAT to refer questions of law to the Federal Court and the right of appeal from the AAT to the Federal Court on questions of law.

Let me say, from the perspective of a Government lawyer whose lot it is, from time to time, to try and explain this distinction to non-lawyers in the bureaucracy, that, if I may plagiarise from Lord Lane's introductory address to this seminar, I search in vain for that great gulf that he talked about. The great gulf between the AAT and a court is illusory. What is the real difference between, say, a Deputy President or a Senior Member of the Administrative Appeals Tribunal giving a decision on the construction of the Social Services Act or the Customs Tariff Act, and a decision of a single Judge of the Federal Court on the same issue—as can now happen on an application for an order for review under the Administrative Decisions (Judicial Review) Act 1977. And if, as I certainly feel unable to, we cannot articulate that distinction to the non-lawyer in a meaningful way, is that supposed distinction still meaningful or is it simply an artificial rationalization?

Let me illustrate further. Quite naturally, the decisions of the AAT have built up their own body of authority and precedent. Tribunal decisions often provide administrators for the first time with authoritative guidance on the construction of the legislation they administer. I use the term authoritative advisedly. Decisions of the AAT are carefully reasoned. They look like decisions of courts. The Deputy Presidents of the Tribunal are all Federal Court judges. The senior non-presidential members are able and experienced lawyers. The professional standing of the decisions of the AAT is without question. And this, notwithstanding that those decisions do not in a technical sense conclusively determine questions of law.

So it seems to me that, in a practical sense, the distinction between the exercise of judicial and administrative power is of diminishing importance.

A particularly curious, but I think as yet little explored, area of the AAT's jurisdiction, is the jurisdiction to provide advisory opinions. I know of only one occasion on which that jurisdiction has been exercised. Now the giving of an advisory opinion on a question of law appears to bring the functions of the AAT remarkably close to the functions of a court. Yet in a Commonwealth context the view still appears to be held that the Constitution impedes the conferral on federal courts of an advisory opinion jurisdiction. Somewhat ironically, therefore, it is only because the AAT is a tribunal and not a Chapter III court that it can be given this advisory opinion jurisdiction. The result is that a Federal Court judge sitting as a Deputy President of the AAT can give an advisory opinion on questions

of law in circumstances where the Federal Court itself could not be given that jurisdiction.

I move from consideration of the AAT as a judicial type body to the AAT as an executive or an administrative body. Discussions of constitutional limitations on administrative review have of course tended to focus on the constitutional restraints on the exercise of judicial power. An area that has not been the subject of the same close judicial scrutiny is the extent to which an administrative tribunal like the AAT is, or ought to be, subject to the restraints which apply to the decision-maker whose decision is subject to review. Certainly, the legal position of the AAT has been closely analysed in cases such as *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 2 A.L.D. 60; *Collector of Customs (N.S.W.)* v. *Brian Lawlor Automotive Pty Ltd* (1979) 41 F.L.R. 338 and *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 A.L.D. 158. We know that the Tribunal must determine for itself what is the correct or preferable decision. In doing so it can have regard to, but is not bound by, government policy. That is the position under the statute.

But what of the position under the Constitution? How does such a tribunal fit into the constitutional separation of powers? In our system of cabinet government a Minister or official is normally regarded as bound to exercise his functions in accordance with the decisions of the cabinet. The High Court has come a long way towards acknowledging that situation. But the constitutional problem I am leading up to is this. Given that the AAT does not exercise the judicial power of the Commonwealth, the constitutional foundation for the legislation providing for administrative review is not to be found in Chapter III. Rather, the constitutional source for administrative review must be the same as the source for the making of the primary administrative decision, that is the legislative and the executive powers of the Commonwealth. Now, Chapter II of the Constitution vests the executive powers of the Commonwealth in the Governor-General who appoints Ministers to administer departments of state. The question I want to pose is this: is an external administrative review tribunal a Chapter II body, and therefore in that sense within the executive arm of government. On this analysis, does our constitutional system require that a tribunal of this kind give the same weight, as the original decision-maker is required to give, to the decisions of cabinet or the policy of the government? In other words, does its place in the administrative or in the executive arm of government impose some special constraint on the manner in which it is to function? Are there perhaps some yet unexplored constraints on the executive powers of the Commonwealth that impede the whole notion of independent review? Is the setting aside of a ministerial decision by an administrative tribunal, which by definition is not a court and which does not exercise the judicial powers of the Commonwealth, inconsistent with the constitutional provisions relating to the exercise of the executive power? Or, contrary to this analysis, is an independent review tribunal such as the AAT quite outside the executive arm of government? Have we created something that cannot be fitted within any of the three traditional functions of government? And, if we have done that, is that constitutionally permissible?

To return to an earlier theme, in the case of judicial power, there is a wealth of constitutional theory that appears not to be reflected in practice. When we look at the exercise of executive power we have no difficulty in finding, in practice, the great gulf between the AAT and the executive. Some will applaud that gulf; others will lament it. But I think we still search for the theoretical rationalisation for it.

Dr GEOFFREY A. FLICK*

I am greatly indebted to Professor Campbell for the preparation of her paper and only wish to raise two issues. The way in which either of these issues will be resolved is unclear, but I raise them knowing that they may prove to be controversial.

1. *Constitutionality of section 7(1) of the Administrative Appeals Tribunal Act 1975?*

Section 7(1) of the Administrative Appeals Tribunal Act 1975 provides that "a person shall not be appointed as a presidential member of that Tribunal unless he is or has been a judge . . . of the High Court, or another Federal Court or of a Supreme Court of a State or Territory . . .".

The doubt as to the constitutionality of this provision arises by virtue of the fact that a person may be selected to be President of the Administrative Appeals Tribunal on the basis that he is, for example, a Federal Court judge. The objection to such a provision is that the basis of appointment is a person's "judgeship". In my opinion the comments of Bowen C.J. and Deane J. in *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 584 do not answer this objection.

The cornerstone as to my doubts of the constitutionality of section 7(1) is found in the following comments of the judgment of the Privy Council in *Attorney-General of the Commonwealth* v. *R.* (1957) 95 C.L.R. 529, 540:

> Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. That is perhaps so, but the explanation of it rests not on a theoretical rejection of the doctrine but upon the text of the Constitution as expounded in a series of cases culminating in *Dignan's Case* (5), from which the majority judgment in the present case cites significant passages. It is worth noting that in the judgment of *Gavan Duffy* C.J., and *Starke* J., in that case a distinction is made between the union of legislative and executive power on the one hand and the union of judicial and other power on the other hand. "It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested etc." (6) are the opening words of a passage in which the granting of a regulative power akin to a legislative

* LL.B. (Syd.), LL.B., Ph.D. (Cantab.); Director of Research, Administrative Review Council.