RESPONSIBLE GOVERNMENT AND THE ADMINISTRATIVE APPEALS TRIBUNAL

BY JOHN GOLDRING*

Section 64 of the Constitution is widely understood to establish in Australia a system of responsible government on the Westminster pattern. I have suggested in an earlier issue of this review[1] that the wording of the Constitution could, but probably would not, be interpreted as requiring that the only permissible form of government organisation is the Department of State headed by a Minister. In practice, administrative decisions, including policy decisions, are taken by Ministers, by Departments (for which, in theory, Ministers are responsible to Parliament), and by statutory authorities, (in which case the position in regard to Ministerial responsibility is unclear).

The establishment of a system of review of specified administrative decisions by an independent tribunal, established by the Administrative Appeals Tribunal Act 1975 (Cth), while in general terms a highly desirable development may, however, give rise to some difficult and unanticipated constitutional questions. In a series of decisions[2] the Tribunal itself, and the courts, have interpreted the Administrative Appeals Tribunal Act in such a way as to require that the Tribunal should, in effect, become the administrative decision-maker, and, if it is not satisfied that the decision under review is the "best or preferable decision" in the circumstances revealed by the material before it, substitute its own decision. Many of the decisions of the Tribunal which have been subject to review by the Federal Court are decisions arising under s 12 of the Migration Act 1958 (Cth), where the Tribunal has power only to *recommend* to the Minister.[3] In such cases, the final decision will, in form if not in substance, be the decision of the Minister, so these remarks will not apply. In virtually all other cases, in accordance with s 43(6) of the Administrative Appeals Tribunal Act, the decision of the Tribunal becomes the decision of the primary decision-maker. The constitutional question which arises is whether s 43(6) of the Act is consistent with s 64 of the Constitution. Further to this question, other questions arise. The clear intention of the Administrative Appeals Tribunal Act is that the Tribunal should be independent of government and Ministers. Yet the effect of s 43(6) of the Act is that this independent

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[1] I have considered the so-called constitutional requirement for "responsible government" in "Accountability of Commonwealth Statutory Authorities and 'Responsible Government'" (1980) 11 FL Rev 353, 353-354, 361-367. This particular point is discussed at 366-367.

[2] *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696; 1 ALD 158; *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634; *Nevistic* v *Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639; *Kuswardana* v *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186; *Collins* v *Minister for Immigration and Ethnic Affairs* (1981) 36 ALR 598. See generally M D Kirby, "Administrative Review on the Merits: the Right or Preferable Decision" (1979-1980) 6 Mon UL Rev 171.

[3] *Eg Minister for Immigration and Ethnic Affairs* v *Pochi* (1981) 36 ALR 561, 564. See M D Kirby, "Administrative Review: Beyond the Frontier marked 'Policy—Lawyers Keep Out'" (1981) 12 FL Rev 121.

body should step into the shoes, as it were, of the primary decision-maker, who, at least in theory, is subject to ministerial control and the normal requirements of accountability to Parliament. There is an argument that s 64 of the Constitution requires that "normal" situation. Fairly clearly, the Tribunal, given that its functions are to review decisions of members of the executive branch of government, is itself part of the executive branch. The Federal Court has decided that in the exercise of its powers it is not exercising "the judicial power of the Commonwealth".[4] The Administrative Appeals Tribunal does not fit within the departmental structure of the major part of the executive branch of government. In this respect it is a statutory authority outside that structure, and is subject to the general principles of administrative law relating to judicial review of administrative action. Yet it is difficult to see, how, short of exercise of legislative powers, the Tribunal may be called to account by Parliament.

Suppose that a decision is made under s 34 of the Marriage Act 1961 (Cth) refusing to register an applicant as a marriage celebrant. A primary administrative decision of this type is one for which, traditionally, the Minister must account to Parliament in accordance with the principles of responsible government. However, if the applicant appeals to the Tribunal, and the Tribunal, having reached the conclusion that the primary decision is not the best or preferable decision in the circumstances, substitutes its own decision, is the Minister still responsible for that decision in the same way that he or she is responsible for other decisions made under enactments which he or she administers? To put the problem another way, where a decision is made by a departmental official in the exercise of a discretionary power, in the absence of specific words making that discretionary power personal to a specified official, it would seem that the Minister may reverse, alter or change the primary decision, and may certainly specify rules, guidelines or statements of policy which affect the making of primary decisions. In theory, though, regrettably, far too seldom in practice, the Minister must account to the Parliament for the making of policy in this way. The Tribunal has made it clear that while matters of policy laid down by the Minister must be taken into account by a primary decision-maker, if they themselves do not lead to the making of the best or preferable decision of the type required to be made by the relevant enactment, the Tribunal will feel free to disregard them at least to the extent that application of that policy may prevent the reaching of the best or preferable decision.[5]

Does the Administrative Appeals Tribunal Act represent an acknowledgement that the legal forms associated with the concept of responsible government can no longer cope with the realities of the interventionist state? The background to its establishment[6] shows that the Act is a response to a need for review in circumstances where the machinery of responsible government and the activities of Parliament and parliamentarians no longer provide an effective means for making administrative decision-

[4] *Drake* v *Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60.

[5] Above n 2; also *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225.

[6] See J Goldring, "The Foundations of the 'New Administrative Law' in Australia" (1981) 40 Australian Journal of Public Administration 79.

makers responsible and accountable to anyone (except possibly, their departmental superiors) for their actions. The Tribunal provides a means whereby decision-makers can be made accountable to the person affected by the decision, rather than to the community as a whole through its representatives in Parliament. The solution, if desirable, is also pragmatic, in the sense that it is a response to a perceived need. Given that the formal structure of government in this country is established by constitutional laws and practices, any solution adopted must conform, or be made to conform, whether or not by processes of judicial interpretation, to that formal structure. The formal structure requires that executive power, vested in the monarch and exercisable by the Governor-General, should be, in the majority of cases, at least, exercised through Ministers who are members of, and accountable to, the Parliament. Therefore the Administrative Appeals Tribunal is problematic because its operation does not fit easily into the formal structure established by the Constitution. It represents an unprecedented attempt to establish a means for the exercise of executive power, in the form of the making of an administrative decision, in a way in which it is difficult to envisage parliamentary scrutiny or control, except in extreme cases. It does not seem to fit at all within Chapter II of the Constitution.

As mentioned above, the Tribunal has, where it finds it necessary to do so, differed from officials in the interpretation of ministerial policy or found that ministerial policy statements are inconsistent with a statute or otherwise lead to a decision which is not the correct or preferable decision. Is this consistent with the system of responsible government under separation of powers established by the Constitution? First, it could be argued that parts of the Administrative Appeals Tribunal Act, especially s 43(6), are unconstitutional. The Commonwealth is unlikely to take such a position; but if there should be a private applicant seeking to overturn a decision, an argument along constitutional lines is a distinct possibility.[7] Secondly, it could be argued that, in respect of ministerial policy,[8] the Tribunal stands in the same relation to the policy as does the primary decision-maker. That view has been reflected in the decisions of the Tribunal, which have been upheld by the Federal Court,[9] which show a reluctance on the part of the appointed members of the Tribunal to interfere with policies made by Ministers who are members of and responsible to the Parliament. Some support for this view may be found in the careful consideration of the place of government policy in the operations of the Tribunal by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[10] where His Honour said:

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[7] In the article on statutory authorities, above n 1, I noted that while some statutory authorities were similarly vested with executive power but did not fall within Chapter II of the Constitution, the High Court has not found it necessary to decide whether the ministerial department is constitutionally the only possible structure for the executive branch of government. No doubt the practical consequences of a decision that a statutory authority was not constitutionally permitted would, at least implicitly, influence the court.

[8] In *Ansett Transport Industries (Operations) Pty Ltd* v *The Commonwealth* (1977) 139 CLR 54, 87, Murphy J said, "It is not for the officer to distinguish between 'government policy' and the Minister's policy".

[9] Above n 2, n 5.

[10] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 642.

> It is one thing for the Minister to apply his own policy in deciding cases: it is another thing for the Tribunal to apply it. In point of law, the Tribunal is as free as the Minister to apply or not to apply that policy. The Tribunal's duty is to make the correct or preferable decision in each case on the material before it, and the Tribunal is at liberty to adopt whatever policy it chooses, or no policy at all, in fulfilling its statutory function.

What is important here is the distinction between the making of the policy and the application of the policy—a distinction which, with respect, is a verbal one only, for it seems that much policy is made incrementally, by the disposition of particular cases. However, conceptually it makes sense to say that the Minister, who, as His Honour is at pains to stress, is responsible to Parliament, *makes* the policy: the Tribunal, like the primary decision-maker applies it: so that it is the *application* of the policy, not the policy itself, which is reviewed. Some of the later decisions do not appear fully to appreciate the distinction, for they regard the reality of the situation, (including the fact that the decision of individual cases is part of the policy-making process) not the form. Also, although as a matter of strict law an official exercising a discretion may be able to decide a particular case on proper consideration of all relevant factors, including a ministerial or departmental statement of policy, but giving to that statement only such weight as he or she personally believes proper, in practice administrative officers in a bureaucratic structure must be expected to place greater emphasis on the policies and practices of the department than a decision-maker (or reviewing Tribunal) which is independent of that structure. In consequence, the Tribunal will be far freer to disregard statements of ministerial policy. This, it is suggested, is implicit in the proposition advanced by Brennan J, and is central to a problem which, in that case His Honour saw as one of political philosophy, *viz* that appointed members of the Tribunal should not usurp the functions of Ministers who are responsible. However, the political philosophy is reflected in Chapter II of the Constitution, and the same reasoning may well apply in the constitutional context.

Regrettable though it may seem, the nice conceptual distinction made by Brennan J may provide the easiest means by which the Administrative Appeals Tribunal may withstand constitutional challenge. It is regrettable because of the artificiality of the point—but the artificiality is no greater than that of a Constitution which fails to take account of the lack of reality of the concept of "responsible government" in modern Australia. In the circumstances, a literal interpretation of the Constitution which led to a finding that the Administrative Appeals Tribunal Act, or any part of it, ran counter to the Constitution, would frustrate a necessary reform, and, because of the possible impact of the consequences on other non-ministerial forms of executive government, could radically change the structure of the executive branch of Australian government. The "New Administrative Law" may well change the "interstitial" constitutional law of Australia, in response to changed circumstances. While a strict interpretation of the Constitution might lead to insistence on ministerial departments as the only permitted structure for the executive branch and decision-making for which Ministers are clearly responsible, there might still be a role for an external

review body such as the Administrative Appeals Tribunal. Nevertheless, it is suggested that s 43(6) of the Act could be so interpreted as not to offend against the constitutional provisions requiring that there be a system of responsible government, and even perhaps that there be a separation of powers, and that this means, though highly artificial, would mean the preservation of the Tribunal in its present, valuable form.