F O C U S

Justiciability of Cabinet Decisions

Two recent cases have dealt with the question of the extent to which a decision of the Cabinet may be amenable to judicial review. In Cohen v Peko-Wallsend Ltd (full court of Federal Court, 7 September 1987) the previously unlitigated question whether a decision of a Westminster-style Cabinet may be the subject of judicial review was squarely raised. The question also arose as a peripheral issue in South Australia v O'Shea (High Court, 2 September 1987).

(1) Cohen case

Peko-Wallsend Ltd has certain mining interests in the area covered by stage 2 of Kakadu National Park. Before the Federal Court the questions at issue were whether, in making the decision to nominate stage 2 of the park for the World Heritage List, the Cabinet was bound by the principles of natural justice to afford Peko-Wallsend an opportunity to be heard and whether it had failed to do so.

The application to the Federal Court at first instance was brought under section 39B of the Judiciary Act 1903, presumably because of doubts whether the Administrative Decisions (Judicial Review) Act 1977 would apply to the decision of the Cabinet. Justice Beaumont had granted the application and had declared that the decision of the Executive (ie, the Cabinet) to nominate stage 2 was void (see (1986) 70 ALR 523). His decision is discussed in [1987] Admin Review 14-15. It was from this decision that the Commonwealth appealed to the full court of the Federal Court.

Decision of full court

The full court allowed the appeal. The central judgment is that of Justice Wilcox. Both Chief Judge Bowen and Justice Sheppard expressed general agreement with the reasons of Justice Wilcox, while making separate observations of their own. All judges agreed that the Cabinet decision was not amenable to judicial review and that, even if it were, Peko-Wallsend had, in the circumstances, been accorded natural justice. However, the separate observations of the 3 judges make it difficult to say with certainty what the considerations are which the Federal Court considers will

render non-justiciable a Cabinet decision made otherwise than under a statutory power. For Justice Sheppard the character of the decision maker is important. Justice Wilcox would not exclude review on this ground but would regard the nature and effect of the Cabinet decision as significant. Sir Nigel Bowen would tend to agree. However, in this case, he took a slightly different view from that of Justice Wilcox on what it was about the nature of the particular decision which made it non-justiciable.

Argument of Commonwealth

Before the full court the Commonwealth argued that the decision of the Cabinet was immune from judicial review on the ground of the identity of the decision maker or alternatively on the ground of the nature of the decision, namely, that it was made in the exercise of the prerogative power of the Crown in connection with an international treaty (the World Heritage Convention).

Reasons for judgment of court

In relation to the argument that Cabinet decisions are not reviewable in a court, Justice Wilcox noted the recent authorities which rejected the doctrine of immunity from review of Executive Council decisions made in the exercise of a statutory power (CREEDNZ v Governor-General [1981] 1 NZLR 172; R v Toohey; ex parte Northern Land Council (1981) 151 CLR 170; FAI Insurances v Winneke(1982) 151 CLR 342). His Honour expressed agreement with the argument of Peko-Wallsend that the reasons which had been found insufficient to exclude review of Executive Council decisions made under statute - the doctrine of ministerial responsibility, the fact that decisions often involve policy elements and the general need for confidentiality - would be insufficient to exclude review of a Cabinet decision made under a statutory power. However, in Australia it was not known for statutes to repose power in the Cabinet.

The present case involved the exercise of a prerogative power. Justice Wilcox noted authorities which had indicated that an exercise of prerogative power could be reviewable, foremost among them Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374. The critical matter, in his view, was the nature and effect of the decision. The principles of natural justice would apply and the decision would be justiciable only if it affected a person by altering his rights, obligations or legitimate expectations and did not contain some feature, eg, a relationship to national security or international relations, which made judicial review inappropriate in the particular case.

In relation to the first element of this test, his Honour found that the decision made by the Cabinet was disadvantageous to Peko-Wallsend, but this was not sufficient. The decision did not alter the mining rights or

obligations of the company, tightly constrained as they were by the existing complex of legislative provisions, nor did it deprive it of a benefit or advantage. In relation to the second element of the test of reviewability, he held that the decision primarily involved Australia's international relations. In Koowarta v Bjelke-Petersen (1982) 153 CLR 168 Justice Mason had indicated that it would be most difficult for a court to review a decision to enter into a treaty. The present case related to a decision to implement a treaty. In the view of Justice Wilcox, it raised the same problem as a decision to enter into a treaty.

His Honour went on to say that, even if he had been of the opinion that the Cabinet decision was justiciable and subject to the obligation to afford a hearing to Peko-Wallsend, the obligation had been discharged through the opportunities it had been given to put written submissions to the relevant Minister.

Chief Judge Bowen differed from Justice Wilcox by expressing doubt whether by reason only of the relationship of the Cabinet decision to the international Convention it was non-justiciable. However that factor, added to 'complex policy questions relating to the environment, the rights of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the Respondents', combined to place the decision beyond review by the Federal Court.

The Chief Judge indicated that decisions of the Cabinet, as a body which functions according to convention, are in a special position:

> In the present case it would, in my view, be inappropriate for this Court to intervene to set aside a Cabinet decision involving such complex policy considerations as does the decision of 16 September 1986, even if the private interest of the Respondents was thought to have been inadequately considered. The matter appears in my mind to lie in the political arena.

Justice Sheppard said that the question whether any decision of the Cabinet could ever be the subject of the exercise of the Federal Court's supervisory jurisdiction was a difficult one. Although unnecessary for him to express a view finally on the matter, he inclined to the view that the application in the case should fail at the outset because the decision in question was one made by the Cabinet. He said that the way in which the Cabinet operates would provide difficulties for a court in endeavouring to determine whether a decision was arrived at in accordance with law. The decision making process does not readily lend itself to review by the courts:

> In my opinion, the Cabinet being essentially a political organisation not specifically referred to in the

> Constitution and not usually referred to in any statute, there is much to be said for the view that the sanctions which bind it to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the Court to interfere with what it does.

(2) O'Shea case

The issue before the High Court in South Australia v O'Shea was whether the decision of the Governor in Council of South Australia not to release Mr O'Shea on licence, despite the recommendation of the Parole Board that he be released, was subject to the requirements of natural justice.

Chief Justice Mason noted that in FAI Insurances v Winneke the High Court rejected the argument that the Governor in Council is intrinsically unsuited, by reason of its composition and procedures, to discharge the duty to act fairly. However, the statutory scheme in the present case made provision for a hearing before the recommending body (the Parole Board) and that provided a sufficient opportunity for a party to present his case. As a result, the decision making process, viewed in its entirety, entailed procedural fairness.

The constitutional practice followed in South Australia is that recommendations to the Governor in Council are based on a Cabinet decision, not on a decision by the responsible Minister. This was said to generate 2 important objections to the existence of a duty to act fairly. The first related to the fact that the Cabinet was a political institution. Chief Justice Mason agreed that it was but said that in some instances it was called upon to decide questions which were much more closely related to justice to the individual than with political, social and economic concerns. Thus, in appropriate cases, it would be subject to a duty to act fairly. The second objection to the existence of a duty to act fairly related to the confidential nature of Cabinet deliberations. As to this the Chief Justice said:

> But I can find no persuasive reason why the courts should not, in an appropriate case, require as an incident of natural justice or the exercise of a duty to act fairly that there be placed before Cabinet by the responsible Minister the written submissions of the individual affected by the decision to be made or an accurate summary of such submissions. Such a requirement could not amount to an intrusion into Cabinet's control of its own proceedings and it would in all probability conform to existing practice.

Justices Wilson and Toohey found that the legislation did not have the effect of requiring the Governor in Council to grant a hearing to Mr O'Shea before it made a decision. Justice Brennan, in a separate judgment, arrived at the same conclusion.

Justice Deane dissented. He said that he found it difficult to envisage a category of case to which the common law rules of procedural fairness were more clearly in point than the case of a political decision that a person be indefinitely held in goal notwithstanding expert advice and a specialist recommendation to the effect that the medical grounds upon which his detention was initially ordered no longer justified it.

(3) Conclusion

The judgments of Justice Wilcox in Cohen and of Chief Justice Mason, in particular, in O'Shea would appear to indicate that we have now reached the stage where it can be said that it is the nature of the decision sought to be reviewed and its effect on interested parties that is decisive of the question whether natural justice applies, rather than the vehicle for the decision. The effect of the decision of the Federal Court in Cohen, however, particularly having regard to the views of Chief Judge Bowen and Justice Sheppard, would appear to be that it is likely to be only in most unusual circumstances that a Cabinet decision will be amenable to judicial review. Whether their reluctance to expose a Cabinet decision to review is correct in the light of the approach taken by the Chief Justice in O'Shea remains to be seen. On the present state of the law, it would seem to lead to a result that is difficult to justify. If the Cabinet makes a decision which has as a result the making of a decision under statutory power by a Minister or the Governor-General in Council (eg to proclaim property under the World Heritage Properties Conservation Act 1983), there would not be any reservations about exposure of the latter action to judicial review. The distinction which would make judicial review available in this case where the decision is effectively that of the Cabinet, though in form the decision of a Minister or the Governor-General in Council, but which may deny judicial review where only a decision of the Cabinet is involved is, it is submitted, difficult to see.

The present writer would, however, agree with the result in Cohen. It is submitted that a more satisfactory basis for exemption from judicial review may be found in a doctrine akin to the political questions doctrine developed by the Supreme Court of the United States of America. Under that doctrine the courts frankly acknowledge that there are certain kinds of controversy which they will not entertain because, for one reason or another, it is better to have them decided by another branch of the government (Baker v Carr (1962) 369 U.S. 186; see also Victoria v Commonwealth (PMA Case) (1975) 134 CLR 81, 134-5, McTiernan J; Western Australia v Commonwealth (Territories Senators Case) (1974) 134 CLR 201, 275-6, Jacobs J; 293, Murphy J). It is submitted that the reasoning of both Chief Judge Bowen and Justice Sheppard in their discussion in Cohen of the Cabinet process comes very close to acceptance of a political questions doctrine.

REGULAR REPORTS

Administrative Review Council

LETTERS OF ADVICE

Since the last issue of Admin Review (July 1987) the Council has sent 3 letters of advice to the Attorney-General. One of these was the outcome of the Council's project on the student assistance area. The second related to the Cash Transaction Reports Bill 1987, and the third to the review provisions under the Nursing Homes and Hostels Legislation Amendment Act 1987.

REPORTS

In September 1987 the Council forwarded to the Attorney-General Report No.29, Constitution of the Administrative Appeals Tribunal. Arrangements have been made for the report to be printed and it will be available for purchase from the Australian Government Publishing Service once it has been tabled in the Parliament.

The Council's 1986-87 Annual Report, which as usual includes a report on the Administrative Appeals Tribunal, is due to be tabled on 20 October 1987, following which copies will be available for purchase from AGPS.

CURRENT WORK PROGRAM - DEVELOPMENTS

Access to administrative review. The Council's committee has been engaged in a round of discussions with Social Security Appeals Tribunal members and welfare groups concerning the examination of the Department of Social Security review officer system. Following the Council decision that the unsatisfactory review officer survey should be redone, the Secretariat met with officers of the Department of Social Security and a representative of the consulting firm that has been engaged to carry out the new survey. The Department is joining with the Council in sponsoring the new survey.

Broadcasting. In 1985 the government rejected some of the recommendations made by the Council in its Report No.16, Review of decisions under the Broadcasting and Television Act 1942 (AGPS, 1982), and referred back to the Council the question of review of decisions of the Australian Broadcasting Tribunal with a view to the Council making a further report following the implementation of the uniform inquiry procedures