CASE NOTES

GIRIS PTY LTD v. COMMISSIONER OF TAXATION[1]

Constitutional law—Taxation power—Delegation

The issue before the High Court in this case was the validity of sections 99 and 99A of the Income Tax Assessment Act 1936-1965 (Cth). Section 99A imposes a liability to pay income tax at the rate declared by Parliament upon the trustee of certain trust estates where there is net income of the estate to which a beneficiary is not presently entitled (other than income in which any of certain bodies, associations, funds or organizations have a vested interest). By sub-section (2) the section does not apply to a trust estate in relation to a year of income if the Commissioner is of the opinion that it would be unreasonable that the section should so apply. Sub-section (3) provides that in forming his opinion the Commissioner shall have regard to certain specified matters and 'such other matters, if any, as he thinks fit'. If section 99A does not apply to a trust estate in a year of income, section 99 imposes a liability upon the trustee to pay income tax at a different rate, namely tax on the net income as if it were the income of an individual and were not subject to any deduction. Windeyer J. considered that the purpose of the provision

> is to enable the Commissioner to keep s. 99A as an instrument to prevent avoidance of taxation by the medium of trusts, but not to use it when to do so would seem to him not in accordance with that purpose.[2]

The appellant trustee appealed against an assessment of tax at the rate appropriate under section 99A of the Act and pursuant to an order made by Menzies J.[3] brought into issue the constitutional validity of the section. The appeal was rejected, the Full Court unanimously upholding section 99A. Barwick C.J., McTiernan and Windeyer JJ. upheld section 99 also, but Kitto, Menzies and Owen JJ. found it unnecessary to decide as to this section. In respect to section 99A the Court held that the scant legislative indication to the Commissioner of the context of the word 'unreasonable' in sub-sections (2) and (3) did not deprive the provisions of the character of a law with respect to taxation, either as prescribing no rule at all or as constituting a delegation of legislative power so complete as not to constitute a 'law'. The Court further decided that the tax was not an 'incontestable' tax in the sense in which that expression was used in *Deputy Commissioner of Taxation v. Hankin*,[4] stressing the distinction between (a) a provision which purports to prevent a taxpayer from invoking the aid of the courts to determine whether or not his liability to tax has been correctly and lawfully assessed and (b) a provision which may make it difficult or impossible to exercise the right of appeal because the facts necessary for a successful challenge cannot be established. An argument that the section permitted unconstitutional[5] discrimination between states was rejected also for although the Commissioner was not expressly forbidden to do this, there was no reason for construing the section as authorizing such discrimination.

It is with the delegation argument that this note is concerned, for the provisions under scrutiny raise and illustrate an important constitutional issue, namely, the role under the Australian Constitution of the separation of powers principle as applicable to legislative/executive functions. A review of the authorities on this matter and the judgments in the present case reveal a

[1] (1969) 43 A.L.J.R. 99. High Court of Australia; Barwick C.J., McTiernan, Kitto, Menzies, Windeyer and Owen JJ.
[2] *Ibid.* 106.
[3] Under the Judiciary Act 1903-1966 (Cth), s. 18.
[4] (1959) 100 C.L.R. 566.
[5] Constitution s. 51(ii).

pressing need for a clear restatement of principle by the High Court, or at least a redefinition of key concepts. The failure of the court to take the opportunity in this case can only be regretted. A further wider issue which will be briefly considered is the challenge to basic democratic assumptions presented by uncontrolled administrative discretions.

The leading authority on the doctrine of the separation of powers as it affects legislative/executive relations is *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan.*[6] In that case Dixon J. whilst accepting a theoretical separation of legislative power from the other arms of government,[7] went on to temper the strict logic of the constitutional form with the reality of parliamentary government. Sometimes called the functional approach this attitude accepts as necessary a certain degree of delegation of a legislative function to the executive arm. On this Dixon J. treated the separation of powers concept as a principle of political restraint rather than a basis for judicial review.

Nevertheless a reservation, substantial in theory at least, was made by Dixon and Evatt JJ.,[8] to the effect that all Commonwealth laws must meet the requirement that they be 'with respect to' one of the enumerated heads of legislative powers. This limitation is of course, quite unrelated to the separation of powers doctrine. Evatt J. took the point that a law purporting to delegate legislative power may be invalid because it is so wide as to amount to an abdication of its function by Parliament. The opinion of Dixon J. is less clear on this matter, and might be developed by the High Court in the future as a useful means of limiting the width of delegation without overruling the basic finding in *Dignan's* case. Dixon J. said that

> [t]here may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power.[9]

An obvious question is whether this limitation was intended to cover anything less than delegation of an entire head of power. It is significant to note that this characterization limitation of Parliament's power to delegate has not invalidated delegations in the widest terms, *Radio Corporation Pty. Ltd. v. The Commonwealth*[10] being a good example. In that case Dixon and Evatt JJ. in dissent, held that the regulation was invalid because imports could be prohibited by the mere will of an executive official. This could be interpreted as indicating that the *Dignan* limits on delegation are not in fact exhaustive of

> that those limits cover more than purported delegations of an entire head of power. It is puzzling that the dissenting judgments made no reference to *Dignan's* case though the majority relied heavily on its authority.

Though the present case did not concern authority to make regulations, the validity of the legislative discretion vested in the Commissioner raises similar issues. The situation here may well be regarded as even more objectionable than in the *Radio Corporation* case because the Commissioner's decisions are subject to neither the Acts Interpretation Act[11] which requires regulations to

[6] (1931) 46 C.L.R. 73.
[7] *Ibid.* 101.
[8] *Ibid.* 101, 119.
[9] *Ibid.* 101.
[10] (1938) 59 C.L.R. 170. 'The Customs Act, 1901-1935 (Cth), s. 52(g), included in the definition of prohibited imports imports prohibited by regulation. By s. 5 of the Act the power to prohibit the importation of goods by regulation extended to allowing their importation on conditions. A regulation was made prohibiting the importation of certain goods without the consent of the Minister for Trade and Customs.' Howard, *Australian Federal Constitutional Law* (1968) 105. See also *Wishart v. Fraser* (1941) 64 C.L.R. 470; *Crowe v. The Commonwealth* (1935) 54 C.L.R. 69.
[11] 1901-1966 (Cth).

go before Parliament, nor to review by the Senate Standing Committee. The judgments point out the great width of the discretion. Barwick C.J. refers to it as a function of the legislature rarely delegated to an official,[12] whilst Menzies J. notes that the Commissioner is given 'no legislative guidance other than that he is to have regard to a medley of facts and circumstances'.[13] To similar effect are Windeyer J.'s comments that 'there are no absolute, precise or objectively determinable tests of what is here reasonable or unreasonable . . . the Commissioner's discretion is apparently at large'.[14]

Whilst *Dignan's* case was apparently considered too well-settled an authority to require citation, except by Windeyer J., analysis of the judgments prompt the question: what exactly does the High Court understand it to mean?

Terminology is loose and key words such as 'delegation'[15] and 'abdication'[16] are used without sufficient definition. The choice of the term 'abandonment' by Windeyer J.[17] does not throw any further light on the matter.

Two[18] members of the court apparently considered the constitutional issue not worth discussion at all, whilst Kitto J. thought it merited but 'brief' consideration.[19] Barwick C.J. in answer to the appellant's argument that the provisions did not amount to a law 'with respect to' taxation merely said that they *do* 'prescribe the rule to be applied in assessing the particular class of taxpayer in the year of income'.[20] Furthermore, in rejecting any argument based on an inadmissable delegation the Chief Justice reaches the conclusion that the provisions did not amount to abdication. This opinion could be interpreted as a strong assertion that all delegation short of clear-cut abdication of a whole head of power will not be invalidated by the High Court. However in the absence of fuller explanation as to what the Chief Justice understood by 'abdication'[21] this conclusion may not be warranted. The Chief Justice invites comparison with *Cobb & Co. Ltd. v. Kropp*[22] on this issue. Although the Privy Council in that case did restate the justification for not insisting on a strict separation of powers in practice, it should be noted that the case concerned delegation in the state sphere and cannot be applied unreservedly in the Commonwealth sphere where there may be at least the characterization limit on parliamentary authority to delegate.

Kitto J. also rejected any argument that the section was not a law 'with respect to' taxation.[23] His treatment of the delegation issue is particularly interesting in that he appears to see the possibility of the invalidity of any provision which purports to authorize an administrator to exclude from the application of a law 'any case in which he disapproves of its application' but in the present case he considers that the specification of 'unreasonableness' is the appropriate standard, together with some broad considerations for the Commissioner in forming his opinion as to this, is sufficient to make the application of section 99A dependent on the will of Parliament. The invalidation of a law such as Kitto J. suggests, would require the wider construction of the reservation made by Dixon J. in *Dignan's* case.

[12] *Giris Pty. Ltd. v. Commissioner of Taxation (Cth)* (1969) 43 A.L.J.R. 99, 101.
[13] *Ibid.* 104.
[14] *Ibid.* 105-6.
[15] *Ibid.* 101 (*per* Barwick C.J.), 105 (*per* Menzies J.).
[16] *Ibid.* 101 (*per* Barwick C.J.).
[17] *Ibid.* 105.
[18] McTiernan and Owen JJ.
[19] (1969) 43 A.L.J.R. 99, 104.
[20] *Ibid.* 101.
[21] *Ibid.*
[22] [1967] 1 A.C. 141.
[23] (1969) 43 A.L.J.R. 99, 103.

The conclusions of Menzies J. are very similar to those of Kitto J. and on the delegation question he points out that

> at some point in the process of parliamentary abnegation, such as the Act reveals in s. 99A and other sections, the shifting of responsibility from Parliament to the Commissioner would require consideration of the constitutionality of the delegation . . .[24]

This view appears closer to that of Kitto J. than to that of the Chief Justice.

Windeyer J. upholds section 99A after finding that there is not such a delegation by Parliament of its legislative power as to be invalid because it amounts to an 'abandonment'. His discussion of this issue goes no further.

In consequence of the uncertainty revealed in this fundamental constitutional area a review of *Dignan's* case by the High Court in the context of this or other legislation would provide valuable information on the standing and scope of the decision. It has been suggested[25] that the decision in *Attorney-General of the Commonwealth v. R.; Ex parte Boilermaker's Society*[26] with regard to the strict separation of judicial power may also have affected legislative/executive relations. However the relevant passages of the High Court and Privy Council judgments are equivocal, for although there are statements indicating a desire to establish the theory of separation of powers as a general basis for the constitution, the High Court shows no clear intention to throw serious doubts on *Dignan's* case, whilst the Privy Council expressly point out that they wish to guard against the conclusion

> that in anything they have said in relation to the judicial power they intended to cast any doubt upon the line of authorities where the union of legislative and executive power has been considered.[27]

But Professor Sawer's analysis of some of the reasoning and authorities relied on in *Dignan* does reveal weaknesses in the findings in that case. A judicial technique probably more acceptable to the High Court than directly impugning *Dignan*, would be to draw on and expand the Dixon reservations considered earlier in this note. Some such device would seem necessary in order to discourage parliamentary legislation conferring discretions any broader than in the present case.

Litigation challenging the validity of legislation conferring wide discretionary powers is likely to recur, as Parliament finds it necessary, through lack of time or expertise, to entrust the detailed regulation of many governmental activities to administrators in these departments. Such discretionary powers raise a broad policy issue which courts will need to accommodate, *i.e.* the abhorence in a democratic society of any likelihood, real or suspected, of arbitrariness in administration. It has been asserted that

> [i]n the entire legal and governmental system, the strongest need and the greatest promise for improving the quality of justice to individual parties are in the areas where decisions necessarily depend largely on discretion.[28]

Professor K. C. Davis proposes[29] that this might best be achieved by the court focusing on the *totality* of protections against arbitrariness including both safeguards and standards. He suggests a two-pronged approach by the courts

[24] *Ibid.* 105.
[25] Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177.
[26] (1956) 94 C.L.R. 254 (*per* the majority), (1957) 95 C.L.R. 529, Privy Council
[27] *Ibid.* 545.
[28] Davis, 'A New Approach to Delegation' (1969) 36 *University of Chicago Law Review* 713, 714.
[29] *Ibid.*

They should insist first that the legislature set out their purposes as fully as possible and secondly that administrators develop and make known the confinements of their discretionary power. Windeyer J. in the present case emphasized the importance of the Commissioner formulating and making known the considerations by which he is guided in exercising his discretionary authority.

Though the decision in the present case may be unobjectionable it involves issues which will need to be investigated more fully in the future.

MARGARET WIMPOLE

EX PARTE THE ANGLISS GROUP[1]

Administrative law—The Commonwealth Conciliation and Arbitration Commission—Natural justice—Bias

The respondent, the Australasian Meat Industry Employees' Union, lodged an application with the Commonwealth Conciliation and Arbitration Commission in June 1968 to vary the Federal Meat Industry Interim Award 1965. The application would, if adopted, operate to remove any differences in the rate of wages payable under the award to males and females in respect of the same classification and work. In support of this application, the respondent referred to the National Wage case of 1967. In that case the Commission adopted the concept of a total wage but noted that apparent anomalies and different total wages existed between males and females because of the complex history of basic wages, particularly those for females. On its own initiative the Commission followed the *Clothing Trades* decision and granted equal margin increments to adult males and females doing equal work. It also invited the unions, the employers and the Commonwealth to give careful study to the question of the gradual implementation of equal pay.

The applicant, the Angliss Group, sought a writ of prohibition to restrain the President and a Deputy President of the Commission from sitting as members of a Bench to hear and determine the respondent's application on the grounds that the members of the Commission had sat on the 1967 National Wage case and that it was therefore reasonable to suspect that they had prejudged an issue involved in the present application (namely the equal pay question); that this application had been in response to the Commission's invitation to the unions, employers, and the Commonwealth to consider this question; and that justice would not appear to be done if Their Honours were members of the Bench.

The High Court, in a joint judgment, dismissed the motion for prohibition.

Natural Justice

The Court recognized that the principles of 'Natural Justice' applied to the Commission and its members but it pointed out 'that these principles are not to be found in a fixed body of rules applicable inflexibly at all times and in all circumstances'.[2] The Court relied *inter alia* on the observations of Kitto J. in *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation*[3] where His Honour noted 'the impossibility of laying down a universally valid test . . . in the infinite variety of circumstances that may exist . . .' and that

[1] (1969) 43 A.L.J.R. 150. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.
[2] (1969) 43 A.L.J.R. 150, 151.
[3] (1963) 113 C.L.R. 475, 504.