

CASE NOTES

BROWN V. WEST¹

In declaring illegal the Federal Government's recent attempt to increase the postal allowance payable to MPs beyond the amount determined by the Remuneration Tribunal, the High Court has demonstrated that the scope of executive power is subject to very real limits. Whether interpreted as 'a telling blow for the supremacy of Parliament over government'² or as a mere political victory for the Liberal/National Party, the decision provides a fascinating insight into the tensions inherent in the distribution of power in the Australian system of responsible government, and raises one of the most topical issues in Australian constitutional law: just how far do the perimeters of executive power actually extend under the Commonwealth Constitution?

FACTS

In 1988 the Remuneration Tribunal, under the Remuneration Tribunal Act 1973 (Cth), determined an annual postal allowance of \$9,000 for MHRs, to take effect from 1 January 1989. In *Brown v. West* the plaintiff, the shadow Attorney-General, brought an action to challenge the decision of the Minister for Administrative Services and 'other members of the Government'³ — presumably the ministry — to increase this entitlement from the \$9,000 set by the Tribunal to \$30,525.

PLEADINGS

The plaintiff claimed declarations, *inter alia*, that the Minister had no power to override the determination made by the Remuneration Tribunal either by altering the postal entitlement established by the Tribunal, or by applying public moneys to provide a supplement to that entitlement. The same relief was claimed against the Commonwealth.

The amended defence identified three main sources of authority for the power to make the decision under challenge: the authority of the executive, the Supply Act (No. 1) 1989-1990 (Cth) which commenced on 8 June 1989), and the Appropriation Bill (No. 1) 1989-90.⁴

THE JUDGMENT

Two 'closely related'⁵ questions of law, upon either of which the plaintiff's demurrer might turn, were identified by the Court. First, 'whether the executive power of the Commonwealth extends to the provision of a postage allowance supplementary to the postage allowance determined by the [Remuneration] Tribunal; and second, whether the Supply Act (No. 1) 1989-1990 contains an appropriation for the purpose of supplementing the postal allowance determined by the Tribunal'.⁶ The two questions were said to be closely related because 'an affirmative answer to the second . . . would bear upon the scope of the executive power'.⁷

¹ (1990) 64 A.L.J.R. 204. High Court, 1 March 1990, Mason C.J., Brennan, Deane, Dawson & Toohy JJ.

² David Solomon, 'Court stamps on ministerial powers', *The Australian*, 2 March 1990.

³ (1990) 64 A.L.J.R. 204, 204.

⁴ *Ibid.* 205.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

The executive power of the Commonwealth

The High Court explored the nature of executive power under the Australian Constitutional system of government, and considered its bearing on the facts in *Brown v. West*.

When the case was argued, there were strong indications that the Court would regard a stamp allowance as the kind of allowance that under s. 48 of the Constitution must be determined by the Parliament.⁸ Eventually deciding that a definitive determination of s. 48 could 'wait for another day',⁹ the Court relied upon other aspects of executive power in order to reach its conclusion. First, the Court noted that in Australia, 'the Crown and the executive have come to represent the same forces as control a majority in the Lower House',¹⁰ and expressed the view that this strengthened the argument that 'Parliament alone may make provision for benefits having a pecuniary value which accrue to its members in virtue of their office and which are not mere facilities for the functioning of the Parliament.'¹¹ Secondly, the High Court referred to the separation of powers provided for in the Commonwealth Constitution and felt that:

it may be that our Constitution provides such a separation of powers as would preclude any exercise of the executive power which takes the form of the discretionary conferring of benefits having a pecuniary value on individual members of the Parliament, not being mere facilities for the functioning of Parliament.¹²

At first glance, these two aspects of the executive/Parliament relationship in Australia — party dominated cabinet on the one hand, and a constitutional separation of powers on the other — might appear to be antithetical, and yet both aspects have apparently been used to support a single conclusion regarding the nature of executive power. It is suggested that what the High Court has done is to recognize that the present day Australian reality is one in which Westminster-style responsible government does in fact co-exist, with varying degrees of harmony, together with a Constitution largely based upon the American model with its three separate arms of government. This recognition is demonstrated in *Brown v. West* through a balancing of principles drawn from both systems in order to determine the correct weight of executive power in Australia.

Turning to a third aspect of executive power, the High Court was in no doubt that, whatever its scope in the absence of legislative controls, executive power in Australia 'is susceptible of control by statute'.¹³ In the words of the Court:

A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope.¹⁴

In the present case, it was held that section 4 of the Parliamentary Allowances Act gave the Remuneration Tribunal power to determine *the* (rather than merely *an*) appropriate level of postal

⁸ The Court noted that at the time of federation, 'the allowance for Senators and Members of the House of Representatives prescribed by s. 48 of the Constitution was, and was intended to be, transitional until the Parliament, not the Executive Government, should make other provision.' (*Ibid.* 205-6.) The effect of s. 48 in the circumstances of the present case was said to depend on 'the meaning attributed to "allowance" and the width of the power conferred on the parliament alone "otherwise" to provide', (*ibid.* 206) the threshold question being whether or not the postage entitlement was an allowance. A second consideration was whether or not the terms of s. 48 were such as to leave scope for separate executive power to be exercised in respect of such allowances, or whether this was precluded by the absolute and exclusive nature of Parliament's power to make provision otherwise. Given the distinction made elsewhere in the judgment 'between the provision of facilities for travel and assembly, which are essential to the functioning of the Parliament, and the discretionary allocation of a benefit having pecuniary value to alleviate a pecuniary burden which members incur as an incident of office' (*ibid.* 205.), this second consideration may well be resolved in favour of Parliament in a future decision.

⁹ (1990) 64 A.L.J.R. 204, 206.

¹⁰ *Ibid.* 205. citing the decision of Stephen J. in *Victoria v. The Commonwealth and Hayden* (1975) 134 C.L.R. 338, 384.

¹¹ (1990) 64 A.L.J.R. 204, 205. The reasoning behind this view does not appear in the judgment.

¹² *Ibid.* 206.

¹³ *Ibid.*

¹⁴ *Ibid.*

allowances. Sections 7(9)(b) and 13 of the Remuneration Tribunal Act appropriated the monies needed to meet this level of entitlement — 'no more and no less'.¹⁵ Thus, the two Acts operated together to deny the existence of executive power to increase the specific postal allowance determined by the Remuneration Tribunal.

Was the Supply Act (No. 1) 1989-1990 intended to include an appropriation for new policies?

Under ss. 81 and 83 of the Constitution, an appropriation made by valid law is the necessary authority for executive government to take monies out of the Consolidated Revenue Fund.¹⁶ An appropriation, whether annual or standing,¹⁷ must designate the purpose for which the moneys appropriated might be expended, such a purpose being either declared by the Constitution or lawfully determined by Parliament.¹⁸

A Supply Act appropriates monies from the Consolidated Revenue Fund from the beginning of the financial year until the bills introduced in connection with the budget are passed. It is an interim measure primarily intended to maintain the *status quo* in the levels and objects of government expenditure. The Supply Act (No. 1) 1989-1990 contains appropriations for all the ordinary annual services of government for the financial year 1989-1990. The question in the present case was whether these allowances included the supplementing of the entitlement to a postage allowance determined by the Remuneration Tribunal.

The Court reached its conclusion after a discussion of the mechanics of the appropriation process, deciding that s. 3(2) of the Supply Act (No. 1) 1989-1990 itself limited the purposes for which monies appropriated under that Act could be used. To ensure that the Supply Act fulfils its function of maintaining the financial *status quo* for the ordinary running of government, s. 3(2) refers back to purposes already established as lawful under appropriating Acts of the previous year. The spending of Supply Act monies in each service area is then restricted to those previously established policies. In other words, s. 3(2) was a decisive indication that the Supply Act was 'not intended to include any appropriation for new policies'.¹⁹ The question then became whether or not the decision to supplement the postal allowance of MHRs could be characterized as implementing an already established policy. Answering this question in the negative, the High Court held that the decision to increase MHR postal allowances amounted to a 'new policy',²⁰ appropriation for which could only be contained 'in a Bill for special legislation or, at the very least, in Appropriation Bill (No. 2)'.²¹

Does the Supply Act (No. 1) 1989-1990 override any restrictions on executive power imposed by the Remuneration Tribunal Act and Parliamentary Allowances Act?

On its true construction, the Supply Act did not confer any additional power on the Executive Government to implement new policies, nor did it contain sufficient indication of an intention to override any of the existing statutory limitations upon the Executive. Unless the requisite intention is readily ascertainable, the Court held that the Act in question (here, the Supply Act) should be read in the context of existing legislation.

The High Court's analysis and interpretation of the Parliamentary Allowances Act and the Supply Act in *Brown v. West* appears to provide a strong indication of the direction it is taking in its treatment of the practical and legal relationship between Parliament and the Executive. The court affirms that the executive cannot set itself above legislation and the legislature, and in doing so speaks volumes about its views on basic rule of law concepts in Australia.

¹⁵ *Ibid.* 207.

¹⁶ *Attorney General (Vic.) Ex rel. Dale v. The Commonwealth* (1945) 71 C.L.R. 237, 271.

¹⁷ A standing appropriation differs from an annual appropriation in that Parliament foregoes its annually exercised power over expenditure by government when a law containing one is enacted.

¹⁸ *The State of New South Wales v. The Commonwealth* (1908) 7 C.L.R. 179, 200.

¹⁹ (1990) 64 A.L.J.R. 204, 210.

²⁰ *Ibid.*

²¹ *Ibid.*

Conclusion

Although the challenge was upheld, the High Court indicated that there were difficulties in making the specific declarations sought by the plaintiff because to do so might affect the rights of persons not party to the proceedings, such as Australia Post.²² Hence, it decided that the desirable course to take in the circumstances was 'simply to allow the demurrer'.²³ The approach taken by the Court has, however, resulted in confusion as to the effect of the judgment. Disputes have arisen as to whether MPs who exceeded the old \$9,000 postal allowance limit will have to make repayments in the absence of any further order from the Court,²⁴ and it is not clear if the decision was restricted to the period between 1 July 1989 and 16 November 1989. As a consequence, *Brown v. West* may be of more importance for the principles it affirms than for the results it achieves.

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²² Australia Post, the provider of postal credit cards, had extended credit 'on the faith of a promise of payment by the Minister purporting to act for the Commonwealth'. (*Ibid.* 211.)

²³ (1990) 64 A.L.J.R. 204, 211.

²⁴ See Campbell, Rod, 'High Court postage decision places return-from-Member poser', *The Canberra Times*, 2 March 1990.

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