



## BOOK REVIEWS

### **THE ADMINISTRATIVE APPEALS TRIBUNAL AND POLICY REVIEW** by *J M Sharpe* (Law Book Co 1986) pp xxvi, 232.

This thoughtful and useful book is devoted to an analysis of the power of the Commonwealth Administrative Appeals Tribunal to review the government and administrative policies which influenced the decision under review, and the practice of the Tribunal in relation to policy review. The book focusses, in particular, on the AAT's treatment of successive government policies bearing on the deportation of aliens and immigrants convicted of drug offences (see ch 9) and on two discretions conferred by the Social Security legislation (see ch 7).

The book does not pretend to have anything to say as to the Tribunal's approach to 'hard law', eg decisions under the Income Tax Assessment Act.

The notion of 'government policy' is not, and is not asserted by the author to be, an altogether clear concept. The introductory part of ch 2 is devoted to an exploration of the various meanings of 'policy' and to the diverse body of rules and views which the word may denote in a bureaucratic setting. The author then demonstrates, by reference to the AAT's statutory charter and to decisions of the Federal Court and of the Tribunal itself, that the AAT has lawful authority and, in a sense, a duty to review those elements of policy which influenced or dictated the decision under review. This power of the Tribunal is, the reader is informed, 'considered by many to be its most unique and radical feature' (p 44).

As the author then goes on to observe, the power to review policy may result in an affront to notions of popular and responsible government, to the extent at least that the AAT sets its face against implementing a policy which is a genuine 'partisan political' policy on the strength of which a government was, or might reasonably be supposed to have been, elected or returned to office (p 44). This theme is elaborated in ch 4.

In fact, such policies generally find direct expression in legislation, primary or subordinate, and are not left to be the topic of a ministerial directive or departmental guidelines; thus, frontal collision between the AAT and elected government is unlikely to occur. The author did not, in her work, identify a case where such a collision had occurred. The policies rejected or set aside by the AAT, as summarised in the book,

were policies formulated at a lower level of government than the ministerial level.

If the AAT did not consider itself free to reject or set aside policy, the effect would be that primary decision-makers and the Tribunal would be working under ministerial dictation, not genuinely exercising (but, rather, abdicating) a power conferred by law: see the discussion of the inconclusive decisions of the High Court in *R v Anderson; ex parte Ipec-Air* (1965) 113 CLR 117 and *ATI (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at pp 61 ff.

In ch 6, the author identifies a number of practical restraints on the Tribunal's power to review policy. In the course of this chapter, the author observes that

'the Tribunal should be slow to set aside broad government or administrative policy which has been influential in the particular decision under review, and the Tribunal should not itself engage in the formulation of broad or general policy designed to guide the direction in which a wide discretion should be exercised (p 122).'

Both of these canons of caution have been disregarded by the Tribunal in a line of decisions under the assets test measures found in the social security and veterans' entitlements legislation (see, in particular, *Williamson* (N85/374, 24 June 1986) and *Twelftree* (S85/207)). This line of cases would make an interesting case study for the author if the book ever goes into a second edition.

It is in fact becoming difficult for advocates to predict when the Tribunal will and when it will not countenance an assault by an applicant on the wisdom and acceptability of a particular governmental policy: contrast *D J Moran Investments Pty Ltd v Minister* (N85/378, 6 August 1986) and *Aston v Department of Primary Industry* (S85/27, 6 November 1985) with *Rendevski v Australian Apple and Pear Corporation* (V86/613, 17 March 1987).

As to matters of style, the book is clear and concise. The arrangement of chapters is conducive to the progressive development of the ideas advanced in the book. There is a thorough index and a helpful table of cases cited and of statutes referred to. The work should prove useful to practitioners, to teachers of the law and to applicants in the Tribunal alike.

Philip McNamara\*

**EVIL ANGELS** by John Bryson (Penguin 1986) pp 550; **SPIES, BOMBS AND THE PATH OF BLISS** by Tom Molomy (Potoroo Press 1986) pp xviii, 393 and Appendices.

There are a number of justifications for reviewing these books together. First, both deal with the events giving rise to protracted criminal proceedings in Australia, proceedings which, after the conviction of the respective defendants, themselves gave rise to public inquiries intended to dispel widespread concerns that miscarriages of justice had occurred. Secondly, both books have as their professed purpose demonstrating the

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innocence of the defendants in those proceedings or, at the least, the raising of grounds for entertaining doubts about the guilt of the defendants. Thirdly, both books were written by authors with an education in law and substantial exposure to the ways of the law. Finally, both authors complain, with justification, of prejudice suffered by the accused at their respective trials by virtue of the reporting by the public media of the underlying facts.

There, the similarities end. Bryson's book deals with the joint trial in Darwin of Lindy and Michael Chamberlain for the murder of their infant child Azaria (the mother having been charged as principal in the first degree and the father as accessory after the fact). Molomby's book deals with the trials in Sydney in 1979 of three members of the Ananda Marga sect, Dunn, Alister and Anderson, for conspiracy to murder one Cameron.

A significant difference between the trials was that, in the Chamberlain case, the Crown relied heavily on expert evidence, evidence so complex that it was doubted in the High Court that the jury would have understood it. That doubt finds a foundation in the extremely short period taken by the jury to reach its verdict. The Ananda Marga case was a case largely of oath against oath, the word of the defendants being pitted against the evidence of a police informer and of a number of police officers.

The major differences between the works is that Molomby advances and elaborates a hypothesis positively inconsistent with the guilt of the Ananda Marga, whereas Bryson does little more than raise questions about the guilt of Lindy Chamberlain, about the investigatory methods of the supervising police officers and about the methods and competence of the experts enlisted to make out the Crown case. Indeed, while Molomby articulates his hypothesis - that the Margi were set up by a police informer and were entirely innocent of the crimes charged, Bryson leaves his hypothesis to be spelled out by the reader; and one is never sure whether it is that the Chamberlains were innocent or whether they should not have been found guilty by the jury.

Certainly, Molomby's task was easier. He had the benefit of material elicited in the course of the Hilton Inquest and in the course of the inquiry into the convictions of the Ananda Margi which was conducted by Wood J of the New South Wales Supreme Court, whereas, at the time of writing of *Evil Angels*, the Morling inquiry into the Chamberlain trial had been announced but had not begun to take evidence.

Again, Molomby had the advantage that he could point to the villain of the piece: the prosecution case against the Ananda Marga trio depended substantially on the credibility of Richard Seary, the police informer, accomplice and *agent provocateur* whose evidence of the events leading up to the arrest of the Ananda Marga trio and of the implication of the defendants in the Hilton Hotel bombing was finally and thoroughly shown to be worthless. In the case of *Evil Angels*, the immediate villain, on the Chamberlains' case, was the dingo; but the real rascality hinted at in the book was the work of officers of the Northern Territory Police Force, and their leaks to the media, which contributed to the irrational inflammation of public opinion against the Chamberlains.

This having been said, the books - aspiring as they do to a technical flavour - stand to be assessed by reference to the extent to which they

succeed in developing and in convincing the reader of the truth of the underlying hypothesis. In that respect, Molomby's is clearly, to this reviewer's way of thinking, the superior work.

There are a number of stylistic features in Bryson's book which may irritate some. It is indirect. In places, it meanders. It is redolent with journalese. In places, the content is simply distracting: the starkest example of this is the introduction, which deals with events in Pennsylvania and elsewhere in the United States between 1844 and 1905. There is no connection relevant to the theme of the book between the Introduction and the rest of the book, although historical material appears again at pp 251-256.

Again, a substantial part of the embellishment of persons, places and events in the narrative in *Evil Angels* adds nothing to and, indeed, detracts from the flow of the work. The worst feature of this embellishment is that it appears to be used to shore up the expression of partisan sentiments; in a serious work of this nature, if such sentiments are allowed to intrude, they should be supported by reference to objective facts, not mere colour.

One question which occurred to this reviewer was why Bryson did not comment at all on the reasoning of the Full Federal Court and of the High Court in the course of their respective reasons for dismissing the Chamberlains' appeals against conviction. A lot of space is devoted, in the book, to events at the inquests and at the trial; subsequent curial developments are ignored.

Both books repay reading. Both authors are to be applauded for having undertaken the difficult tasks of thoroughly narrating the facts underlying the trials on which the books focus, of explaining to a lay readership the technical reasons why, in the view of the authors, miscarriages of justice occurred and of sketching the human dimension of our demonstrably imperfect system of criminal justice administration.

One gains the impression that both authors are supporters of the jury system. If the trials the subjects of these two books demonstrate anything, it is the unreliability of the jury and the inappropriateness of committing certain kinds of cases to juries. In the language of one High Court justice, the juries' verdicts were, as they have always been, 'opaque'. The only means by which the veil can be lifted from the deliberations of the jury is to require juries to deliver reasons in writing for their verdicts. Such a requirement would quickly bring the system of trial by jury to an end.

*Philip McNamara\**

**DRUG USERS AND THE LAW IN AUSTRALIA** by *T Carney* (Law Book Co 1987) pp 1xi, 390.

I want to get something off my chest at once. Let there be no mistake about it. This is a *wonderful* book. Its only flaw is a completely inadequate index. That aside, it is intelligent, thought-provoking, well written, very thoroughly documented and researched, and beautifully organised. The Law Book Company should be congratulated for producing it, all health and welfare workers, especially the bureaucrats, should be

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compelled to read it and then be examined on it, and someone should give Terry Carney an award.

The book is obviously a flow on from Carney's PhD thesis. It deals comprehensively with civil drug and alcohol treatment systems, sentencing of drug offenders, detoxification services for alcoholics, and income support for drug addicts and alcoholics. It not only sets out the present position in Australia and how we got there and why, it also critically examines each area with a fine attention to detail, and then steps back from all of these disparate areas and discusses the broad policy questions which have been synthesised from each. It's a tour de force, and no book review could adequately summarise it, so I do not intend to do so. Instead, I will take up some of Carney's themes as illustrations of what this book is about. But first, this is what Carney says that it is about:

'The purpose of this book has been to examine three branches of legislative policy relevant to the management of people characterised by society as either alcoholics or as dependent on drugs. The branches selected for discussion - namely sentencing dispositions, civil treatment programmes and welfare schemes - highlight the conflicting values and principles pursued by adherents to the law enforcement, medical, and social welfare perspectives. Legislative and administrative responses by the community to this group of people differ according to the perspective adopted. Ambiguity and conflict between legislative policies is mainly due to unresolved tensions between these professional perspectives on this social problem. (at 368)'

'This book argues...that the principal requirement is a new mechanism for policy formulation and administration - a Commission which is able to take the long view, and to concentrate on the less spectacular enunciating an integrated set of policies - the keystone objective of which policies would be a cluster of welfare objectives. That is the central (and conservatively framed) argument advanced in this book. (at 1xi)'

Now, I am not sure that that proposal will be accepted, and if so, whether it will work. And I am less sure that this Commission will do what Carney wants it to do. The idea is to set up an independent autonomous statutory authority with essential control over all aspects of the area and over all three of the branches - criminal justice, civil treatment, and welfare. The Commission should be independent of Ministerial control and have a guarantee of funds. It should be composed of a variety of people, the majority of whom should be independent of government. It should, however, be accountable to Parliament. Crucially, the Commission should have the carriage of reforms as its object, with adequate executive powers of implementation.

While I see what Carney puts forward as the benefits of this idea, including, for example, the values of independence and accountability and the appropriate structuring of inevitable discretions, I have the following difficulties:

1. I am not sure that the Commission will be any better than what we have now - an assortment of what are in essence Government departments with varying degrees of autonomy. In other words, funding

and policy-formulation are at present in a sorry state. How will this Commission guarantee that the same persons will not move into a new set of offices and wear different hats? Carney seems to think that the majority of non-government members of the Commission will make a crucial difference. I beg to differ. For example, Carney argues forcefully and well that compulsory third party civil committal should be abolished except in cases where, broadly speaking, the person in question is causing harm to others. I agree - but I was spectacularly unsuccessful in persuading any one else on a committee of experts which included lawyers, private service providers, a police officer, government experts and a union representative. Why would this Commission reach a different result.

2. Carney gives no indication that I can find whether this would be a State Commission, or a Federal Commission, or both. As always in Australia, the constitutional distribution of powers is a major impediment to the integration of defensible policies in overlapping areas. The fact is that criminal justice and civil treatment are fundamentally under State control, income maintenance is essentially under Commonwealth control, and health is split between them. Moreover, as Carney himself notes, the Commonwealth and the States have simply been unable to agree on policy in the drugs area, despite such rhetorical (and ultimately futile) devices as the Drug Summit. The Commission may find itself very effectively hamstrung.

3. As a matter of politics, I doubt very much that either the criterion of autonomy from Ministerial control or guaranteed funding levels will eventuate. Carney discusses the political feasibility of the Commission, remarking, quite rightly, that questions of political feasibility are problematic. I do not think his assessment that it is politically feasible is naive - I simply think that he underestimates the desire of politicians and departmental bureaucrats for power. Power, particularly in an area which includes drug use, is rarely given away. Moreover, it is very clear that Treasury thinking opposes tied budgetary funding, and in the present climate of frenzied budgetary restraint, a call for yet another quasgo (or quango) with guaranteed levels of funding is likely to be met with snorts of derision. In fact, Carney contemplates two bodies, not just one. Almost as a throwaway line, he advocates the simultaneous creation of an 'advisory council' (at 342). It is not clear why this is necessary or who will be in it.

4. Carney clearly envisages a reforming role for the Commission. He is, however, less than clear on the tricky question of whether the Commission is to have some power to by-pass the usual (clogged and timid) avenues of legislative change. If the Commission is merely to generate proposals for change, there is little ground for believing that it will be more effective in prodding Ministers and legislatures than government departments. On the contrary, there is the distinct possibility that the creation of an autonomous external body will generate hostility to proposals for change within the departmental structures responsible for the carriage of the Minister's legislative programme. On the other hand, if the Commission is to be given some sort of legislative or quasi-legislative power, questions of political feasibility raise themselves again. Similar proposals have been made for law reform commissions and have fallen on VERY deaf ears.

All of this does not mean that Carney is wrong. I just have my doubts. And none of this should detract from the quality of this work. The number of Australian law books which go beyond the dry recitation of

law and occasional formal critiques to the overt discussion of social policy based on detailed inter-disciplinary research can be counted on the fingers of one hand. This may be the index finger. Buy the book and read it.

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