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THE TOBACCO INSTITUTE CASE: IMPLICATIONS FOR THE NH&MRC, FOR PUBLIC INQUIRIES AND FOR JUDICIAL REVIEW

*Robin Creyke**

Introduction

Decision-making in the public sphere, to be lawful, must comply with the processes of administrative law. Behind this requirement is the assumption that a decision which adheres to administrative law principles, is more likely to be defensible or, indeed, correct. Rigorous processes are also required for developing scientific principles. The methodology of science involves analysis, deduction and inference in order to construct a systematised body of knowledge about people and the environment. These processes must be undertaken with the utmost care and precision in order to produce results which are not discredited. The quality of a legal or scientific principle will depend on the rigour of the methodology by which it was constructed.

In *Tobacco Institute of Australia Ltd v National Health and Medical Research Council*[1] (the *Tobacco Institute* case), an application of administrative law standards to the processes of the National Health and Medical Research Council (NH&MRC) resulted in the discrediting of a draft scientific report on passive smoking,[2] without necessarily casting doubt on the validity of the science contained in the report.[3] The draft report represented three years of intensive work, by reputable researchers,[4] supervised by a working party of eminent medical scientists and academics.[5] It is not surprising, therefore, that there are some in the community who question the appropriateness of the intrusion by the law into the operations of this pre-eminent national scientific body.[6]

This paper considers the background to the *Tobacco Institute* case and the reasons for the decision, comments on certain aspects of those reasons and makes suggestions for strategies to avoid some of the legal criticisms. The paper also examines the effect of the finding that the processes of decision-making engaged in by the NH&MRC were flawed, and concludes by exploring whether there is value in having a legal regulatory regime imposed on the operations of the NH&MRC. The focus of the paper is on the proper processes of consultation which should be undertaken for public inquiries, and in particular what the law requires of those processing material submitted to such inquiries by members of the public.

The Findings

On 20 December 1996 Justice Finn of the Federal Court of Australia found that the NH&MRC, in undertaking an inquiry into the effects of passive smoking on health, had not followed statutory procedures for its decision-making processes; had failed to discharge its duty of public consultation; had not taken into account relevant considerations; and had breached its obligations to adopt fair processes. He set aside the decision of the Administrative Appeals Tribunal (Tribunal) under appeal and remitted the matter to the Tribunal to redetermine the

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matter. The finding was the culmination of several challenges, both informal and formal, led by the Tobacco Institute of Australia Ltd (Tobacco Institute), into the NH&MRC inquiry into passive smoking.[7]

Background to the dispute

The genesis of these proceedings was a public announcement by the NH&MRC in May 1993 that it had established a working party to update its 1986 report, *Effects of Passive Smoking on Health.* The notice offered public consultation, invited public comment on the terms of reference, and stated that further consultation would be held once a draft report was prepared. The Tobacco Institute objected to the terms of reference, an objection which resulted in an application to the Federal Court for review. That litigation was settled in March 1994.[8]

In the meantime, in June 1993 the *National Health and Medical Research Council Act 1992* (Cth) (the NH&MRC Act) came into effect. Hence, for the first time in its over 60 years of existence, the processes of the NH&MRC were covered by a well-defined legislative regime.[9] The result was that the subsequent litigation between the Tobacco Institute and the NH&MRC took place in the context of formal legal requirements for public consultation which were imposed on the NH&MRC under the *NH&MRC Act.*

Public consultation is required by section 12 of the Act whenever the NH&MRC intends to make a recommendation for some form of regulatory regime or to issue guidelines.[10] The public must be consulted at two stages: when the NH&MRC decides to make a recommendation that a matter be regulated or to issue guidelines, it is required to publish a notice of its intention and invite submissions; and when draft regulatory recommendations or guidelines have been prepared, the NH&MRC must again publish a notice containing the text of the draft and invite submissions from the public. The NH&MRC acknowledged in its draft report that the "process is designed to encourage public participation at every stage in the development of NH&MRC advice, guidelines and recommendations".[11] Further details of the processes appear later.

On 9 March 1994, the NH&MRC published a notice under subsection 12(2) of the Act, as required, formally indicating that an inquiry was to be held, and that the inquiry was to determine whether to issue regulatory recommendations or guidelines in relation to the effects of passive smoking on health in the workplace, public places and the home. The task of preparing a draft report was delegated to a working party of the NH&MRC. The working party, in turn, commissioned two researchers to read and summarise the submissions, and to assign key words to each submission so as to provide identification of their scope.

On 12 April 1994, the Tobacco Institute made a 34 page submission.[12] Attached to that submission was a report from a University of Queensland researcher; three folders containing 122 scientific publications and four books referred to in the submission; five bound volumes of comments of independent scientists in relation to a report of the United States Environmental Protection Agency (EPA), *Health Effects of Passive Smoking: Assessment of Lung Cancer in Adults and Respiratory Disorders in Children*; a bound volume containing comments by independent scientists entitled *Environmental Tobacco Smoke: A Guide to Workplace Smoking Policies - Public Review Draft*, and a folder containing comments on the EPA document entitled "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders". In all, it was estimated that the material filled at least three standard sized cardboard wine boxes.[13]

Later, in November 1994, the Tobacco Institute submitted a report it had

commissioned, by what was described as the independent working group (IWG) of doctors and scientists, to examine whether a link existed between passive smoking and disease in adults and children and to prepare an evaluation of the scientific literature on the subject.[14] This material was in addition to papers and references to a further 79 scientific publications which had been supplied by the Tobacco Institute on 29 September 1993 in response to the NH&MRC's first terms of reference.[15] Over fifty submissions were received from other interested people and organisations.[16]

By November 1995 a draft report had been prepared by the NH&MRC working party and on 22 November, the NH&MRC discussed the draft Report and apparently accepted its recommendations.[17] The draft Report was then released for public comment and a copy was supplied to the Tobacco Institute. On 2 December 1995, the NH&MRC placed an advertisement in *The Weekend Australian* advising that the draft report had been released and invited comments.[18]

Proceedings for review

On 4 July 1996, the Tobacco Institute instituted proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and sought judicial review of the processes or conduct of the inquiry on three grounds:

- that a policy adopted by the NH&MRC of only considering papers published in the peer-reviewed scientific press was unlawful;
- that it was unlawful to extrapolate from studies of environmental tobacco smoke (ETS) in the home and conclude that there would be similar risk effects, in proportion to the degree of exposure, in the workplace; and
- that it was unlawful for the NH&MRC to fail to consider submissions and support material lodged by the Tobacco Institute, and to rely instead on summaries of submissions prepared by researchers.

The specific claims were that the NH&MRC failed to take account of relevant considerations, that it did not accord the Tobacco Institute procedural fairness, and that it had acted unreasonably.[19] Finn J made no findings in relation to unreasonableness [20] and concluded that the factual matters which resulted in the finding of failure to take account of relevant considerations would equally have grounded a procedural fairness error.

The NH&MRC and public consultation

Before examining the grounds of invalidity, it is instructive to consider the background to the NH&MRC's consultative processes. The need for public participation in the information-gathering and policy-providing functions of the NH&MRC was a key issue in the report in 1991 by the Administrative Review Council (ARC) which preceded the passage of the NH&MRC Act.[21]

The report recommended that there should be legislation to cover the operations of the NH&MRC, and the ARC also suggested that:

- the legislation should require a consultative process for any inquiry, and prior notification of the form of consultation;
- the NH&MRC should determine the form of consultation, including minimum requirements;
- the NH&MRC should publish guidelines on the forms of consultation which would be offered and what procedures would be adopted for consultation including the circumstances in which consultation might be curtailed or dispensed with; and

- the NH&MRC's *Annual Report* should provide details of the implementation of these guidelines.[22]

The recommendations were largely implemented.[23] The NH&MRC Act and the Regulations are, for practical reasons, not as prescriptive as the ARC recommended. Nonetheless, it is clear that public consultation is a central element of NH&MRC processes. For example, the Act states in its objects clause (subsection 3(2)) that:

> It is the intention of the Parliament that, to the extent that it is practicable to do so, the Council should adopt a policy of public consultation in relation to individual and public health matters being considered by it from time to time.

Sections 12 to 15 of the Act detail the consultation procedures, list the occasions when procedures may be modified, and require the Council to develop procedures for making submissions.

Section 12 of the Act, referred to earlier, is the key provision. Once the NH&MRC has decided to make a regulatory recommendation or issue guidelines, subsection 12(2) requires the issue of a notice seeking public consultation. Broadly the notice must inform of the intention to make the recommendation and invite submissions from interested persons or organisations. The manner and form of the notice are set out in the National Health and Medical Research Council Regulations (NH&MRC Regulations).[24] The NH&MRC Regulations state that any notice must specify the subject of the inquiry, invite submissions, set out how to make a submission, specify the closing date for submissions and give details of any other consultations which are contemplated. To underscore the obligatory nature of the notice, the NH&MRC Regulations were amended in 1993 to replace the words "is to" in the operative provisions with "must".[25] There is no obligation to hold a public inquiry. Inviting submissions from the public is sufficient. However, it is clear from the terms of subsection 12(2) that the two are not synonymous and that, on occasions, a public consultation process may be implemented in addition to calling for public submissions. The procedures are, therefore, a good model for public consultation processes and the findings in the Tobacco Institute case of what the law requires of such processes contain lessons for other bodies subject to similar consultative obligations.

The requirement for public consultation was said by Finn J to enhance the NH&MRC's independence, and to ensure that it operated in a public and open manner and was accountable for its actions.[26] As Finn J noted, public consultation is not an "empty term"[27] nor should the requirement be treated "perfunctorily or as a mere formality".[28] Indeed, his Honour noted that the spirit of the Act "designedly places the NH&MRC in a partnership of sorts - albeit not an equal one - with the community it serves" and he went on to note that "[t]here are obvious democratic reasons why the parliament, in giving the NH&MRC its powers, subjected it to this obligation".[29]

In summary, then, public consultation means that whenever the NH&MRC is involved in making a regulatory recommendation or issuing guidelines, the Council must publicly advertise its intention; must call for submissions, not once, but twice; and may provide for other forms of consultation such as holding a public hearing or by personal interview. The purposes of the public consultation process are twofold: to ensure that the NH&MRC is independent and that it is accountable.[30]

In the *Tobacco Institute* case it appears that the NH&MRC complied with these rules. When it called for submissions the NH&MRC placed an advertisement in *The Australian*[31] which notified people that there was to be an inquiry. The notice specified the subject matter of the inquiry. The advertisement stated that the inquiry

was to identify whether guidelines and regulatory recommendations were needed to prevent any ill effects on health from passive smoking in the workplace, public places and the home;[32] and the advertisement called for "comments". Again, when the draft report and recommendations had been prepared, the NH&MRC inserted an advertisement in *The Weekend Australian* in accordance with subsection 12(3), inviting submissions on the draft recommendations.[33]

How then can Finn J claim that the public consultation process was flawed? The judgment does not state that there is any specific breach of the statutory processes. The only comment is that "in so far as complaint is made of failure to comply with the statutorily prescribed consultative process, it is that the working party did not have regard to the submissions received when preparing its recommendations".[34] In other words, it was not failing to follow the prescribed statutory steps which was the problem; rather it was the manner in which those steps were carried out.

The focus of the criticism was the deliberate exclusion by the working party of some of the material received by the NH&MRC. It was argued on behalf of the NH&MRC that to achieve a workable volume of material, "it was open to the working party to determine the matters to which, and the material for which, it would have regard in making its recommendation" and that "to limit its review of scientific evidence to peer reviewed material and to exclude studies on ETS in the workplace, were ones properly open to it as a matter of judgment and methodology".[35] The procedures had been devised because the volume of material received by the NH&MRC, particularly from the Tobacco Institute, was so great that filtering the material was essential if the draft report was to be prepared in a reasonable time. Finn J's findings on these processes have resource implications for public inquiries especially when they receive a larger than expected volume of material.

Failure to consider relevant matters

It is necessary, therefore, to turn to those issues. It will be recalled that the first ground of complaint was that the NH&MRC failed to take account of relevant considerations. This ground of judicial review was given the benefit of a text book analysis by Mason CJ in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[36] and requires that four matters be established:

- that the matter was relevant;
- that there was an obligation to consider the matter;
- that the decision-maker was aware or ought to have been aware of the matter; and
- that the matter was not considered.[37]

The principal finding in the *Tobacco Institute* case was that all the material produced by way of the public submissions was relevant material. The Council should not have excluded some material (non-peer reviewed material and studies of ETS in the workplace) and should have given a more thorough consideration to other submissions. It was not sufficient for it to rely on a report of its working party which relied on the summaries of the two researchers and the examination of some only of the submissions and other studies. For the purposes of this paper these failures will be considered in relation to all four aspects of the ground of review. In reality, only the first and the fourth element of the ground are pertinent to the facts of the *Tobacco Institute* case.

Is the matter relevant?

Limiting the range of potentially relevant matters is a difficult task for decision makers and inevitably involves an element of subjectivity. Criteria of relevance may be explicitly stated in the legislation; or may be discerned from the

scope and ambit of the Act or regulations.[38] Matters outside the legislation may also be relevant, for example, letters, submissions or, as in this case, the advertisements and the terms of reference. Provided there is some connection, in an administrative sense, between the material and the statutory criteria, the material may be the genesis of relevant matters. Hence parties can add to the agenda and manipulating the agenda can work to advantage one party or the other.

The NH&MRC Act is general in nature and does not specify the criteria of relevance for any particular inquiry. However, the invitation to the public in subsection 12(2) to make submissions "relating to the proposed recommendations, [or] guidelines" and the requirement in subsection 12(3) that the NH&MRC must prepare its recommendations "having regard to the submissions received" ensures that submissions relating to the inquiry are relevant matters. The NH&MRC Regulations require the subject-matter of the inquiry to be identified and that, too, is a relevant matter. Of necessity, when a public inquiry is to be held, the terms of reference of the inquiry will particularise the matters for comment and these provide detailed matters of relevance.

The terms of reference of the passive smoking inquiry were quite specific:

- to review the relevant scientific evidence linking passive smoking to disease in adults and children;
- to estimate the extent and impact of any illness found likely to be due to passive smoking in Australia;
- to make recommendations to reduce any illness found likely to be due to passive smoking in Australia.[39]

Although the NH&MRC attempted to argue that this was an internal working document and did not restrict the ambit of its inquiry,[40] Finn J rightly rejected this claim. As he commented, the document was provided to the public and "it thereby provided and *fixed* some part at least of the criteria for judging whether material was or was not relevant to the decision".[41] For example, the mention in the first term of reference that the NH&MRC would review "the relevant scientific evidence," in combination with its statutory obligation to consider "submissions" from the public, made relevant any material which could be so classified. As Finn J noted, it was unfair to advertise that the organisation would accept any relevant scientific material if it did not intend to do so.[42]

There are other, less formal, sources which may become legally relevant. These often comprise communications between the parties such as press releases, publicity material,[43] letters, facsimiles and today, email. In the *Tobacco Institute* case, Finn J found relevant matters in the terms of the advertisements and in the letter dated 17 March 1994 from the NH&MRC to the Tobacco Institute. The request in the first advertisement for "comments" on the inquiry meant that any material received in the form of "comment", regardless of its content, became legally relevant. That was a criterion of relevance which applied to the public at large.

However, as this case illustrates, some relevant matters may be specific to an individual or group. The letter from the NH&MRC to the Tobacco Institute had stated: "the working party will consider in the review *all relevant scientific evidence, including all relevant scientific evidence submitted to it by the institute and by other interested parties*" (italics supplied).[44] In effect that became a guarantee to accept any material the Tobacco Institute supplied. "[A]ll relevant scientific evidence," according to Finn J, meant just that. Hence, when the Tobacco Institute produced its large volume of scientific literature, the NH&MRC incurred an obligation to scrutinise every item which fell within the

description. The relevant matters discerned from the legislative terms, the terms of reference, the advertisements and the letter to the Tobacco Institute, allied with the obligatory requirement to "have regard to" such evidence (see below, *Obligation to consider the matter*), proved to be the undoing of the NH&MRC draft report.

Obligation to consider the matter

The foregoing discussion indicates that the parties can take control of the agenda of relevance. That is true. However, there are limits. Not every relevant matter must be considered by the decision-maker. As Deane J commented in *Sean Investments Pty Ltd v Mackellar*:

> This does not, however, mean that a party affected by a decision is entitled to make an exhaustive list of all the matters which the decision-maker might conceivably regard as relevant and then attack the decision on the ground that a particular one of them was not specifically taken into account. ...The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.[45]

His Honour did not specify what circumstances would be relevant. However, matters which *must* be considered are those which are given prominence by the legislation or which are central to an inquiry.[46] Hence critical evidence, including of key witnesses, or major submissions, must be read and referred to in a report or reasons for a decision. A failure in either regard creates a risk that a court would infer that the matters have not been considered.[47] For example, the NH&MRC Act, in part of its charter which was not relevant for the *Tobacco Institute* case, requires that in the case of medical research involving humans "the Council must issue guidelines" on the ethical issues relating to health.[48] The centrality of that principle means that consideration of ethics guidelines is an essential matter in research using human subjects. The obverse of these principles is that matters which are insubstantial or inconsequential do not have to be referred to in any report, nor does their consideration become mandatory.[49] That is no comfort to researchers or officials faced with a large number of submissions to a public inquiry since they must still examine each submission to determine its significance.

In the *Tobacco Institute* case the key matters for consideration were indicated by the expression "*having regard to* submissions received" in subsection 12(3) (italics supplied).[50] The use of the obligatory formula meant, as Finn J noted, that the NH&MRC was obliged to consider every submission, and by implication, the documents accompanying each submission, as part of the decision-making process. The impact of this requirement is examined under *Failure to consider the matter* (see below).

Awareness of the material

A decision-maker is under an obligation to consider something only if the person is aware of the matter. That does not mean that the decision-maker can avoid having a decision invalidated through ignorance or wilful refusal to learn. There are minimum standards of inquiry and a failure to seek out centrally relevant material which is relatively easily obtained is a ground of invalidity.[51] In addition, the decision-maker is deemed to have constructive knowledge of the matter, if that knowledge is possessed by a delegate or *alter ego* in the agency.[52] In the *Tobacco Institute case*, there was no doubt that the NH&MRC was aware, in a general sense, of the submissions it received. The real problem was the degree of attention each item was accorded (see *Failure to consider the matter,* which follows) and that is not a matter addressed by this element of the ground of review.

Failure to consider the matter

What amounts to a failure to consider a matter was critical to the outcome in the *Tobacco Institute* case. This element of the ground of review raises two issues: what is the extent of consideration which the law requires; and legally, who has to undertake that consideration. It will be recalled that the consideration of the public submissions to the passive smoking inquiry was undertaken in three stages: submissions were examined and much of the material summarised by two academic researchers; the summaries were read by the 10 member working party which selected some full submissions and supporting material for closer analysis; the working party's report based on this process was then presented to the NH&MRC for decision.

Finn J found that the fundamental legal obligation on the NH&MRC was to consider every submission and its accompanying documentation; and "genuine" consideration, or consideration in a "real sense" had to be given to each one.[53] As Finn J noted, the NH&MRC "must have regard to the submissions received irrespective of whether, in the end, they are found to contain matter relevant at all to the decision to be taken. This obligation is a central element in facilitating the community's participation in the NH&MRC's policy development process".[54]

This first requirement was breached in two respects: the working party, and in turn the researchers, adopted an *a priori* criterion for excluding material on the basis that it was not peer-reviewed or that it related to the impact of passive smoking in the workplace (the "self-denying ordinance" the working party imposed on itself[55]); and the working party did not, at least collectively, consider all the submissions.[56] Finn J was critical of this tactic. As he noted, when public participation is involved, the public is not going to speak solely in peer-reviewed terms, especially when they have been led to believe that other material will be acceptable.[57] In this statutory context, by excluding some material, albeit on academically acceptable grounds, without warning the public that it intended to do so, the NH&MRC fell into error.

Finn J was also critical of the degree of consideration of the material which was perused. The statutory requirement to "have regard to" the submissions, involved more than brief summaries and a cursory examination of the material submitted. The NH&MRC had argued that consideration of the summaries and a selective examination of the submissions was adequate for this purpose. Finn J rejected this argument. The minimum legal standard is that consideration of material must be "genuine" in the sense that it is not simply a formality or a token examination.[58] As Finn J noted, genuine consideration involves "an active intellectual process directed at that ... submission"[59] and the obligation required the Council or its working party "to give positive consideration to [the] contents"[60] of all the submissions "even if in the end it decided to give some or all of that material no weight".[61] In other words, the summaries of the researchers were inadequate since they were too brief to alert the members of the working party to the need to undertake a more thorough analysis of the material, and the working party were selective in what they read which was insufficient for the comprehensive examination which was required.

The reference to the weight to be accorded the material warrants a comment. It is orthodox doctrine that the weight given to a matter is for the decision-maker alone, and the weight given to a matter is generally not to be questioned by the courts.[62] In reality, the courts do attempt to set minimum standards. This is illustrated by the *Tobacco Institute* case. If the NH&MRC was free to decide that no weight should be accorded to non peer-reviewed material, it follows that the Council was

free to ignore the material. There is little point in reading a submission if it will have no impact on the final decision. This reasoning exposes the inconsistency between this rule and the requirement that the decision-maker must genuinely consider the matter. That can only suggest that the rule about weight must give place to the requirement to consider relevant matters.

The second issue is whose failure to do the considering is legally relevant. Unless the statute requires a named decision-maker personally to consider the matter,[63] it is accepted that others may undertake part of the task.[64] That is a recognition of the realities of decision-making within a bureaucracy where the formal decision-maker may be a busy senior official or the minister. Hence, in an inquiry involving public submissions it is clearly acceptable to delegate the reading, analysing and evaluating of material. The decision-maker may rely on these evaluations, summaries or reports provided they are accurate and sufficiently comprehensive to enable a lawful decision to be made.[65] But if the summary is too brief, or fails to note a material fact which the decision-maker is bound to consider, or is legally or factually incorrect, the decision by the statutory decision-maker will be flawed by these errors.[66]

The NH&MRC, the named decision-maker, did delegate preparatory aspects of the task. The working party was to consider the material submitted and draft a report and recommendations. In turn the working party commissioned two academic researchers to undertake the preliminary sifting and classification of the submissions and supporting documents. Unfortunately, although the delegation may have benefited the NH&MRC in a practical sense, it did not do so legally. The NH&MRC was deemed, through its working party, to have failed to consider the non-peer reviewed and other material which had been excluded as a matter of policy; and the draft report was invalidated because the consideration accorded to such material as was considered, was inadequate.

There is a hint in the judgment that the degree of attention required may vary with the number of people involved in the process. Finn J qualifies his finding that consideration of the summaries was insufficient by noting that it was certainly inadequate in a situation in which there was, in addition to the two researchers who prepared the summaries, a 10 person working party which could have been expected to divide up the reading between them.[67] However, it is unlikely, even if the task had been assigned solely to the two researchers, that their preparation of the short - often less than a page - summaries, could have met the law's test.

Lessons for public inquiries from the Tobacco Institute case

The case provides several lessons for public inquiries. Given the volume of material submitted, meeting the standards set in the *Tobacco Institute* case would have been an onerous obligation. Further, the standards took no account of the judgment which experts are expected to make about the quality of research findings and other writings.[68] This paper has earlier canvassed ways to minimise this requirement in order that insubstantial material will be excluded. Tailoring the terms of reference, and notifying members of the public of any limitations on the range or quality of material to be considered, are strategies which can be adopted for future inquiries.

Another important lesson may be learned from this example. If terms of reference of inquiries particularise relevant matters, crafting the terms of reference must always be undertaken with care. With hindsight, the NH&MRC should have been more specific about the kinds of material they were seeking. It is easier to be wise after the event, but if organisations like the NH&MRC, which are involved in public consultation

processes, have reason to believe they may receive more material than they can handle, or are unwilling to consider unmeritorious material, it is sensible to cap the volume of material or, at least, to warn people that not all material will be accorded equal weight. The warning can be made in the information, such as the terms of reference, which is available to those likely to make submissions.

In other words, not only may each party extend the agenda but the government agency can also limit the range of matters for consideration.[69] Hence, in the *Tobacco Institute* case if the terms of reference or the letters had clearly indicated that only peer-reviewed material would be considered, or that only meritorious material would be accorded weight, or that there was to be a ceiling on the number of pages of material submitted, the invalidation may have been avoided.[70] Provided any restrictions meet statutory requirements, and are reasonable, there can be no objection to such an approach.

Consequences of invalidity

Administrative activity benefits from a presumption of regularity. That is, administrative acts are valid until stated by a court to be otherwise.[71] Moreover, not every unlawful action will result in invalidity. It is only those matters which are critical to the outcome or are of fundamental importance which will have that effect.[72]However, once a court declares a decision or conduct to be unlawful, the result is that the decision or conduct is invalid or of no effect.[73] In this case, Finn J's characterisation of the requirement that the NH&MRC have regard to submissions by the public as fundamental, meant that invalidity was the outcome.

What impact did that have on the draft report? The immediate effect was that the draft report could not be submitted to the Council for release in final form, not could its recommendations for a regulatory regime to control ETS be accepted. In an administrative lawyer's terminology, the invalidated processes meant that the draft report could not provide a lawful foundation for subsequent administrative action. In order to reverse that outcome, the matter would have to be remitted to the working party who collectively would need to evaluate all the submissions and supporting documentation, whether that was undertaken personally by the members of the working party, or whether the members considered more complete summaries of all the material. That in turn would probably require a re-working of part of the report. At that point the draft report would again have to be issued for comment. Each of these steps would involve considerable cost and delay.

Invalid action can be ignored. Indeed, it is possible that much administrative action is based on unlawful decision-making. That is, there would be countless instances in which decisions have been made peremptorily in the knowledge that proceedings are unlikely to ensue. However, to ignore the unlawful status of a decision in a politically charged area of government administration would be unwise. For example, it would have been foolish for the NH&MRC to accept the recommendations of the draft, relying on the comment by Finn J that invalidating its process implied no judgment on its science. Given the history of this matter it is certain that the Tobacco Institute would again have mounted a challenge to any such action. In any event, the litigation has exposed at least one weakness in the scientific findings, since it has thrown doubt on the assumptions that the studies apply equally to the workplace and the home. In those circumstances, if the NH&MRC wished the integrity of the report to be beyond challenge, it would have no option but to take the harder route.

Litigation strategy

Finn J noted several times in his judgment that members of the working party did not

appear and give evidence about the processes adopted by the NH&MRC, nor of the extent of their consideration of the submissions. His Honour, therefore, applied a well-established evidentiary principle that a failure to adduce evidence, when evidence could be expected, implies that there is no positive evidence available.[74] Whether the failure to call the members of the working party as witnesses was a deliberate strategy by the NH&MRC's legal advisers is impossible to gauge from the judgment. However, it may have been prudent for a representative of the working party or the NH&MRC to take the witness stand. The absence of evidence from those most intimately connected with the conduct of the inquiry worked to the disadvantage of the NH&MRC since it prevented the presentation of evidence which might have allayed Finn J's concerns about the processes.

The second matter to note is the timing of the action. It was argued by counsel for the NH&MRC that the Tobacco Institute should not have been permitted to make the application because there had been a delay of some seven months between the release of the draft report and the application. That exposes an interesting anomaly in the procedures under the ADJR Act. An application for judicial review of a "decision" must be made within twenty-eight days of the notification of the decision. No such time limit is set for an application for review of "conduct".[75] In part, this may be due to the difficulty of pinpointing the time at which administrative activity culminates in what can be described as reviewable conduct. However, the time within which an application to review conduct is brought must still be reasonable and the court has a discretion to refuse to hear the matter.

This aspect of the case raises matters of concern - matters of which Finn J was fully aware. In the *Tobacco Institute* case it could be argued that a "decision" in ADJR Act terms had been taken. The statutory extension of "decision" in ADJR Act subsection 3(3) to include the making of a report or recommendation which is a precursor to a final decision, would encompass the draft report required by subsection 12(3). Publication of the draft report was the final phase in what his Honour characterised as the five-stage decision-making process[76] leading to regulatory recommendations or guidelines to be given legal effect by state legislation.[77] Yet the Tobacco Institute was permitted to mount an application for review on the basis of "conduct" not "decision" under the ADJR Act.

Two things about that finding may be noted. First, the High Court has indicated that it is generally inappropriate for a challenge to be made to conduct when the conduct has ripened into a decision. The reason is that any defects in matters of procedure can be adequately canvassed in a challenge to a decision, since any antecedent steps leading to the decision will be exposed for examination during discussion of the decision.[78] Hence, as a matter of practicality, there is no need to rely on conduct in these circumstances.

The second and more worrying element of Finn J's findings is that it opens the way for other litigants to avoid the 28 day time limit in the ADJR Act by challenging the preliminary conduct rather than the final decision. Although his Honour took care to make findings which indicated that the delay was not due to any dilatoriness on the part of the Tobacco Institute - findings based on the negotiations which were under way between the parties during this period - that does not obviate the possibility that other litigants may choose to circumvent the time limits in the ADJR Act by acting in a similar fashion. Although the outcome may have been justified in the circumstances of the *Tobacco Institute* case, the need for this course highlights the fact that the timelines in the ADJR Act for seeking review of a decision may need to be revisited - at least if the existing time limits are not to be subverted.

Conclusion.

A superficial conclusion which some might draw from this litigation is that despite the apparent rigour in the methodology required by scientists and lawyers, applying the processes of one discipline to the other is productive of angst for no discernible benefit. To those exposed to the lengthy and demanding judicial system, who were faced with an outcome which has apparently stymied the production of recommendations about a significant matter concerning public health, that belief may be understandable. Their response is one which is common to all faced for the first time with the demands for more stringent administrative process. If it could truly be said that the science of the report is impeccable then, it is argued, legal invalidation would be unwarranted. If that conclusion is correct, the exposure of the NH&MRC's processes to judicial review could be said to be an unnecessary exercise.

In my view, however, that conclusion is unwarranted. The *Tobacco Institute* case has exposed the magnitude of the legislative requirements for public consultation By doing so, it has alerted the NH&MRC and policy-makers to the demanding nature of these requirements. Making the research body aware of the need to adopt more rigorous administrative procedures is a healthy development. Careful process does enhance good decision-making. In order to avoid a repetition of the litigation, the NH&MRC is unlikely in the future to couch its advertisements or give undertakings in its correspondence which are unrealistic. It may choose, or have already chosen, to sharpen its procedures and to be more careful about defining its objectives and the methods it adopts for subsequent inquiries. That will benefit the public by alerting them to the ambit of inquiries and should prevent an undue burden being placed on the limited resources the NH&MRC has to conduct such inquiries.

At the same time, policy-makers have been made aware that meeting the current statutory obligations, for example, to consider all public submissions and their attendant documentation, may impose too great a burden on the NH&MRC's limited resources. That realisation, in both instances, may lead to changes in practices and even legislative change.

Further, it is not just inadequacy in process which has been exposed. The findings have cast doubt on the scientific propriety of transposing the scientific findings in relation to the effects of passive smoking in the home, to the workplace. In other words, the application of lawful processes has indeed thrown doubt on the quality of the science in the draft report.

Finally, the case has identified difficulties in applying the ground of failing to have regard to relevant matters, and the possible need to give further consideration to the time limits in the ADJR Act for applications for review. The litigation may have been painful and counterproductive at one level, but at another it has the potential to bring benefits not only to the public but to the administrative justice system, including its methods of conducting public inquiries, and to the national system for administering science research.

Endnotes

1 *Tobacco Institute of Australia Ltd v National Health and Medical Research Council* (1996) 44 ALD 1 (*Tobacco Institute* case).
2 National Health and Medical Research Council, *The Health Effects of Passive Smoking: The Draft Report of the NH&MRC Working Party* 1995 (*Passive Smoking Report*).
3 *Tobacco Institute* case 44 ALD 1 at 2.
4 Dr Charles Guest then of the Department of Community Medicine, University of Adelaide, now at the National Centre for Epidemiology and Health, Australian National University, and Mrs Soi Yeng Lewis, also of the Department of Community Medicine, University of Adelaide.

5 National Health and Medical Research Council, *Draft* Report, op cit, foreword [ii].
6 For example, "Threat to bypass gag on passive smoking study" *The Australian* 24 April 1997.
7 Also referred to as environmental tobacco smoke (ETS).
8 *Tobacco Institute* case 44 ALD 1 case at 5-6.
9 Prior to 1994 the operations of the NH&MRC had been conducted under a series of *Orders in Council* dating from 1936 (*Tobacco Institute* case 44 ALD 1 at 3).
10 The obligation also applies if the NH&MRC intends to engage "in any other prescribed activity" (paragraph 12(1)(c)). No other activities have yet been prescribed.
11 National Health and Medical Research Council, *Draft Report*, op cit, foreword [i].
12 This submission was in addition to two earlier submissions on 22 June and 20 June 1003 respectively (*Tobacco Institute* case 44 ALD 1 at 6).
13 Conversation with Dr Charles Guest, 29 May 1997.
14 *Tobacco Institute* case 44 ALD 1 at 7. The NH&MRC's closing date for submissions was 11 April 1994.
15 *Id* at 5.
16 *Id* at 10.
17 There was no formal notification that the recommendations had been accepted, but Finn J was prepared to infer acceptance from the issuing of the notice inviting public submissions (*Tobacco Institute* case 44 ALD 1 at 7).
18 *Id* at 7.
19 *Id* at 7-8.
20 *Id* at 16.
21 Administrative Review Council *Fifteenth Annual Report 1990-91*, Part 2, Letter 8 and see particularly, para 38, pp 111-112.
22 *Id* at paras 64-65, p 116.
23 *National Health and Medical Research Council Act 1992* (Cth) sections 12-15.
24 National Health and Medical Research Council Regulations 1993, SR 198/1993 as amended by SR 239/1993.
25 SR 239/1993 reg 3.
26 *Tobacco Institute* case 44 ALD 1 at 8.
27 *Ibid*, citing *TVW Enterprises Ltd v Duffy (No 2)* (1985) 7 FCR 172 at 178.
28 *Ibid*, citing *Port Louis Corp v Attorney-General of Mauritius* [1965] AC 1111 at 1117.
29 *Id* at 9.
30 *Id* at 8-9.
31 National Health and Medical Research Council, *Draft Report*, op cit, Appendix 1, 218.
32 *Tobacco Institute* case 44 ALD 1 at 5.
33 *Id* at 7.
34 *Id* at 10.
35 *Id* at 15.
36 (1986) 162 CLR 24.
37 J McMillan *The Laws of Australia Vol 2 Administrative Law* Chapter Four.
38 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.
39 National Health and Medical Research Council, *Draft Report*, op cit, 2-3.
40 *Tobacco Institute* case 44 ALD 1at 14.
41 *Id* at 15.
42 *Id* at 16.
43 *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 38 ALD 573, 589 per Hill J.
44 *Id* at 6.
45 (1981) 38 ALR 363, 375.
46 *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 144 ALR 567). The obverse is that matters which are insubstantial or irrelevant, even if considered, will not vitiate the decision (*Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 1 at 31, 33 per O'Loughlin J).
47 *WA v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 633; 686.
48 *National Health and Medical Research Council Act 1992* (Cth) ss 7(1)(a)(v), 8(1).
49 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24-25 per Gibbs CJ; *Muralidharan v Minister for Immigration and Ethnic Affairs* (1995) 40 ALD 265; on appeal 41 ALD 361.
50 That expression usually precedes certain factual criteria or matters of a policy nature which must be taken into account (*Tobacco Institute* case at 11 citing *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119).
51 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549; *Videto v Minister for Ethnic Affairs* (1985) 8 FCR 167; *Secretary, Department of Social Security v O'Connell & Sevel* (1992) 38 FCR 540; *Lek v Minister for Immigration and Ethnic Affairs* (No 2) (1993) 45 FCR 418; *Akers v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 363; *Tickner v Bropho* (1993) 40 FCR 183. The duty was acknowledged by several members of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR at 363-64 per Mason CJ and Deane J, at 374 per Toohey J, at 376 per Gaudron J; and at 389 per McHugh J.
52 *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65.
53 *Tobacco Institute* case, 44 ALD 1, at 15

54 *Id* at 12.
55 *Ibid.*
56 *Ibid.*
57 *Id* at 15.
58 *Ibid.* See also *Turner v Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 237, 241 per Toohey J; *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 per Gummow J; *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453, 468; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 at 472 per Wilcox J. However, use of standard form paragraphs in a statement of reasons does not necessarily mean that proper, genuine and realistic consideration has not been given to a matter (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481, 486).
59 Finn J was quoting from *Tickner v Chapman* (1995) *sub nom Norville v Chapman* 133 ALR 226 at 238 per Black CJ. See *Tobacco Institute* case 44 ALD 1 at 12.
60 *Tobacco Institute* case 44 ALD 1 at 12.
61 *Id* at 14.
62 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 24 at 40-41.
63 *Chapman v Minister for Aboriginal and Torrens Strait Islander Affairs* (1995) 37 ALD 1 at 31, 33, 46-7.
64 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65; *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The surrogate decision-maker may have formally delegated authority if the statute so provides or may undertake the task as a *de facto* decision-maker or *alter ego* (*O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1, 11).
65 *Century Metals & Mining NL v Yeomans* (1989) 100 ALR 383.
66 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.
67 *Tobacco Institute* case 44 ALD 1 at 12.
68 A view presented by Sir Gustav Nossal at the hearing and referred to by Finn J in the *Tobacco Institute* case 44 ALD 1 at 15.
69 For practical reasons, the same freedom to restrict the criteria of relevance is not possessed by the citizen.
70 *Tobacco Institute* case at 14-15.
71 *Re Adams and the Tax Agents' Board* (1978) 1 ALD 251.
72 *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 1 at 31, 33 cf at 46-7 per O'Loughlin J.
73 *Yarran v Blurton (No 2)* (1992) 112 ALD 603.
74 The principle in *Jones v Dunkel* (1959) 101 CLR 298. The principles has been accepted as being applicable to applications for judicial review (*Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (1996) 67 FCR 40).
75 *Administrative Decisions (Judicial Review) Act 1977* (Cth) paragraph 11(1)(c).
76 *Tobacco Institute* case 44 ALD 1 at 16
77 Section 4 of the Act defines a "regulatory recommendation" as "a recommendation of the Council that it intended to be given legal effect in a State by legislation of that State".
78 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322.

JUDICIAL POWER AND ADMINISTRATIVE TRIBUNALS: THE DECISION IN *BRANDY v HREOC*

*Janice Nand**

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Part 1: Introduction

The decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*[1] ("*Brandy*") brought into focus the longstanding tension between the limitations in the Commonwealth constitution regarding the bodies that may exercise judicial power and the administrative necessity to have executive tribunals exercising supervisory jurisdiction over government decision-making. Chapter III, section 71 of the constitution vests the judicial power of the Commonwealth "in the High Court of Australia, such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction". Since the High Court decision in the *Boilermakers'* case in 1956,[2] it has been settled law that the constitution precludes judicial power being vested in a body other than a court established in accordance with chapter III.

In *Brandy*, the High Court found that a statutory scheme which made determinations by the Human Rights and Equal Opportunity Commission ("HREOC") enforceable, in the absence of judicial review, invalidly conferred judicial power upon a body not established under chapter III of the constitution. The immediate effect of the decision was to preclude determinations of the HREOC from being enforced unless the Federal Court also found the relevant action to be contrary to the relevant human rights legislation.[3] Enforcement of such determinations can now only be effected through the judicial process. The broader effect of the Court's decision was to remind administrative tribunals of their limited authority and status in administrative review.

Administrative tribunals and government

The Commonwealth constitution distinguishes the powers of the executive, legislative and judicial arms of government. One of the most litigated constitutional matters in relation to the issue of the separation of powers is the division of power between the executive and judicial branches of government. The High Court in *Brandy* found that the uncertain boundary between judicial and executive power had been breached by the legislative scheme in question. Prior to this decision, however, the plethora of federal administrative tribunals had been able to edge closer to the roles played by courts due to the difficulties in determining the limits of judicial power. The exponential growth of legislation (at least in the volume of Acts, if not their number[4]) in the past two decades has created an imperative for administrative review due to the increase in decision-making pursuant to statutory criteria. In addition, one of the aims of the administrative law package was to ensure that individuals subject to administrative decisions had an

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expeditious and inexpensive right of appeal or review. Courts are generally acknowledged as being unable, or unable fully, to meet these requirements.[5] It is against this background that administrative tribunals emerged to fill the need for review without immediate recourse to the courts. Administrative tribunals are generally viewed as providing an informal or unintimidating avenue of redress for individuals who feel aggrieved by government action[6] and have become an entrenched part of the administrative landscape at the federal level of government.

The legislative schemes incorporating review by federal administrative tribunals are numerous. Aside from the broad jurisdiction currently exercised by the Administrative Appeals Tribunal ("AAT")[7], since federation many legislative schemes have included reference to specialist tribunals such as in the areas of taxation, broadcasting, corporations and securities, immigration, industrial relations, public sector employment, social security and veterans' affairs.[8] Early indications of the tension between judicial power and the power of administrative tribunals emerged in the fields of taxation in the *BIO* cases[9] and industrial relations in the *Boilermakers'* case.[10] In both cases, the Court's approach led to significant alterations to the structure of the tribunals in question. For example, the Taxation Board of Appeal was changed to the Board of Review with different powers and the Court of Conciliation and Arbitration was abolished and replaced by two separate bodies, namely the Conciliation and Arbitration Commission and the Commonwealth Industrial Court. The history of the High Court's approach to the powers of administrative tribunals is discussed in detail later in this paper and at this point it is sufficient to acknowledge that the Court's early views were largely restrictive of the powers of tribunals. Despite this early evidence of judicial antagonism toward administrative tribunals, tribunals continued to multiply in number to the extent that the administration of complex legislative schemes has now been structured around them. Judicial review has been relegated to the 'last resort' for aggrieved individuals.[11]

With this trend of conferring jurisdiction upon administrative tribunals has developed the need to give them the indicia of authority. Powers to award costs, issue summons, take evidence on oath and to conduct formal, court-like hearings have gradually been adopted by various tribunals to shore-up their status in the hierarchy of review. It is therefore not surprising to note the gradual increase in the powers conferred upon tribunals with a view to making their determinations the final step for aggrieved individuals. For example, sections 27 and 30 of the *Administrative Appeals Tribunal Act 1975* ("the AAT Act") grant the AAT the power to determine matters upon application by persons "whose interests are affected" by an administrative decision within the jurisdiction of the AAT. Section 31 of the AAT Act then provides that if the Tribunal decides that the interests of a person are affected by a decision, the decision of the Tribunal is conclusive. Such conclusive powers of determination were previously considered the traditional preserve of the courts and yet the perceived need for certainty and authority in relation to tribunals has led to significant developments and increases in their powers.

Adjudication of human rights issues by tribunals

The area of human rights regulation in Australia exemplifies the evolution of the powers of executive tribunals. Statutory regulation and the creation of a human rights tribunal form the core of the Australian response to the need for the elimination of discrimination and recognition of human rights. This approach commenced with the enactment of the *Racial Discrimination Act 1975*

which focused on conciliation and mediation by the Race Discrimination Commissioner as the primary steps in addressing racial discrimination. Court proceedings could be instituted where conciliation and mediation failed to resolve the matter, with injunction or damages being the main avenues of judicial remedy in such cases.

In 1981, the Human Rights Commission was created pursuant to the *Human Rights Commission Act 1981* and it assumed the intermediate tribunal position between the conciliation process and resort to the courts. The Commission had the power to determine whether an unlawful act had been committed and made recommendations to the minister.[12] As the opinions of the Commission were not "binding" on the parties, there could be no issue of the Commission straying into the field of judicial power.

The Commission was succeeded by the HREOC which was created by the *Human Rights and Equal Opportunity Commission Act 1986*.[13] The HREOC currently comprises a President, Human Rights Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Sex Discrimination Commissioner, Privacy Commissioner and Disability Discrimination Commissioner.[14] Initially, the powers of the HREOC were restricted to the making of declarations that the actions in question were unlawful and that certain remedial action should follow. The determinations could only be legally enforced through a party/complainant instituting proceedings in the Federal Court.[15] The Federal Court would then hear the matter *de novo* and reach its own views in relation to the original complaint.

The limited powers of the HREOC were emphasised by the Federal Court in *Aldridge v Booth*[16] and *Maynard v Neilson*.[17] In *Aldridge v Booth*, Spender J found that despite the investigation of a complaint by the HREOC, subsection 82(1) of the *Sex Discrimination Act 1984* required the Court to satisfy itself that as a matter of law and fact the actions in question were unlawful.[18] The following comments of Spender J demonstrate the lack of authority accorded to HREOC determinations once the matter reached the Court:

> [T]he court is bound to proceed only on evidence properly admitted before it in accordance with the rules of evidence, a stricture that does not necessarily apply to the Commission. Independently of that consideration, the evidence before the court will frequently not be the same as that before the Commission. It seems to me, having regard to the terms of s. 81(2), that any findings by the Commission can be of no assistance in the performance of the task entrusted to the Federal Court by s 82(2). That is not to say that what occurred before the Commission is irrelevant; by way of example only it frequently will happen that, in matters of credibility, the consistency of accounts will have significant evidentiary consequences; but the court has to exercise its own mind on material properly before it.[19]

This approach meant that a complaint was investigated afresh by the Federal Court and therefore a determination by the HREOC was without effect if challenged or not complied with. In *Hall v A & A Sheiban Pty Ltd*,[20] Lockhart J put the powers of the HREOC into a constitutional context:

> Plainly the reason for the legislature's enactment of s 81 [of the *Sex Discrimination Act 1984*] in its present form, which invests the Commission with the power to make declarations that of themselves have no force, effect or operation and which provides that the Commission's findings do not bind the parties, is to make clear that the Commission does not exercise the judicial power of the Commonwealth, which is exercised only when a matter comes before the Federal Court under sec.82.[21]

Despite the constitutional reason for the limited powers of the HREOC, concerns

emerged regarding the expense of instituting proceedings in the Federal Court and the uncertainty inherent in the duplication of investigation. For example, in *Maynard v Neilson*,[22] Wilcox J commented that the unenforceability of HREOC determinations could cause even greater hardship to a complainant if the respondent did not comply with the determination. His Honour concluded that in these circumstances it would be better to dispense with the inquiry procedure of the HREOC and amend the legislation to provide an immediate right of action in the Federal Court if a matter could not be resolved through conciliation. Criticism such as this led to the powers of the HREOC being investigated by a Senate committee with a view to finding ways in which to give determinations of the HREOC some "teeth".

In November 1992, the Senate Standing Committee on Legal and Constitutional Affairs released its report *Review of Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner*. In the report, the majority of the Committee recommended that the various legislation conferring jurisdiction on the HREOC be amended to allow determinations to be registered with the Federal Court and take effect as an order of the Court if not challenged through the commencement of judicial proceedings within a prescribed time. The effect of this proposal was to permit HREOC determinations to be enforceable by virtue of registration rather than through judicial review. However, where an objection was lodged within the prescribed period, the Federal Court would review the determination. Where judicial review was pursued, the introduction of "new evidence" (evidence which was not before the HREOC) could only proceed with the leave of the Court. This would ensure that the evidence considered by the Court and the HREOC would be similar which in turn could increase the possibility of the same determination being reached. The recommendation of the Committee was accepted by the Government and enacted through the *Sex Discrimination and Other Legislation Amendment Act 1992*. That Act established the scheme reviewed by the High Court in the *Brandy* decision.[23]

It is important not to overlook the importance of the amendments which gave rise to the decision in *Brandy*. Essentially, the high level of dissatisfaction with the previous scheme based on judicial enforcement brought about an innovative approach to defining tribunal powers. It was no longer politically acceptable to require complainants to go to the effort and expense of Federal Court review to enforce a determination in their favour and concurrently run the risk of receiving an adverse determination by the Court. Judicial review was considered to be a more appropriate course of action for the party dissatisfied with a HREOC determination, rather than a complainant who has achieved his or her desired outcome.

The new scheme was supported by the Attorney-General's Department. In an opinion dated 12 November 1991, the Chief General Counsel of the Attorney-General's Department, Mr Dennis Rose, expressed the view that removing the requirement for judicial review in order to enforce a determination by the HREOC did not contravene the constitutional allocation of judicial power. In Mr Rose's view the new scheme was analogous to the law concerning default judgments in that registration of the determination with the Court gave the respondent to the proceedings the "originating process" to contest the claim and where this was not availed of within the prescribed period, the determination should be enforceable.[24] On this approach, there was no conferral of judicial power on the HREOC, rather, the failure to pursue Court proceedings precipitated an order of the Court by "default".

Administrative necessity versus constitutional limitations

The development of administrative review in the area of human rights is instructive of the growing reliance and importance placed on tribunals by the federal government. As shown above, regulation of this area started from a purely conciliatory or mediation role played by the tribunal, developed through various levels of determinative powers which were only enforceable through judicial action involving a hearing *de novo*, to a relatively self-contained scheme including the potential for enforcement without judicial hearing. Prior to the decision in *Brandy*, independent action by the Court was no longer a prerequisite for enforcement of a HREOC determination.

The continued reliance upon tribunals in the area of human rights in Australia demonstrates that an administrative solution to dealing with human rights issues has been considered successful. It may be that society views judicial proceedings as inappropriate and less sensitive to the needs of parties in this area. Whatever the reason for the general reliance on administrative tribunals in Australian government, the fact remains that tribunals have grown not only in number but also in terms of their functions and powers. Is this development at odds with the stricture of section 71 of the constitution? If so, how can the legal and administrative requirements be reconciled to reduce the possibility of challenge to the powers of tribunals and the consequent diminution of their effectiveness and efficiency?

The aim of this paper is to examine the decision of the High Court in *Brandy* in the context of the Court's previous views regarding judicial power and administrative tribunals. One issue to be addressed is whether the decision in *Brandy* is a logical development in the Court's approach, an unexpected departure, or a distinguishable aberration. The implications of the decision are considered in the context of the difficulties for structuring federal administrative schemes arising from the limitations on the exercise of judicial power in the Commonwealth constitution. The decision in *Brandy* demonstrates the problems which section 71 of the constitution raises for developing schemes of review which meet the complex needs of modern government. As will become apparent, this issue is further exacerbated by the uncertain definition of judicial power utilised by the Court. If the uncrossable "line" set by section 71 is always shifting or obscured, the issue of conferring powers upon administrative tribunals will continue to be problematic. Finally, this paper will consider the possibility of developing a new approach to judicial power which would allow for the needs of modern government. Such an approach could redefine the parameters of judicial power in relation to administrative tribunals by accepting the broader, public law interest served in having tribunals with extensive powers.

Part 2: Brandy v Human Rights and Equal Opportunity Commission

Introduction

As discussed above, the scheme under review in the *Brandy* decision resulted from a widespread view that enforcement of human rights required a scheme which was not dependent upon judicial review. Despite the judicial comment, Senate Committee report and the view of the Attorney-General's Department which led to the scheme, on 23 February 1995 the High Court found key aspects of the scheme constitutionally invalid.

The publicity which followed the Court's decision in *Brandy* was extraordinary in its extent and concern about the implications of the case.[25] Other legislation incorporating similar enforcement schemes was thrown into doubt[26] and there was public concern that there would

be a return to a situation where human rights law in Australia was impeded by the cost and delay of judicial review.[27] The level of public reaction to the High Court decision reflected the concern which led to the creation of the scheme and the sudden public awareness of the limited powers of administrative tribunals. The Court had, it seemed, suddenly reasserted its role in the determination of human rights and rejected the more "user-friendly" scheme developed with widespread support. If nothing else, the High Court decision in *Brandy* is significant because of the way in which it focused public attention on the difference between courts and administrative tribunals in public administration. The decision is also significant due to the resolute manner in which the High Court rejected a model of administrative necessity in favour of strict constitutional requirements.

Facts of the case

The High Court decision in *Brandy v Human Rights and Equal Opportunity Commission*[28] ("*Brandy*") arose out of a complaint to the Human Rights and Equal Opportunity Commission ("HREOC') pursuant to section 22 of the *Racial Discrimination Act 1975* (Cth) ("the Act"). The complaint was lodged by John Bell, an officer of the Department of Aboriginal Affairs which later became the Aboriginal and Torres Strait Islander Commission ("ATSIC"), against fellow officer Harry Brandy. The complaint alleged verbal abuse and threatening behaviour by Mr Brandy and included a complaint regarding the inadequacy of the response of ATSIC and its Chief Executive Officer. The complaint alleged breaches of sections 9 and 15 of the Act which make racial discrimination unlawful generally and specifically in the context of employment.

The HREOC, as constituted by Mr Castan QC, investigated the complaint and found it to be substantiated. On 22 December 1993, Mr Castan declared, *inter alia*, that Mr Brandy and ATSIC respectively should pay $2,500 and $10,000 to Mr Bell by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by Mr Bell. In accordance with s25ZAA of the Act (discussed below), this determination was lodged by the HREOC for registration with the Federal Court on 23 December 1993.

On 20 January 1994, Mr Brandy applied to the Federal Court pursuant to subsection 25ZAB(5) of the Act for review of the determination. He also commenced proceedings in the High Court claiming that the sections of the Act which provided for the registration and review of a determination were invalid by reason of the requirements of chapter III of the Commonwealth constitution.

In its unanimous decision, the High Court found that the relevant registration and enforcement provisions of the Act were invalid. The decision of the Court was handed down with two sets of reasons, firstly, the joint judgment of Mason CJ, Brennan and Toohey JJ and secondly, the joint judgment of Deane, Dawson, Gaudron and McHugh JJ. In essence, there is little variation between the two sets of reasons. Both examined the statutory scheme for registration and enforcement in the Act and the case law relating to the nature of judicial power and found that one of the critical elements of judicial power, namely the ability to enforce a decision, was conferred upon an administrative or executive body in this case. On this basis, the relevant provisions amounted to the unconstitutional conferral of judicial power upon an administrative tribunal not constituted under chapter III of the constitution.

The legislative scheme

At issue in *Brandy* were provisions of the Act which allowed for a determination of the HREOC to be registered with the

Federal Court and subsequently enforced as a decision of the Court in circumstances where the determination was not the subject of an application for review by the Court. Given the unusual nature of the scheme, the relevant provisions warrant examination.

Section 25Z of the Act authorised the HREOC to inquire into a complaint and make a determination in the form of a declaration of the lawfulness of the conduct complained of and specifying action that should flow as a consequence. One of the declarations authorised by the legislation was the payment of compensation for any loss or damage suffered by reason of the conduct of the respondent. Subsection 25Z(2), nevertheless, provided that a determination "is not binding or conclusive between any of the parties to the determination".

Subsection 25ZAA(2) of the Act required the HREOC, as soon as practicable after the determination was made, to "lodge the determination in a Registry of the Federal Court". Lodgement for registration was a mandatory requirement. Subsection 25ZAA(3) imposed an obligation upon the Registrar of the Federal Court to register the determination. Section 25ZAA had no application where the respondent was a Commonwealth agency or the principal executive of a Commonwealth agency (discussed below). Pursuant to subsection 25ZAB(1), a determination registered by the Federal Court had effect as if it were an order made by the Court. However, no action to enforce the determination could be taken before the end of the application and review period (28 days) during which the respondent alone could apply to the Federal Court for review of the determination (subsections 25ZAB(3),(4),(5),(6) and (11)). Subsection 25ZAB(7) limited the power of the Court to grant an extension of time for applications to "exceptional circumstances".

The decision of the High Court

The reasons of the High Court were relatively brief considering the vast body of case law on the issue of judicial power. As the challenge in *Brandy* dealt exclusively with the registration/ enforcement provisions, the Court concentrated on a few leading judgments which dealt with the power of enforcement as one of the characteristics of judicial power.

The joint judgment of Mason CJ, Brennan and Toohey JJ

The joint judgment of Mason CJ, Brennan and Toohey JJ referred to the decisions in *Huddart, Parker & Co Proprietary Ltd v. Moorehead*,[29] *Rola Co (Australia) Pty Ltd v. The Commonwealth*,[30] and *Reg v. Davison*[31] for the proposition that a common, though not exclusive, characteristic of judicial power is a tribunal's ability to make binding and enforceable decisions. Whilst the Court in *Davison* found that it was possible for a tribunal to exercise judicial power without having the power to enforce its decisions, Mason CJ, Brennan and Toohey JJ in *Brandy* appeared satisfied that enforcement was a strong indicator of an exercise of judicial power.[32]

In this judgment, their Honours briefly canvassed other common aspects of judicial power such as the power to determine the existing rights of parties (as opposed to the non-judicial function of determining future legal rights, discussed below), the power to punish for criminal offences and to try actions for breach of contract. However, Mason CJ, Brennan and Toohey JJ did not consider in any detail the range of indicia of judicial power due to the fact that the *Brandy* challenge was limited to reviewing the constitutionality of the registration and enforcement provisions. In addition, subsection 25Z(2) of the Act unequivocally provided that determinations were "not binding or conclusive between any of the

parties to the determination". Their Honours had regard to the decision in *Aldridge v Booth*[33] and concluded that subsection 25Z(2) meant that the holding of an inquiry and the making of a determination under the Act could not of itself be seen as an exercise of judicial power.[34]

The following comment in this joint judgment compares previously recognised exercises of judicial power with the present legislative scheme:

> [W]hen A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards "supposed already to exist". And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question. Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch.III of the constitution.
>
> In the present case, the determinations by the Commission for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss 9 and 15 of the Act. Accordingly, the only distinction between the determination supposed in the last sentence of the preceding paragraph and the determinations by the Commission in the present case is that the Commission's determinations only become binding on the parties and enforceable after registration of the determinations in the Federal Court.[35]

This passage indicates that while the powers of determination vested in a court or tribunal may be the same in terms of applying pre-existing principles and standards, the inability of the tribunal to enforce its determinations weighs against the latter exercising judicial power. In this case, their Honours found that the relevant provisions of the Act included a scheme of enforcement based on the powers of the Federal Court without a determination by the Court. Their Honours therefore concluded that the provisions were invalid:

> [W]hatever might be the enforceability of a declaration that the plaintiff "do apologise", a declaration that the plaintiff "do pay the sum of $2500" to the third defendant, once registered, attracts the operation of s53 of the Federal Court of Australia Act 1976 (Cth). By that section, a person in whose favour a judgment is given is entitled to the same remedies for enforcement, by execution or otherwise, as are allowed by the laws of the State or Territory applicable.[36]

The registration of a determination created a debt enforceable at law. Together with the provision in section 25ZAB that a registered determination has effect "as if it were an order by the Federal Court", the legislative scheme clearly intended to confer legal enforceability upon the determinations. It was therefore found that section 25ZAB purported to prescribe what the constitution does not permit.[37]

The joint judgment of Deane, Dawson, Gaudron and McHugh JJ

As indicated above, there is little to distinguish the approach adopted in the two judgments. The judgment of Deane, Dawson, Gaudron and McHugh JJ also acknowledged the difficulty in defining judicial power[38] and recognised that "there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not."[39] In a brief summary of the debate surrounding the definition of judicial power, their Honours made the following comments:

> However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion. Thus Kitto J in *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* said that judicial power consists of the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct". But again, as was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*, the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations.[40]

The above comments bring into sharp focus the indeterminate and equivocal nature of most of the recognised indicia of judicial power. No sooner is a characteristic of the power determined, but an exception emerges. It is therefore not surprising that their Honours did not venture further into the mire of defining judicial power. Having examined previous cases regarding the enforceability of decisions and found that this attribute, whilst not determinative, "may serve to characterise a function as judicial when it is otherwise equivocal"[41], their Honours canvassed no further attributes of the power. The capacity of a body to give a decision enforceable by execution was one way in which the concept of judicial power was manifested.[42]

In this joint judgment, their Honours canvassed similarities between acknowledged attributes of judicial power and the HREOC's powers, particularly in relation to deciding controversies between parties by determining rights and duties based upon existing facts and law and the remedies that the HREOC could award, including damages and declaratory or injunctive relief. It was then held:

> However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because, under s 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions.
>
> Under s 25ZAA registration of a determination is compulsory and under s 25ZAB the automatic effect of registration is, subject to review, to make the determination binding upon the parties and enforceable as an order of the Federal Court. Nothing that the Federal Court does gives a determination the effect of an order..... It is the determination of the Commission which is enforceable and it is not significant that the mechanism for enforcement is provided by the Federal Court.[43]

As with the first joint judgment, no further comment was made regarding the nature of the determinative powers of the HREOC due to the express legislative provision that determinations were not binding or conclusive. This follows the classic approach of the High Court in *Huddart, Parker & Co Proprietary Ltd v Moorehead*[44] in which Griffith CJ stated that:

> [t]he exercise of [judicial] power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[45]

In *Brandy*, their Honours adopted the view that the absence of a power to make binding or conclusive determinations (leaving aside the registration provisions) would have precluded a finding that the scheme contravened chapter III of the constitution.

Right of review and default judgments

One area in which the two sets of reasoning were virtually identical was in relation to the argument that the provisions relating to review by the Federal Court could save the legislative scheme from invalidity. Section 25ZAB of the Act provided that within 28 days of the registration of a HREOC determination, a respondent could apply to the Federal Court for review of the determination. Under section 25ZAC, the Federal Court had power to review all issues of fact and law, but a party could not adduce "new evidence" without the leave of the Court.

In an effort to defend the legislative scheme, the Commonwealth intervened in the *Brandy* case and argued that registration of the determination was simply part of the judicial review process by the Federal Court. In other words, registration could be viewed as the originating process for judicial review. Enforcement would therefore arise out of these new "proceedings" rather than the HREOC determination since it was the failure to proceed with judicial review that led to the enforceability of the determination by way of a "default judgment". The Commonwealth also argued that the nature and existence of the scheme of judicial review saved the registration and enforcement provisions from invalidity. The scheme was represented as establishing judicial review by way of the original jurisdiction of the Federal Court (that is, fresh proceedings) and not by way of appeal.[46] The implication of the latter argument was that judicial power was not being exercised by the HREOC since there was a fresh hearing procedure vested in the Court. Where a respondent applied for review, the determination would become enforceable (if at all) due to a decision of the Court and not any action of the HREOC.[47] Both joint judgments summarily dismissed these arguments.

In relation to the argument regarding the nature and existence of the review mechanism, the joint judgment of Mason CJ, Brennan and Toohey JJ succinctly rejected the Commonwealth's argument:

> The argument is without substance for the simple reason that the determination is registered and becomes enforceable in circumstances where the review procedure [of the Court] is not invoked.[48]

The High Court, nevertheless, considered the nature of the review that could be conducted by the Federal Court and noted that the Federal Court was not required to conduct a hearing *de novo*. The review proceeded by way of re-examining a determination of the HREOC[49] or rehearing[50] rather than by way of fresh proceedings (where the complainant would have to make out his or her case and call witnesses). It will be recalled that this was a key policy intention behind the development of the scheme. In an attempt to limit the extent of any duplication in the consideration of a matter, the scheme granted the Federal Court the discretion whether to review all issues of fact and law and there were limitations upon the introduction of 'new evidence' (although the meaning of this phrase was not clear to the High Court).[51] There was no requirement that the Court review all matters leading to the determination and the extent of the review would be largely determined by the arguments presented as to why the determination should not stand.[52] Where judicial review was invoked, it could therefore proceed on a more limited basis than the matters considered by the HREOC. In any case, the nature of the review process of itself could not save the scheme since there was no judicial review in the situation where a determination became enforceable.

Similarly, both joint judgments rejected any comparison between the present system of registration and a default judgment. It had been argued before the High Court that registration of a

determination with the Federal Court was the originating process and that in the absence of a "defence" being filed in the form of an application for review, the determination should take effect as a decision of the Federal Court by default. The Court did not accept this argument. In the view of Deane, Dawson, Gaudron and McHugh JJ:

> A judgment entered by default is nonetheless a judgment of the court whose rules provide for such a course. The circumstances in which judgment may be entered are prescribed by the court itself and the process is one which is commenced and brought to a conclusion in accordance with those rules.[53]

In the present case, however, the legislative scheme and not the Federal Court Rules gave force to the determination and therefore it could not be said that there was a default judgment by the Court.[54]

Individual rights

It is important to note that the obligation imposed by section 25ZAA to register a determination of the HREOC did not apply where the Commonwealth was a respondent. In the context of *Brandy*, this meant that ATSIC could not challenge the constitutionality of the relevant provisions as the determination in respect of ATSIC was not registered and therefore not subject to the enforcement provisions. In the view of Mason CJ, Brennan and Toohey JJ, parliament apparently assumed that where a Commonwealth agency or its principal executive was the respondent, the determination would be met without the need for registration. The legislation, nevertheless, made provision for an application to the Federal Court for an order requiring compliance by the Commonwealth.

The Court made no further comment in relation to the fact that the registration scheme only applied to disputes between individuals. Nevertheless, inferences may be drawn that the Court was concerned to ensure that its traditional role in the protection and determination of individual rights was not interfered with by legislation.[55] Most administrative tribunals involve the determination of disputes between individuals and government agencies whereas the power of the HREOC extended beyond the normal domain of administrative review. That is, the HREOC could determine disputes between individuals. It is possible that this transgression beyond reviewing the actions of government led the Court to take a particularly restrictive view of the scheme. It is not possible to determine if this did in fact influence the Court, but it may serve as a means of distinguishing the case at a later time.

Response to the Brandy decision

The Federal Government's response to the Court's finding that the registration and enforcement provisions were invalid was twofold.[56] Firstly, urgent amendments were introduced into parliament to restore the relevant human rights legislative schemes[57] to the situation which existed prior to the enactment of the relevant provisions. The amendments were given effect in the *Human Rights Legislation Amendment Act 1995* (assented to 28 June 1995) and removed the registration provisions from the relevant legislation and allowed for a review *de novo* by the Federal Court. Similar amendments were proposed in relation to the *Native Title Act 1993*.[58] The second part of the Government's response to the *Brandy* decision was to refer the issue of developing a new and permanent enforcement mechanism to an existing Review Committee comprising representatives from the Attorney-General's Department, the HREOC, the Department of Finance and relevant experts in the area.

As discussed earlier, the public response to the Court's decision was extraordinary. All major newspapers ran articles

expressing concern about the implications of the Court's rejection of a scheme which had been expeditious and relatively inexpensive compared with court proceedings.[59] Concerns were also expressed about the implications for compensation payments previously made pursuant to the invalid scheme and whether the payments were required to be repaid.[60]

An often repeated concern in the media was the implications of the decision for the controversial native title scheme[61] which had emerged out of the *Mabo* decision.[62] Prior to the decision in *Brandy*, where the parties agreed to a determination by the National Native Title Tribunal, the determination was registered with the Federal Court and was enforceable after a prescribed period. The highly sensitive area of native title was seen as particularly vulnerable if there was no certainty of enforcement where the parties consented to a determination. The possibility of later Federal Court challenges to such determinations by disgruntled parties was seen as raising considerable instability in the scheme.[63]

Speculation and discussion also emerged in the media as to alternatives to the need for judicial enforcement of determinations. Among the proposals were the creation of a federal magistrates' court to hear disputes involving HREOC determinations.[64] Another suggestion was to remove the determination power of HREOC and vest it in a human rights court.[65] Such proposals were intended to avoid the particularly costly route of Federal Court review.

Implications of the Brandy decision

What are the implications of the decision of the High Court in *Brandy*? In the immediate aftermath, the enforcement of human rights will return to a situation where determinations of the HREOC have marginal effect, that is, morally persuasive but legally unenforceable. An effective and efficient means of structuring administrative review in relation to sensitive subject matter had to be abandoned in favour of a more costly, time-consuming and formal scheme of enforcement. Chapter III of the constitution operated to limit an effective administrative response to human rights issues.

Is the effect of the decision limited to the operation of enforcement provisions or is there a broader issue arising from the judgments? The findings in relation to the enforcement procedure appear unremarkable given the stark way in which the scheme mixed the powers of the HREOC with those of the Federal Court. However, there is also the question of whether the Court was influenced by the fact that the parties to the HREOC proceedings were individuals. Would the scheme have failed on such a strict application of chapter III of the constitution but for the effect on individual rights? In order to assess the implications of the decision, it is necessary to understand where the decision sits in the historical development of the Court's views on judicial power and administrative tribunals. Critical in this analysis is the issue of whether the decision is part of a general development in the Court's views or whether it signals a point of departure.

Part 3: Judicial power

Introduction

In *Brandy*, the High Court found that judicial power was being exercised where an administrative tribunal had the power to make enforceable determinations. The Court also alluded to two other indicia of judicial power. The first was where a tribunal has the power to make determinations as to existing rights as opposed to determining rights for the future. It was suggested that another indicia of judicial power was the power to make binding and conclusive determinations. The Court's comments on

the characteristics of judicial power reflect previous decisions in relation to the tension between the powers of courts and administrative tribunals. This section examines the major cases that considered judicial power in relation to administrative tribunals prior to the decision in *Brandy*. From this examination it emerges that in recent years the Court has been largely accommodating of the needs of modern government by upholding the validity of powers conferred on tribunals. In considering whether any of the indicia of judicial power are present in a given scheme, the Court has demonstrated flexibility in interpreting either the nature of the power being exercised or the limits of the judicial power of the Commonwealth.

Why, then, was the Court so immutable about the invalidity of the scheme in *Brandy*? Why was the flexibility exhibited in previous cases not present in the decision in *Brandy*? It may be that the nature of the scheme in *Brandy* was so unusual or unprecedented that it could not be accommodated by the Court. Schemes previously considered by the Court did not involve the express "combining" of the powers of a tribunal with the powers of a court. On this basis, *Brandy* was distinguishable. However, in terms of the broad approach to defining judicial power. was *Brandy* different from the earlier cases? Given that the Court in *Brandy* applied the previously developed indicia of judicial power, it would appear not. Previously, the Court had been flexible in characterising tribunal powers, but nevertheless proceeded on the assumption that there were limits to the powers which could be conferred on tribunals. The divide between judicial power and administrative tribunals was consistently acknowledged, with the Court being flexible as to the practical application of the division.

This raises the issue of whether the Court's views on judicial power and administrative tribunals are functional given that these views have the potential to raise obstacles to effective government. Despite the Court's flexibility in relation to particular circumstances, there remains the potential for an administratively effective scheme to be found invalid, such as in *Brandy*. It has been suggested by Allan Hall, former Deputy President of the Administrative Appeals Tribunal, that the Court has failed to consider the "public law dimension" of administrative tribunals. His concern is that the separation of judicial power from the other branches of government should be distinguished in relation to administrative tribunals since there is more than an individual interest at stake in determining statutory rights. It may be that this broader role of tribunals should be accommodated within the Court's approach to judicial power.

The separation of powers and judicial power

The concept of judicial power is a product of the separation of powers doctrine. The High Court recognised the separation and inviolability of powers embodied in chapters I, II and III of the Commonwealth constitution in cases such as *Huddart Parker v Moorehead*[66], *State of New South Wales v The Commonwealth (The Wheat case)*[67] and *Waterside Workers' Federation of Australia v J W Alexander Ltd*[68]. In the high-watermark case, *Boilermakers*[69], the High Court held that the judicial power of the Commonwealth could not be vested in a body other than a court established under chapter III of the constitution and that non-judicial power could not be vested in a court:

> Notwithstanding the presumptive force which has been given to these matters in the consideration of the present case, it has been found impossible to escape the conviction that Chap. III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organised as a court and in a manner which might otherwise satisfy ss.71 and 72, and that Chap. III does not allow a combination with judicial power of

> functions which are not ancillary or incidental to its exercise but are foreign to it.[70]

The rationale for restricting the exercise of judicial power to the courts is based on the premise that in order to rule authoritatively in relation to disputes, there needs to be an independent judiciary. In the words of a former judge of the Supreme Court of Victoria:

> The case for independence of the judicial arm is incontrovertible. Judges must be free from pressure by, and their office not dependent on approval by, the other arms of government. Otherwise justice cannot be impartial.[71]

Section 72 of the constitution ensures this independence through removal of judges (by the Governor-General in Council on address from both Houses of Parliament) only in the extreme circumstances of misbehaviour or incapacity, thereby denying the executive or the legislature undue influence over the courts. The corollary of this is that if administrative tribunals were allowed to exercise judicial power, the independence of their determinations could not be ensured, particularly since the terms of members of tribunals are generally limited and renewable at the discretion of the executive. In any event, it is generally recognised that at the federal level of government, the separation of powers doctrine is an essential feature of the rule of law.[72]

Incidental or ancillary powers

While section 71 of the constitution requires the judicial power of the Commonwealth to be exercised by the courts, it does not prevent the courts from exercising non-judicial powers that are incidental or ancillary to the exercise of judicial power.[73] Similarly, the executive or legislature could exercise powers incidental or ancillary to their areas of power. This means that one form of governmental power can be added to the exercise of another form of governmental power, provided that the additional power is introduced only as an ancillary facility to effectuate the exercise of the main power.[74] The additional power in this context is neither distinctly judicial nor non-judicial in character.[75] For example, in *Cominos v Cominos*[76], the High Court considered whether the power of state supreme courts to alter property rights under the *Matrimonial Causes Act 1959 (Cth)* involved the conferral of non-judicial power. The High Court held that the powers in question were incidental to, or incidents of, the exercise of judicial power and therefore validly conferred on the courts. While the characterisation of a power as being incidental to the constitutionally conferred power may not be clear in specific cases, it has nevertheless been utilised as a means of making the separation of powers doctrine functional.[77]

Initial attempts at defining judicial power of the Commonwealth

It is perhaps surprising that the courts have eschewed numerous opportunities to lay down a comprehensive definition of judicial power; surprising, in that judicial power is the core of the courts' function. For example, in *R v Davison* it was said that "it has never been found possible to frame a definition [of judicial power] that is at once exclusive and exhaustive".[78] The parameters of judicial power remain ill-defined despite the need for a guide against which to measure the constitutionality of powers exercised by executive tribunals. As discussed in *Brandy*, an early attempt at characterising judicial power was by the High Court in *Huddart Parker* where it was found that:

> ....the words "judicial power" as used in s71 of the constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to

> appeal or not) is called upon to take action.[79]

The emphasis on the conclusive and enforceable nature of the exercise of such power was also emphasised by Griffith CJ in the *Alexander* case:

> Without attempting an exhaustive definition of the term "judicial power", it may be said that it includes the power to compel the appearance of persons before the tribunal in which it is vested, to adjudicate between adverse parties as to legal claims, rights and obligations, whatever their origin, and to order right to be done in the matter.[80]

An early example of the difference between a tribunal exercising judicial power and one that was not arose in the *BIO* cases.[81] In the first of these cases, the Taxation Board of Appeal had the power to determine an appeal against an income tax assessment made by the Commissioner of Taxation. The members of the Board were appointed for seven years, subject to removal or suspension. The Board could make determinations of fact and law and any order it viewed appropriate, including reducing or increasing the assessment of taxable income. Decisions of the Board in relation to facts were 'final and conclusive' and there was a right of appeal to the High Court in its appellate jurisdiction on matters of law. The High Court found that the Board, a non-judicial body, had been invalidly vested with judicial power. The exercise of judicial power was said to be evident from the fact that the determinations of the Board did not "create a standard of liability, but ...ascertain and authoritatively pronounced upon the standard already created."[82] The jurisdiction or authority of the Board was therefore to ascertain and declare the liability of a taxpayer to the tax imposed by the legislation.[83] As this power was being exercised by members not holding office consistent with the provisions of section 72 of the constitution, the conferral of such powers was invalid.

By the time of the second *BIO* case, the statutory powers of the Board had been amended. The Board now had all the powers and functions of the Commissioner of Taxation in making assessments and decisions of the Board were deemed to be decisions of the Commissioner. Appeals to the High Court were no longer in its appellate jurisdiction and the provision that decisions of the Board were final and conclusive had been repealed. The powers conferred on the Board in this case were found to be valid and not the conferral of judicial power. The provisions equating the Board with the Commissioner appeared to the High Court to save the Board in this case. In other words, having the powers of the Commissioner meant that the Board could not be exercising judicial power. On appeal to the Privy Council the validity of the Board's powers was upheld, with the Board's inability to make final and conclusive determinations being the primary reason for this finding.[84]

Binding and conclusive determinations

Whilst far from being a clear example of what does and does not constitute judicial power[85], the facts of the *BIO* cases cast light on some of the characteristics of judicial power. One of these characteristics, the power to determine an existing liability, is discussed below. Another key element of judicial power is the making of final and conclusive determinations. In *Brandy*, a legislative provision that determinations of the HREOC were not binding and conclusive ensured that the making of determinations did not involve an exercise of judicial power. This raises the issue of what "binding and conclusive" means and how it operates in light of a right of appeal. Enid Campbell has made the following comments in this regard:

> A determination is binding and conclusive if it is not open to recall or rectification by the person or body which made it, and, more importantly, is not open to challenge in collateral

> proceedings before a court of law, for example, in enforcement proceedings. A determination is binding and conclusive even if it is appealable. Equally it may be binding and conclusive even though subject to judicial review in a supervisory jurisdiction. It could not, for example, be said that decisions of a federal court are not judicial because they may be impeached in proceedings before the High Court under s.75(v) of the constitution for alleged excesses of jurisdiction or error of law on the face of the record.[86]

In summary, the quality of finality subject to appeal attaches to the term "binding and conclusive". This can be related to the quality of immediate enforceability (found to be invalid in *Brandy*) as indicated by the Court in *Huddart Parker*. Where a finding can be reviewed in the course of enforcement proceedings or reviewed *de novo*, there is a strong inference that the tribunal is *not* exercising judicial power.

An example of a power that could fall within the prohibition on tribunals having binding and conclusive powers is section 31 of the *Administrative Appeals Tribunal Act 1975* which allows the Administrative Appeals Tribunal (AAT) to make a conclusive decision as to whether the interests of a person are affected by a decision. Similarly, section 44 of the same Act essentially makes AAT determinations on issues of fact conclusive and not subject to appeal to the Federal Court. Neither power has been the subject of judicial determination, although in *TNT Skypak International Pty Ltd v Federal Commissioner of Taxation*[87] Gummow J expressed concern as to the extent of the validity of section 44. It is interesting to note that the central tribunal in administrative appeals could have powers which constitute judicial power.[88]

Determinations as to existing rights

Courts have repeatedly distinguished the power to determine existing rights from the power to create rules or standards for the future, with the result that only the former amounts to an exercise of judicial power. For example, in *R v Davison*, the High Court found that:

> The truth is that the ascertainment of *existing rights* by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss.71 and 72 of the constitution.... [89] [Emphasis added].

Similarly, Brennan J in *Harris v Caladine*[90] found that the power to decide controversies with respect to existing rights and liabilities lies at the heart of judicial power.[91] The reference to "existing rights" has become another touchstone for determining whether a body is exercising judicial power. The basis for this appears to be that while the creation of rights and duties is a legislative function, the declaration and enforcement of existing rights and duties is a judicial function.[92]

The distinction between existing and future rights has received repeated endorsement by the High Court in recent years. In *Precision Data Holdings Ltd v Wills*[93], the plaintiffs argued that the Corporations and Securities Panel exercised judicial power in declaring that an acquisition or conduct was "unacceptable" under the *Corporations Law of Victoria*. The Panel could then make any order that it viewed necessary to protect the rights or interests of any person affected by the acquisition or conduct. The High Court, in an unanimous decision, held that the Panel was not exercising judicial power. The Court found that although the Panel made declarations about past events or conduct, the object of the Panel's inquiry and determination was to create a new set of rights and obligations which did not exist antecedently and independently of the making of the orders.[94] In addition, the presence of criteria requiring the Panel to take into account certain policy considerations and the absence of any binding effect of the orders were influential in reaching this result. The reasoning leading to this conclusion, however,

endeavoured to take a flexible approach to the definition of judicial power and in doing so left the issue of determining an exercise of judicial power without a great deal of certainty:

> Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.....
>
> It follows that functions may be classified as either judicial or administrative according to the way in which they are to be exercised. So, if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power. That is not to suggest that considerations of policy do not play a role, sometimes a decisive role, in the shaping of legal principles.[95]

The equivocation in this reasoning is symptomatic of the case law in the area of judicial power. While "guidelines" such as the distinction between existing and future rights purport to render some certainty in ascertaining an exercise of judicial power, they are undermined by the perceived need to retain flexibility. In addition, the difference between existing and future rights may not be readily apparent from the particular facts of a case and such distinctions may appear arbitrary. For example, industrial arbitration or arbitral power is often stated to be non-judicial. The comments of Isaacs and Rich JJ in *Alexander* set out the perceived difference:

> But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the functions of the arbitral power in relation to industrial disputes is to ascertain and declare, but not to enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[96]

However, as indicated in the joint judgment of Deane, Dawson, Gaudron and McHugh JJ in *Brandy*, "exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations".[97] Why would the power to determine a dispute about the application of an industrial award relate to future rights when it may also impact on an existing liability? The fine line between existing and future rights is evident in comments such as those of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*:

> .....a judicial power involves, as a general rule, a decision *settling for the future*, as between defined persons or classes of persons, *a question as to the existence of a right or obligation*, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons.[98] [Emphasis added].

The shifting nature of the distinction made between judicial and administrative power on the basis of existing and future rights serves only to contribute to the uncertainty in identifying judicial power. The distinction may be more apparent than real. In this regard, it may be that the functional approach adopted by the Court to protect the work of arbitral bodies such as the Industrial Relations Commission is based more on the reality of their existence than on a satisfactory legal rationale.

Body exercising the power

The flexibility of interpretation with regard to judicial power is further demonstrated by the decision in *R v Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation*.[99] Paragraph 143(1)(h) of the

Conciliation and Arbitration Act provided that any organisation or person may apply to the Commonwealth Industrial Court for an order directing the cancellation of the registration of an organisation on the ground that the conduct of the organisation had prevented or hindered the achievement of an object of the Act. The High Court held that empowering the Industrial Court to direct the cancellation of registration was not an attempt to vest the Court with non-judicial functions. The fact that the Industrial Court was vested with a discretion in the matter did not make the power non-judicial. In the view of Barwick CJ, the power "clearly partakes of the judicial function: weighing the gravity of ascertained facts and decision upon the claims of justice".[100] McTiernan J found that the power to make an order directing cancellation was judicial while the actual cancellation by the registrar was an executive act.[101]

The decision of the High Court in *Joske* has been criticised as being too eager to find the conferral of power lawful.[102] The reasoning of Barwick CJ could equally have been used to justify a finding that the power in question was executive in character due to the discretion involved. Similarly, the approach of McTiernan J appears to be based on a subtle, if not arbitrary, distinction between ordering the cancellation and carrying out such an order. The case again leaves the area constitutionally uncertain and yet reveals an emerging trend in the accommodating attitude of the Court. The nature or inherent character of the power in question appears less important in determining the constitutionality of its conferral than the nature of the body exercising the power. This point is also exemplified in the case of *R v Quinn; ex parte Consolidated Foods Corporation*[103] in which the High Court held that a statutory provision conferring on the Registrar of Trade Marks the power to order a trade mark be removed from the register, did not confer judicial power. The Court found that registration did not confer a legal right and therefore registration and removal were administrative acts.[104] In the words of one commentator:

> ...one would have thought that the determination of a controversy affecting rights...the adjudication between adverse parties as to legal claims and the ordering of right to be done...the giving of a definite and binding decision—all indicated an exercise of judicial power by the non-judicial Registrar of Trade Marks. But in the new climate the High Court found that Federal Parliament had merely assigned statutory rights under the *Trade Marks Act* through a Commonwealth agency, the Registrar of Trade Marks, and had continued or terminated those statutory rights through the same agency—without calling for an exercise of the judicial power of the Commonwealth.
>
> Putting this law on the Trade Practices Tribunal and the Registrar of Trade Marks on a general basis, one may now allow a federal non-judicial body to give a binding and conclusive decision (say, on the existence of an agreement or a practice described in a federal law) as long as this decision is not given specifically for the purpose of determining rights....
>
> In the upshot, the strictures on the separation of judicial and non-judicial powers inculcated by *Boilermakers* are being watered down.[105]

This 'watering down' appears to have been achieved through taking the view that a power is characterised by the status of the performer of the function and not by the function itself.[106] This would assist in understanding the approach of the High Court in finding most conferrals of power constitutional. In addition, this approach appears to be greatly influenced by the view that many powers are not exclusively judicial or non-judicial. The approach was directly acknowledged by Mason J in *Hegarty*:

> It is recognized that there are functions which may be classified as either judicial or administrative, according to the way in which they are to be exercised. A function may take its character from that of the tribunal in which it is reposed.

> Thus, if a function is entrusted to a court, it may be inferred that it is to be exercised judicially; it is otherwise if the function be given to a non-judicial tribunal, for then there is ground for the inference that no exercise of judicial power is involved.[107]

This determination of the character of a power is based on the function of the body exercising the power. That this should be the case demonstrates the practical difficulty in adhering to the *Boilermakers* strict separation of powers. In order to acknowledge the now accepted role of administrative tribunals, the Court has departed from a clearly defined evaluation of a power and resorted to a functional, if not intellectually rigorous, approach to determining judicial power. In the words of one commentator:

> One thing that can now be adduced from this development, however, is that if power is "coloured" by the status and purpose of the user of that power, then there cannot really be various kinds of power (as supposed by the doctrine of the separation of powers) — only one, which has a chameleon-like quality that allows it to change, as ordered, or as convenient to the user.[108]

While the Court is not prepared to overrule *Boilermakers*[109], it is apparently prepared to stretch its intended meaning by finding more and more exceptions to the separation of powers doctrine.

Essentially, the Court is faced with the need to reconcile the theoretical requirements of judicial power with the day-to-day administration and requirements of government decision-making and review. This dilemma was expressly raised by Murphy J in the following passage from *R v Hegarty; ex parte Salisbury City Corporation*:

> The courts vested with judicial power of the Commonwealth by and under Ch III are given directly by the constitution or by Parliament certain judicial functions. These include giving binding determinations of fact and law (and extend to review of determinations of fact and law by other adjudicative bodies, administrative as well as judicial). Subject to this, the exercise of the executive power of the Commonwealth requires the daily exercise of adjudicative functions, similar analytically to those performed by the courts exercising judicial power. It would be hairsplitting to distinguish the judicial functions of many federal administrative agencies from those carried out by courts. Administrative determinations made by these agencies are not binding on the courts, but in practice and unless set aside by courts are operative and constitute the cement which binds the whole administrative process. The judicial and executive powers thus overlap, but of course far from completely.[110]

This "overlap" in the powers exercised by the executive and judiciary contributes to the difficulty in characterising and identifying judicial power. What may in one context appear to be a judicial function, may in another appear to be essentially administrative. This in turn leads to the situation where some functions may be conferred either on a court or on an administrator, and such functions may be judicial power when vested in a court, but administrative or quasi-judicial and not judicial power when vested in an administrator.[111] The flexibility inherent in this approach makes it difficult to predict the Court's approach to specific facts. It also raises serious questions about the strict application of the separation of powers doctrine in the Australian federal system. If the certainty sought to be achieved through the *Boilermakers* approach is consistently undermined in order to accommodate the practical needs of government, does this mean that the separation or distinctiveness of judicial power is a myth?

A new approach to judicial power in public law?

In an extensive article on judicial power and the AAT, former Deputy President of the AAT, Allan Hall raises an important issue about the approach to characterising the powers of administrative tribunals.[112] Hall argues

that the concept of judicial power has developed out of the common law approach to determining individual rights and fails to accommodate modern public law arrangements for review of decisions:

> The description enunciated by Griffith CJ in *Huddart Parker* embodies the essence of the common law concept of judicial power. It is founded upon the rich tradition of the common law in upholding the Rule of Law and in protecting and enforcing the basic rights of the individual in society. The function of this primary, or private law, aspect of judicial power is the resolution of controversies over such basic rights, whether they relate to the life, liberty, property or, it may be added, the legal status of the individual, by bringing to bear the unique characteristics of judicial power in order to quell the controversy between the parties....
>
> By elevating this primary aspect of judicial power to "definitional" status, however, what has tended to be obscured, in the writer's respectful view, is that judicial power, in its secondary or public law aspect, presents quite different characteristics. As exercised through the traditional supervisory jurisdiction of the courts, the public law function of judicial power, so far as presently relevant, is to contain excess or abuse of executive power. In marked contrast to the primary aspect of judicial power, the exercise of the supervisory jurisdiction of the court does not normally quell the real controversy between the individual and the executive arm of government; it does not enable the court itself to exercise the statutory power or discretion, the lawful limits or purpose of which it is called upon authoritatively to define.[113]

Hall's contention is that the reality of administrative tribunals ought to be recognized in the theory underpinning judicial power. He argues that there needs to be a different and less restrictive concept of judicial power when assessing the activities of administrative tribunals. Such tribunals generally are not dealing with common law or "basic rights" (with the notable exception of the HREOC where both parties may be individuals) but rather public law rights, privileges and liabilities arising out of statute.[114] Hall argues that these tribunals operate in that area where functions may be classified as either judicial or administrative, that is, where there is a 'duality of functions'. As discussed above, the High Court has apparently sought to address this area of uncertainty through finding that the function normally takes its character from that of the body exercising the power. Nevertheless, in Hall's view, there needs to be a formal recognition that once parliament vests the function of reviewing administrative decisions on the merits to a tribunal, the power subsequently exercised by the tribunal should not be open to attack as being in contravention of chapter III of the constitution. He supports this by reference to the practical advantages of administrative tribunals over resort to the courts:

> But experience has shown that even in matters falling within the duality principle, there are many cases (particularly in respect of veterans' and social welfare pensions, public service retirement benefits and the like) which are probably better dealt with by way of administrative review than by bringing to bear the full weight of the judicial power of the Commonwealth. The experience of ... administrative review in busy jurisdictions .....has shown that many disputes over such rights are capable of being settled in an informal non-adversarial context, which the judicial system may find much more difficult to provide.[115]

In Hall's view, therefore, the practical advantages of administrative tribunals should be recognized in the theory of judicial power and should give rise to a new approach in analysing the powers of tribunals.

Whether a change in the theory of judicial power would have altered the outcome in *Brandy* is uncertain. The fact that the HREOC was determining matters between individuals would appear to take it outside of the situation envisaged by Hall. That is, allowing tribunals greater powers on the basis of the "government" or "public law"

dimension of a dispute does not apply where individuals are parties. At another level of analysis, however, it could be argued that human rights determinations are a matter of public interest regardless of the parties. Certainly the rights determined by HREOC are conferred by statute in a similar manner to other rights and entitlements determined by tribunals. It could therefore be justifiable to have tribunals vested with extensive powers of determination so as to resolve such issues expeditiously and informally without the need for recourse to the formal and rigid processes of the courts.

The difficulties arising from the Court's approach to identifying exercises of judicial power make Hall's thesis compelling. In applying the "test" of whether a body is determining existing or future rights, difficult and apparently arbitrary distinctions have emerged in order to accommodate administrative reality. Similarly, the power to make binding and conclusive or enforceable determinations requires a detailed examination of the legislative scheme conferring the power and the relationship between the tribunal and judicial review. There is a strong case for the concept of judicial power and its theoretical underpinnings to develop and evolve to meet the modern requirements of public law and government. There is a need for the courts to recognise the different nature of judicial power in the context of public law and the fact that the strict protections afforded by chapter III may be unnecessary and even counterproductive in this context. The Hall argument could be used to provide a theoretical basis for the pragmatic approach adopted by the Court and to explain the historical development of the Court's flexible approach to judicial power.

Part 4: Conclusion

From the foregoing discussion of the High Court's approach to the issue of judicial power and administrative tribunals it can be seen that a flexible approach has developed over time in order to accommodate the needs of modern government. Nevertheless, the limits imposed by chapter III of the constitution remain and occasionally result in the Court stepping away from recognising administrative necessity, such as in *Brandy*. The cases indicate a number of characteristics of judicial power, including:

(i) the power to make binding and conclusive decisions;

(ii) the power to make enforceable decisions; and

(iii) making determinations as to existing rights but not future rights.

Do these characteristics of judicial power in some way restrict the aims and functions of administrative tribunals? The first two characteristics deprive tribunal determinations of the quality of finality, certainty and enforceability. They restrict the efficacy of tribunals to situations where parties consent to abide by the determinations of tribunals, such as where the Commonwealth is a party. The third characteristic of judicial power, the power to make determinations as to existing rights, has been shown to be difficult and arbitrary when applied. In *Brandy*, the effect of applying the characteristics of judicial power to a tribunal was to remove certainty, efficiency and effectiveness from the determination of human rights issues by the HREOC.

Where does the decision in *Brandy* stand in relation to the High Court's previous approach to judicial power and administrative tribunals? Was the legislative scheme in *Brandy* an exception or aberration, or was the Court's decision indicative of a broader issue involving judicial power? With such a consistent line of decisions since *Boilermakers'* favouring the view that the power is characterised by reference to the body exercising it, how

was it that the Court found the human rights scheme invalid?

The answers to the questions regarding the implications of the High Court's decision in *Brandy* arise at a number of levels. At one level, the peculiar nature of the legislative scheme in *Brandy* makes it distinguishable. The scheme expressly mixed the powers of the HREOC with those of the Federal Court in a manner which appears to be unprecedented. It conferred upon the determinations of one body the status of determinations made by the other body. Assuming that determinations and decisions of the Federal Court arise from an exercise of judicial power, it is difficult to see how the scheme could not have ultimately involved a conferral of judicial power upon the HREOC by conferring upon determinations of the HREOC the status of Federal Court decisions for the purposes of enforceability.

Another distinguishable feature of the decision in *Brandy* is that the matter arose out of a dispute between individuals and did not involve a Commonwealth agency. Most administrative tribunals determine matters between individuals and the federal government whereas the HREOC also had the capacity to determine individual rights. This unusual situation may have resulted in the High Court applying the concept of judicial power more rigorously than in previous cases since the determination of individual rights is traditionally viewed as within the province of the courts alone. While the absence of comment by the Court in *Brandy* on this aspect of the case makes it difficult to determine whether this was in fact a matter underpinning the decision, it nevertheless remains a distinguishable feature of the case.

At a broader level of analysis, however, it may be that the decision in *Brandy* is not an aberration. The case demonstrates the need for a doctrine or approach which can reconcile chapter III of the constitution with the complex needs of government administration. The legislative scheme in *Brandy* was devised in response to the need for the HREOC to have "effective" powers. The scheme sought to address serious issues including the duplication of hearings between the tribunal and the Federal Court, cost and certainty for parties. It was not devised in the abstract; the scheme in its previous form (and post-*Brandy* form) had not satisfied the needs of human rights enforcement.

The approach of the High Court to determining the nature of judicial power has developed over time. The Court was initially strict in its views as to the powers that could be exercised by administrative tribunals but became more flexible as the number of tribunals increased and the administrative reality of the need for tribunals became inescapable. This flexibility arguably resulted in the concept of judicial power being stretched beyond any recognisable or definable form. The Court's approach of not interfering with the development of administrative tribunals gave rise to difficult distinctions and a curious body of case law. At times the Court appeared to accept that if Parliament conferred powers upon a tribunal, such powers were unlikely to comprise judicial power. The acceptance of powers exercised by tribunals was essentially pragmatic rather than the result of applying a definition of judicial power. Overall, there is an absence of a strong body of legal theory in the Court's approach to judicial power in this regard.

As discussed in the previous chapter, Hall has suggested that, rather than trying to fit current administrative practice into traditional concepts of judicial power, it would be preferable to develop a new body of theory in public law. Hall argues for a different approach to judicial power when considering the powers of administrative tribunals. Instead of applying vague standards, which can at times be flexible enough to meet the needs of modern government and yet at others be applied strictly to undermine

effective schemes of administration, a new approach is needed. This new approach would recognise that the protections afforded by chapter III are unnecessary where the issue involves public law rights as opposed to private rights. The aim of administrative tribunals is to relieve the courts as much as possible of the role of determining rights and benefits conferred under statutes. Why not give these tribunals the authority to make binding and conclusive determinations (subject only to appeal to a court) which are immediately enforceable? Individuals who apply to such tribunals rarely understand that if they are successful and the other party does not abide by the determination, the substantive arguments, at least in part, have to be redetermined by a court. The crucial element of certainty would be gained if the concept of judicial power were redefined in its application to public law matters.

Without a new approach to judicial power in relation to administrative tribunals, the current uncertainty about determining the limits of tribunal powers will continue. Similarly, the tension between judicial power and administrative tribunals will continue to threaten the development of effective administrative schemes.

Endnotes

1 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.

2 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

3 The HREOC administers and makes determinations in relation to matters arising under the *Racial Discrimination Act 1975* (s 25Y), *Sex Discrimination Act 1984* (ss 80 and 81), the *Disability Discrimination Act 1992* (ss102 and 103) and the *Privacy Act 1988* (s 52).

4 See McHugh, M H, "The Growth of Legislation and Litigation" (1995) 69 ALJ 37 at 37-8.

5 See for example, McHugh, M H, "The Growth of Legislation and Litigation" (1995) 69 ALJ 37 at 45; and comments of Davies J in *Bragg v Department of Employment Education & Training* (1995) 38 ALD 251 at 253.

6 See Allars, M, *Introduction To Australian Administrative Law* (Sydney: Butterworths, 1990) at 329-330.

7 Section 25 of the *Administrative Appeals Tribunal Act 1975*.

8 Examples of specialist tribunals in these areas include the Taxation Board of Appeal (and Board of Review - see the discussion of the *BIO* cases in chapter III of this paper), the Australian Broadcasting Tribunal, the Companies and Securities Panel (see the discussion of the *Precision Data* case in chapter III of this paper), the Immigration Review Tribunal and the Refugee Review Tribunal, the Conciliation and Arbitration Commission (now the Industrial Relations Commission), Disciplinary Appeal Committees, Promotion Appeal Committees and Redeployment and Retirement Committees (in relation to public sector employment), the Social Security Appeals Tribunal and the Veteran's Review Board.

9 *British Imperial Oil v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro; British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the Privy Council in *Shell Co. of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530.

10 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

11 See, for example, the approach of Davies J in *Bragg v Department of Employment Education & Training* (1995) 38 ALD 251 at 253, in which the Court dismissed an application for review of a decision regarding disciplinary action under the *Public Service Act 1922* in the exercise of the court's discretion pursuant to s10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act 1977*. The Court found that the *Public Service Act 1922* made provision for appeal to a Disciplinary Appeal Committee (an administrative tribunal) and that this was an adequate right of review in the first instance. His Honour noted that the Court was "too busy and its processes too costly for it generally to be appropriate for an applicant to come to the Court when there is an informal and expeditious administrative tribunal established to resolve the dispute".

12 Sections 9 and 10 of the *Human Rights Commission Act 1981*.

13 For a discussion of the historical development of the Human Rights Commission and the HREOC, see Bailey, P, *Human Rights: Australia In An International Context* (Sydney: Butterworths, 1990) at 106-149.

14 Subsection 8(1) of the *Human Rights and Equal Opportunity Commission Act 1986*.

15 See, for example, s 27ZA of the *Racial Discrimination Act 1975* and s 82 of the *Sex Discrimination Act 1984* as originally enacted.

16 (1988) 80 ALR 1.
17 [1988] EOC 92-226.
18 (1988) 80 ALR 1 at 7.
19 (1988) 80 ALR 1 at 8.
20 (1989) 85 ALR 503.
21 Ibid at 527-8.
22 [1988] EOC 92-226.
23 The legislative scheme is discussed below.
24 See extract of Mr Rose's opinion in Morris, A J H, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation" (1994) 68 ALJ 193 at 198 (fn 30).
25 See for example Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Jurman, E, "Bias ruling rocks Govt" in *The Sydney Morning Herald*, 24 February 1995, p1; Campbell, R, "Race, sex laws put in doubt" in *The Canberra Times*, 24 February 1995, p1; Farouque, F, "Rights rulings under a cloud" in *The Age*, 24 February 1995, p1.
26 The registration and enforcement provisions of the *Racial Discrimination Act 1975* (reviewed in *Brandy*) were mirrored in the *Native Title Act 1993*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Privacy Act 1988*.
27 Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Editorial, *The Canberra Times*, 24 February 1995, p8; Taylor, M, and Burgess, V, "Impact being assessed" in *The Canberra Times*, 24 February 1995, p4; Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
28 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.
29 (1909) 8 CLR 330.
30 (1944) 69 CLR 185.
31 (1954) 90 CLR 353.
32 (1995) 127 CLR 1 at 8.
33 (1988) 80 ALR 1.
34 (1995) 127 CLR 1 at 8.
35 Ibid at 9-10.
36 Ibid at 10.
37 Ibid at 10.
38 Ibid at 16.
39 Ibid at 16.
40 Ibid at 17.
41 Ibid at 17.
42 Ibid at 17-18.
43 Ibid at 18-19.
44 (1909) 8 CLR 330.
45 Ibid at 357.
46 (1995) 127 ALR 1 at 19.
47 Ibid at 11 and 19.
48 Ibid at 12 and 19-20.
49 Ibid at 14.
50 Ibid at 20.
51 Ibid at 11-13 and 19-20.
52 Ibid at 14.
53 Ibid at 10.
54 For a discussion of the "default judgment" argument in support of the scheme, see Morris, A J H, "Constitutional Validity of Enforcement Procedures under Federal Anti-Discrimination Legislation", (1994) 68 ALJ 193 at 198-9; see also Power, S, "Constitutional Validity of Enforcement Procedures under Commonwealth Anti-discrimination Legislation — Response to Article by Anthony J H Morris QC", (1994) 68 ALJ 434. The debate between Morris and Power closely follows the arguments presented to the Court.
55 In recent years, the High Court has emphasised the importance of implying individual rights from the constitution. For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the Court held that there was an implied freedom of communication in relation to political matters. The majority in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 followed the same approach. In both cases, legislative provisions viewed as being in conflict with the implied individual rights were found to be invalid. The implied freedom of political discussion was reaffirmed in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 although in that case the Court had to weigh the implied freedom against the individual right protected by the law of defamation (the majority gave priority to the freedom of political discussion).
56 See Attorney-General's Department, "The Brandy Decision and Judicial Power" (Legal Practice Note, no.1, 19 April 1995).
57 *Racial Discrimination Act 1977*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Privacy Act 1988*.
58 See Bachelard, M, "Government forced to change Native Title Act" in *The Canberra Times*, 2 September 1995, p.3.
59 See for example Lane, B, "Court ruling throws laws on discrimination into doubt" in *The Australian*, 24 February 1995, p1; Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Jurman, E, "Bias ruling rocks Govt" in *The Sydney Morning Herald*, 24 February 1995, p1; Campbell, R, "Race, sex laws put in doubt" in *The Canberra Times*, 24 February 1995, p1; Farouque, F, "Rights rulings under a cloud" in *The Age*, 24 February 1995, p1.
60 See, for example, Glascott, K, and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2; Horin, A, "Sacked pregnant worker prepared to fight" in *The Sydney Morning Herald*, 25 February 1995, p7.

61 *Native Title Act 1993.*
62 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.
63 See Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
64 See comments by Alan Rose, President of the Australian Law Reform Commission, in Glascott, K. and Windsor, G, "Brandy decision opens 'can of worms' " in *The Australian*, 24 February 1995, p2.
65 See comments by Elizabeth Hastings, Disability Discrimination Commissioner, in Jopson, D, "Native title rulings open to challenge" in *The Sydney Morning Herald*, 25 February 1995, p 7.
66 (1909) 8 CLR 330.
67 (1915) 20 CLR 54.
68 (1918) 25 CLR 434.
69 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
70 (1956) 94 CLR 254 at 296 (per Dixon CJ, McTiernan, Fullagar and Kitto JJ); affirmed on appeal by the Privy Council in *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529. The importance of the separation of the judicial power was reaffirmed by Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70.
71 Marks, K, "Judicial Independence" (1994) 68 ALJ 173 at 174.
72 Constitutional Commission, *Final Report of the Constitutional Commission - Volume 1* (Canberra: AGPS, 1988) at 391. See also Constitutional Commission, *Australian Judicial System Advisory Committee Report* (Canberra: AGPS, 1987) at 65-6.
73 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
74 Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532 at 535. See also *R v Davison* (1954) 90 CLR 353 at 368.
75 See Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532 at 539; and Campbell, E, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *F L Rev* 24 at 27 & 58.
76 (1972) 127 CLR 588.
77 cf de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 119.
78 (1954) 90 CLR 353 at 366 (per Dixon CJ and McTiernan J).
79 (1909) 8 CLR 330 at 357
80 (1918) 25 CLR 434 at 442.
81 *British Imperial Oil v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro; British Imperial Oil v Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the *Privy Council in Shell Co. of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530.
82 (1925) 35 CLR 422 at 439 (per Isaacs J).
83 (1925) 35 CLR 422 at 445 (per Starke J).
84 (1930) 44 CLR 530 at 543.
85 For a commentary on the cases see Zines, L, *The High Court and the Constitution* (3rd ed), (Sydney: Butterworths, 1992) at 155-8.
86 Campbell, E, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *F L Rev* 24 at 34; and see Renfree, H E, *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) at 79-80.
87 (1988) 82 ALR 175.
88 See Ong, D S K, "The Separation of Powers and the Exercise of Ancillary Powers Through the Supervision of the Commonwealth Executive" (1982) 13 *MULR* 532; and Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13.
89 (1954) 90 CLR 353 at 369.
90 (1991) 172 CLR 84.
91 Ibid at 107.
92 See Zines, L, *The High Court and the Constitution* (3rd ed) (Butterworths: Sydney, 1992) at 153.
93 (1991) 173 CLR 167.
94 Ibid at 190.
95 (1991) 173 CLR 167 at 189. The decision in *Precision Data* was cited with approval in *Re Dingjan; Ex parte Wagner* (1995) 128 ALR 81 at 107.
96 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 (per Isaacs and Rich JJ).
97 (1995) 127 ALR 1 at 17.
98 (1970) 123 CLR 361 at 374.
99 (1974) 130 CLR 87.
100 Ibid at 94.
101 Ibid at 96.
102 See de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 114-116.
103 (1977) 138 CLR 1.
104 Ibid at 12 (per Jacobs J).
105 Lane, P H, "The Decline of the Boilermakers Separation of Powers Doctrine" (1981) 55 *ALJ* 6 at 12.
106 de Meyrick, J, "Whatever Happened to Boilermakers? Part I" (1995) 69 *ALJ* 106 at 118.
107 (1981) 36 ALR 275 at 281.
108 de Meyrick, J, "Whatever Happened to Boilermakers? Part II" (1995) 69 ALJ 189 at 192.
109 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69-70 (per Deane and Toohey JJ). Note, however, comments

critical of the doctrine in the *Joske* cases: *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90; and *R v Joske; Ex parte Shop Distributive Allied Employees' Association* (1976) 135 CLR 194 at 201 and 222.

110 (1981) 36 ALR 275 at 284.

111 Renfree, H E, *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) at 43.

112 Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13.

113 Hall, A N, "Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal" (1994) 22 *F L Rev* 13 at 53.

114 Ibid at 54.

115 Ibid at 55.

REGULATORY REVIEW: THE NEXT WAVE

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Introduction

As the 21st century looms, those in government charged with the responsibility of making regulation are under increasing pressure. This is reflected in the observation that "[t]o some business spokespeople, government interference in the marketplace is regarded as the embodiment of evil. Others adopt a more flexible approach, objecting strenuously to some forms of regulation, but tolerating, indeed, embracing, those forms of government involvement which happen to foster their own business interests".[1]

There is increasing pressure to improve the business environment by reducing costs and other impediments. There are increasing demands that regulations be "efficient and effective". In response, governments (or, at least, those that wish to be elected and re-elected) increasingly pledge that they will "cut red tape". However, there is a general business ignorance of what those in government are doing to make the regulatory process more efficient.

The best publicised project is the National Performance Review of the United States of America, chaired by Vice-President Al Gore, with its objective of "re-inventing government". However, even this project receives relatively little credit, leading to the title of the Vice-President's September 1996 report, "*The Best Kept Secrets in Government*".[2]

This is not true in my home jurisdiction of Victoria (Australia) where the Executive and the Parliament are actively involved in innovative approaches to the problems that face both regulators and the regulated in the late 20th century.

After eight years service on a parliamentary committee charged with scrutiny of regulation, I believe it is vital that parliamentary committees remain abreast of the multi-disciplinary work of regulatory reform and ensure that reform is not a guise for avoiding parliamentary and public scrutiny.

Thus, in this paper, I will focus on new developments in regulatory reform, including negotiated rulemaking, cost-benefit analysis and especially the concept of regulatory flexibility. I will touch on developments in rule-making in Victoria (and in Australia generally) to demonstrate that, rather than being swamped by the waves of criticism, regulators in Victoria are well-placed to ride those waves. This is because we have already implemented reforms including:

- mandatory cost-benefit analysis;
- mandatory consultation with interest groups and the general public;

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- ten year sunset clauses;
- a strong system of review by an all-party parliamentary committee with disallowance by either House of the (bicameral) Parliament.

However, while much has been achieved, we still grapple with the assessment of the costs and benefits of regulation, how such costs are changing over time, and what effect increasing complexity has on compliance.

I do not claim that Victoria has cornered the market on regulatory innovation. In May 1996, the NSW Government issued a Green Paper entitled *Regulatory innovation: Regulation for results.* In that paper, the NSW Government opened up discussion on the concept of "regulatory innovation strategies", the common thread of which is expressed to be "that they create room for businesses to influence the means by which they will satisfy the objectives of the regulation".[3] The paper canvasses various alternatives to the current system of regulation, including "performance based regulation", "negotiated rule making", "class exemptions" for small business, "regulatory flexibility" and "third party certification".

This is further evidence of the fact that governments and parliaments in Australia are aware of the demands of those being regulated, the pressures these demands place on the regulators, and also of the alternative compliance mechanisms that are available.

"Governments are not omnicompetent"

I believe current progress in regulatory reform is more than the knee-jerk reaction of politicians to the self-interested demands of business. Rather, governments must look at ways of improving their approach to regulation because regulation is increasingly believed to be beyond the capacity of governments to manage on their own (and from their own resources). That being so, there is a wider public interest in regulatory reform.

The thesis that the "business" of regulation is becoming too much for governments to handle has been put by Dr Peter Grabosky, an Australian commentator on regulatory policy. In his words, "governments are not omnicompetent". Nevertheless, governments of many countries have been torn between a pressure to reduce public spending, on the one hand, and an increasing pressure to deliver more, on the other. He has suggested that, this being so, one way of addressing the issue is to harness resources outside the public sector, to mobilise non-governmental resources and to enter into "co-productive" arrangements with those to be regulated.[4]

Thus, governments may achieve more efficient and effective regulation, with better compliance, if they engineer a regulatory system in which they themselves play a less dominant role, one in which they facilitate the "constructive regulatory participation of private interests",[5] in which their role is in "manipulating incentives in order to facilitate the constructive contributions of non-government interests"[6] and in which they "act as facilitators and brokers, rather than commanders".[7]

Negotiated rulemaking - "Reg-Neg"

There is increasing international support for what Grabosky calls "interest co-option" - the concept of building support for policy outcomes, by involving those who are to be regulated in the actual process of making the regulations.[8] This is a recognition of the basic nostrum that all law is ultimately dependent on consent for both legitimacy and enforceability. A good example is the concept of "negotiated rulemaking", also known as "*Reg-Neg*",

which operates under the (United States) Negotiated Rulemaking Act of 1990.

Briefly, the basic idea behind *Reg-Neg* is that a government agency considering making a *rule* (which is the US equivalent of what most of us here would call a regulation) first brings together representatives of "*affected parties*" for discussions on the proposal. The concept of "*affected parties*" incorporates interest groups, as well as those to be regulated by the proposed rule. When the parties are brought together, the object of the exercise is to achieve consensus about the text of the proposed rule, with a view to avoiding costly litigation further down the track. This must be done carefully, lest the result be a reduction in regulatory quality through deal-doing by interest groups at the expense of objective policy formulation.

While *Reg-Neg* may be a relatively new concept in common law jurisdictions, several European countries have long histories of involving business and academic elites and other groups in a highly institutionalised structure with a consensus approach to rule-making. France has its Council of State and the Economic and Social Council, the Netherlands its Socio-Economic Council and Labor Foundation, Greece has a Council of State.[9]

An OECD commentator, Rex Deighton-Smith, has observed, "By contrast, the English speaking countries have not only not had many of these structures but have tended to look upon regulation-making as an activity which was more or less exclusively the concern of government".[10]

"Reg-Neg" Australian-style

A form of negotiated rule making has been operating in Victoria since 1985, under provisions of what is now the *Subordinate Legislation Act 1994*. The general scheme requires that government departments consider various matters (including the existence of alternative methods of achieving the desired ends) *before* introducing regulations. There is also a requirement that the making of the proposed regulations be publicised in advance and that interested parties be consulted.[11] Finally, in all substantial cases, a "Regulatory Impact Statement" (RIS) has to be prepared by the government department proposing the regulation, in which the costs and benefits of the regulation - both economic and social - have to be evaluated.[12] The availability of an RIS also has to be advertised, and comments sought from those affected by the proposal, before the regulation can be made.[13]

A similar system operates in New South Wales, under provisions of the (NSW) *Subordinate Legislation Act 1989*. There is also a regulatory reform Bill before the Australian Federal Parliament.[14] The Bill would require all "legislative instruments"[15] "directly affecting business, or having a substantial indirect effect on business"[16] to be subject to consultation procedures similar to those of Victoria. Unfortunately, due to the failure of the government to take account of the criticisms by the Senate Standing Committee on Regulations and Ordinances of other less desirable features,[17] that Bill may be defeated in the Senate.

Victoria's experience of negotiated rule making

The process of publication and public consultation in Victoria is monitored by the Scrutiny of Acts and Regulations Committee,[18] a Committee of the Victorian Parliament of which I was the foundation Chair. The Committee's role includes one of scrutinising regulations to ensure that the formal requirements of the Subordinate Legislation Act have been complied with. In turn this requires the Committee to assess the adequacy of the Regulatory Impact Statements.

Subsection 10(1) of the Subordinate Legislation Act prescribes that an RIS must include:

(a) a statement of the objectives of the proposed statutory rule;

(b) a statement explaining the effect of the proposed statutory rule, including in the case of a proposed statutory rule which is to amend an existing statutory rule the effect on the operation of the existing statutory rule;

(c) statement of *other practicable means* of achieving those objectives, including other regulatory as well as non-regulatory mechanisms;

(d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;

(e) the reasons why the other means are not appropriate;

(f) any other matters specified by the guidelines;

(g) a draft copy of the proposed statutory rule.

With respect to "other practicable alternatives", I should note that the Office of Regulation Reform (ORR) has published a useful guide to what is envisaged by the concept. They include:

- performance-based regulation;
- co-regulation;
- extending the coverage of principal legislation;
- removing other legislative impediments;
- increased enforcement;
- tradeable permits/licences;
- voluntary codes/self-regulation;
- negative licensing;
- public education programmes;
- information disclosure;
- economic incentives;
- risk-based insurance or guarantee funds; and
- rewarding good behaviour.[19]

I want to focus for a moment on the requirement in paragraph (d) that an RIS contain a cost-benefit analysis of a proposed statutory rule and of its identified alternatives. The cost-benefit analysis can be quite substantial and may be particularly difficult in cases where the benefits are social rather than economic.

The requirement to produce a document which, as best as possible, accurately assesses costs and benefits has been reinforced by the Supreme Court and, more particularly, by the Scrutiny of Acts and Regulations Committee (SARC). Over recent years the Committee has rejected Regulatory Impact Statements relating to pollution controls over ports[20] and over pollution controls over prescribed premises.[21] In both cases, the assumption of the agencies was that an assertion of benefit was sufficient. In the first case following consultation between the SARC and the relevant Ministers, the Regulations remained in place for an agreed period while a new RIS was prepared and a new process of consultation took place. In the second case, a new protocol for EPA/industry consultation was the extremely desirable result of a successful intervention by the scrutiny committee.

It is important to note that, in assessing whether the requirements of subsection 10(1) have been met, the Committee is assisted by the work of the Office of

Regulation Reform.[22] This office has a formal role in the process because of the requirement in subsection 10(3) of the Subordinate Legislation Act that "independent advice" be available as to the adequacy of an RIS. It is also important to note that, despite operating within the Government umbrella, ORR really does provide *independent* advice, and does not merely rubber-stamp RISs provided by Government departments and agencies.[23] Though it is not prescribed as the *only* source of such advice, ORR is the principal source of that advice. However, as a result of the operation of competition policy (and perhaps through some dissatisfaction by rule-makers with the stringent demands of ORR) its role is open to competition. There remains a danger that rule-making departments could seek to buy compliant advice.

While it is difficult to give precise quantitative evidence on the operation of the RIS procedures, it is my firm view (as Chairman of the Scrutiny of Acts and Regulations Committee) that the RIS procedures work and that they help to make regulations in Victoria both more effective and more efficient. Those rough quantitative estimates available support my assertion. ORR estimates about 20% of regulatory proposals coming to their attention via RIS drafts are either modified substantially or withdrawn, resulting in cost savings running into tens of millions of dollars. The 20% figure would underestimate the effect, in that many poor proposals do not proceed beyond a rough draft. Similarly, a United States Environment Protection Authority analysis of their experience with cost benefit analysis estimated that it had saved the economy $1000 for every $1 spent doing it.

Alternative compliance mechanisms

I now turn to the most recent regulatory reform proposal, namely, the concept of "Alternative Compliance Mechanisms" (ACM), which are embodied in the (Canadian) Regulatory Efficiency Bill (C-62). Under this 1994 Bill, Ministers would be able to approve alternative methods of complying with regulations pertaining to a particular business or industry. Before a draft "compliance order" is negotiated between the government agency and the relevant business or industry group, there must be consultation with affected parties. It is a key feature of an ACM that, while it does not meet the prescriptive requirements of the relevant regulations, it must nevertheless meet the **regulatory objectives** of the regulations. In that sense, it focuses on the ends, rather than the means.

However, the Canadian proposal is stalled or dead. The Bill was the subject of a scathing report by the Standing Joint Committee for the Scrutiny of Regulations (The Canadian Scrutiny Committee).[24]

While taking no issue with the goals of the Canadian Bill (ie to relieve the public, especially businesses, from the effects of unnecessarily burdensome or costly regulations, etc), the Canadian Scrutiny Committee stated that the Bill represented "a major departure from traditions of law and government" and, as a result, "ought to be very carefully examined and tested".[25] The particular problems that the Canadian Scrutiny Committee identified were that it would give the Executive a discretion to grant dispensations from the operation of subordinate laws in favour of individuals (which, the Committee said, amounted to a partial abrogation of the Bill of Rights of 1689) and that it was inconsistent with other constitutional values (including the rule of law and the principle of government accountability).[26] I need not tell an audience such as this that these are very serious matters, even if overstated in the report.

At its last "outing", the proposal was defeated in the governing Federal Liberal Party's caucus room. In 1996, I travelled to Ottawa to interview its authors (the Regulatory Affairs Division of the Treasury

Board of Canada), proponents, and opponents. Both before and after my visit, I used Internet and email to research the proposal and maintain contacts with those authors, proponents and opponents. It appears to me that the main reason for its defeat was a political assessment that the proposal would be bad politics in that it would be seen as the Liberal Party pandering to its business constituency. A secondary reason for its caucus defeat was a perceived lack of equity, in that only large corporations could afford the resources to successfully apply for and maintain an ACM.

Regulatory efficiency legislation - the Victorian proposal

While ACMs may have died in Canada, there is some impetus in Australia to take up the idea. This is, in part, a reflection of the fact that, as part of its platform for the 1996 election, the Victorian State Government pledged that it would:

> Introduce Regulatory Efficiency Legislation which allows business to propose alternative means of compliance with regulatory objectives. This will lower compliance costs across a range of regulations, by allowing business to tailor its method of compliance to suit its specific business circumstances and will build on flexibilities which are already being implemented in relation to specific legislation.
>
> For example, a road haulage firm with an integrated anti-fatigue program might have this accredited as an alternative to compliance with detailed driving log requirements, or a business might propose an inspection schedule for major machinery which suits its own maintenance schedule rather than meeting periodic requirements set in regulation.[27]

This commitment was, in turn, taken up by the Executive Council, which (on 28 June 1996) referred the issue of Regulatory Efficiency Legislation to the Law Reform Committee of the Victorian Parliament for inquiry, consideration and report.

A proposal prepared by the Office of Regulation Reform to the Victorian Government was made available to the Law Reform Committee. The proposal is similar to that in the Canadian Bill. This raises my suspicion that OECD meetings - which Australian and Canadian regulatory reformers attend - and the use of the Internet result in a process whereby a reform proposal stalled in one jurisdiction will spring up in another!

However, this is not necessarily a bad thing. An OECD Committee, the Public Management Committee has a Regulatory Management and Reform Group. This Group endeavours to ensure that regulation and regulatory systems are increasingly internationalised, with best practices being identified and information shared throughout the member countries. An important theme is that as economies globalise, so regulation must be harmonised if it is not to replace tariffs and quotas as the most significant barrier to trade.

In any event, we parliamentarians have taken to the Internet too and my Committee will use the Internet and its world-wide-web to undertake our process of consultation. You can be assured that we will be asking you to turn your minds to the acceptability of alternative compliance mechanisms.

The ORR proposal seems to have taken into account the reasons for the defeat of the Canadian proposal. There is a requirement that the proposal does not involve any lowering of regulatory standards and an assurance that proponents of Alternative Compliance Mechanisms would, in all cases, be required to demonstrate that their proposals would meet the identified regulatory objectives and performance standards *at least as effectively as the specific regulations that they seek to replace.*[28] In particular, an ACM would not be approved if it would compromise any safety, health or environmental objectives

of the relevant regulations. There is also a commitment that the principles of equality, fairness, competitive neutrality and government accountability will be respected and that government budgetary policy will not be compromised.

The scheme outlined by the ORR would apply only to statutory rules (within the meaning of the *Subordinate Legislation Act 1994*) and only to those statutory rules that are specifically "scheduled" by statute as being appropriate for the application of ACMs. A statutory rule would only be proposed for scheduling where it imposed an appreciable economic burden on business or another sector of the community. Proposals for scheduling would be made by the Minister responsible for the relevant legislation and would only be carried through after consultation with those persons and groups most likely to be affected by the scheduling.

The proposal includes a requirement that the relevant Minister must prescribe all the "relevant criteria" that would be taken into account in deciding whether or not to approve an ACM. Certain "minimum criteria" are suggested, namely:

- consistency with the stated statutory objectives;
- clear specification of the part(s) of the statutory rule(s) for which the ACM is to substitute;
- a clear explanation of the proposal, including a description of how the stated regulatory objectives will be achieved under the ACM and identification of businesses, activities or categories of persons to be subject to the ACM;
- adequate means of monitoring compliance with an ACM, including sufficient access to information necessary for monitoring performance.

The proposal envisages that there will be a requirement that the Minister publish (including in a daily newspaper circulating generally throughout Victoria) details of the statutory rule that is proposed to be scheduled, the stated statutory objectives and all "relevant criteria". It also proposes that the "relevant criteria" should be open to review by the Scrutiny of Acts and Regulations Committee, which would determine whether the criteria were adequate and whether they were consistent with both the stated regulatory objectives of the relevant statutory rule and the purposes and principles of the proposed Bill.

Approval of an ACM would not be possible unless the formal requirements discussed above have been satisfied. There would also be an obligation on the relevant department of agency to evaluate the ACM and recommend to the Minister whether or not it should be approved. Before making such a recommendation, the relevant department or agency would be required to consult with parties and groups affected directly and significantly by the proposed ACM (including other departments and agencies).

If a Minister decided to approve an ACM, he or she would be able to do so for whatever period he or she thought appropriate in a given case. The Minister would be required to publish notice of his or her approving the ACM and also to table such a notice in the Parliament. There would be an obligation on the relevant department or agency to make copies of the ACM available to the general public for inspection and purchase. There would also be an obligation on the proponent to inform all parties directly affected by the ACM (including the employees of the proponent, if relevant) of the details of the ACM.

Under the proposal as outlined to the Law Reform Committee, the ACM would operate to bind both the Government and the proponent to its terms. The legislation

would contain a statement to that effect. It is also proposed that there be a mechanism in the proposed legislation to ensure that a breach of the ACM will render the proponent liable to prosecution in the criminal courts for a breach of the relevant regulations (ie that the ACM operates as an alternative *to*) and/or to be subject to the forfeiture of security deposits and/or any other penalty prescribed in the relevant guarantee.

Finally, it is proposed that there be a discretionary power on the part of departments to recover the costs incurred in providing services relating to the preparation, finalisation evaluation and approval of a proposed ACM. There would be fees for any administrative action taken after the approval of an ACM, for example, where higher administrative costs are incurred or where requests are made to amend, vary, extend or cancel the approved ACM.

Critics of the proposal may consider that it is just a way of facilitating the watering-down of standards that currently operate to keep business in proper check. This will not be the case because any alternative will not be politically acceptable. If this proposal is to work, it must be on the basis that the proponents of ACMs can demonstrate that they meet the identified objectives of the relevant regulations (eg to keep the level of impurities in air or water below a certain percentage). A similar process already operates in Victoria, in the form of State environment protection policies (SEPPs) issued under the *Environment Protection Act 1970*. Under those SEPPs, "environmental quality indicators and objectives" are set and must be met by businesses and bodies that come within their jurisdiction.[29]

Further, if the proposal is ultimately adopted in Victoria, it will only work if it is in a form that ensures maximum transparency and accessibility to the general public and, in turn, maximum accountability of the Government to the electorate. It must not simply be a means for the Government to ingratiate itself with big business or a political party's financial backers.

The Canadian criticisms need to be examined closely. There must not involve any inappropriate delegation of legislative power to the Executive Government. Transparency and accountability must be guiding principles for any proposed legislation. It will be necessary for the Minister to be accountable to the Parliament and the general public for any exercise of that power. This would be achieved by ensuring that proposals - and the criteria by which they are to be judged - are published.

In my opinion, ACMs will only be politically acceptable if they are subject to the same level of parliamentary scrutiny as the primary regulation. Thus, they must be subject to disallowance by either House of Parliament, with appropriate examination by the Scrutiny of Acts and Regulations Committee.

Alternative compliance mechanisms in action?

It is possible to argue that the concept of alternative compliance mechanisms already operates to some extent. A system of "accredited licensees" already operates in Victoria, under amendments made in 1994 to the *Environment Protection Act 1970* (Vic).[30] Under this system, companies subject to environmental regulation can be freed from "the standard prescriptive approach to works approval and licensing" if they can demonstrate a high level of environmental performance and an ongoing capacity to maintain and improve that performance.[31]

Three "cornerstones" are required of companies participating in the accredited licensee process: an environmental management system, an environmental audit program and an environmental

improvement plan. A company must be able to convince the Environment Protection Authority (EPA) that it meets these cornerstones to a sufficient standard. If the EPA is so convinced, it will issue a licence that grants the licensee "a high degree of operational freedom".[32]

Once issued with a licence, an operator must lodge performance reports to demonstrate to the EPA that they are complying with its terms. Continuation of the licence is assessed on the basis of actual environmental performance and is judged against factors such as licence compliance, implementation of environment improvement plans and legal compliance by the operator.[33]

The transparency aspect is met by a requirement for community participation, consultation and access, particularly in relation to the environment improvement plan. Accountability is facilitated by virtue of the cornerstones of the licence being the subject of review at a predetermined frequency that must not exceed 5 years.[34]

As at 3 February 1997, 5 accredited licences were operating in Victoria.[35] Anecdotal evidence is that the concept works to the satisfaction of all concerned. In this context, it is important to note that the Chairman of the EPA, Dr Brian Robinson, recently said that the overall aim of the accredited licence system is "environmental improvement *through co-operation between industry, government and the community*" [emphasis added].[36]

At the Australian Federal level, the National Road Transport Commission (NRTC) is also pursuing the concept of alternative compliance mechanisms. It issued a discussion paper on alternative compliance in May 1994[37] and an interim regulatory impact statement on alternative compliance options in April 1995.[38] My inquiries indicate that the NRTC is slowly but actively pursuing this proposal.[39]

The bottom line is that the concept of alternative compliance mechanisms can work because, in Victoria at least, it appears to work.

Regulatory budgets

The general theme of my paper is that governments are aware of the current challenges of regulation and are open to the alternatives that are being proposed to the system that currently exists. I should add, however, that this does not mean that I necessarily endorse all the reform options that are currently the subject of discussion in Australia and overseas.

One option that I have in mind is that of the "regulatory budget", a concept that has generated not only interest but draft legislation in the United States. Under this concept, government agencies would be required to estimate the economic cost of implementing their regulatory policies and then to weigh this cost against the benefit that those policies would produce.

Under this Republican proposal, a regulatory budget would be tabled annually along with the fiscal budget. Hardly radical is an obligation on government that only those policies whose benefits outweighed the net costs would be implemented. However, under the Republican proposal, there would be a net sum of money available to regulators from which the cost of regulation would have to be met. The effect of this would be that, in order to find the money to pay for new regulations, regulators would have to repeal some old ones.

There are fundamental problems with this proposal, the most obvious being that it is "perilously" difficult to measure the value of, for example, a clean beach or racial equality.[40] It is worrying that it is superficially attractive to economic commentators who believe that a regulatory budget would force Congress and administrators to take responsibility for the cost of new laws, by making "bad"

regulation as politically embarrassing as wasteful spending.[41]

The regulatory budget proposal is probably a political stunt in the hurly-burly of US politics. With the increasing prevalence of cost benefit-analysis in the case of each new and remade regulation, it is a proposal that has no merit in the context of our Commonwealth systems.

Conclusion

In 1995, Christopher Booker, an English author and journalist, asserted that the British government had:

> recently unleashed the greatest avalanche of regulations in peacetime history; and wherever we examine their working we see that they are using a sledgehammer to miss a nut.[42]

We can laugh at this hyperbole but, it seems, this thinking has a high level of credibility amongst our business constituency and even among the general public.

Parliamentarians are not oblivious to this concern. The Fourth Report of the UK House of Commons Procedure Committee, tabled in June 1996, observed that "There is widespread concern at the growing volume and complexity of delegated legislation, and the obvious deficiencies in its consideration and scrutiny by Parliament".[43]

While this may be true in the United Kingdom, in the Australian State jurisdictions of Victoria and New South Wales, the volume of regulation has been almost halved with the impact of sunset clauses and regulatory impact statements. We need to work hard to ensure that the general public and business understands what we are doing. Like the National Performance Review, Parliamentary Scrutiny Committees are amongst the best kept secrets of our parliaments.

We need to ensure that commentators and the press acknowledge that (in some jurisdictions at least) efforts are being made to address the kinds of criticisms that are generally (and easily) made. While there is ample evidence to support the general thrust of such arguments, criticisms about the volume of regulations, for example, fail to recognise that, in some jurisdictions at least, there is legislation in place to require that redundant regulations be repealed.[44] It is equally the case that not enough credit is paid to the efforts of governments who do explore and implement innovative regulatory strategies.

Government should ensure that the resourcefulness of the private sector is brought to bear on regulatory mechanisms - whether it be by consulting the private sector on the form and content of regulations or by inviting the private sector to use its own expertise (and resources) to develop alternative compliance mechanisms. Even if there are very few Alternative Compliance Mechanisms produced because of the high cost of preparation, we will have opened a door to business and an avenue of counter-attack to criticism. We will be able to invite critics of regulation to propose alternative means better benefiting the community and themselves. While this will not silence the radicals, most business leaders are moderate and socially-responsible and will see the sense in our work.

However, public confidence in such a system will only be developed and maintained if there is a vigorous parliamentary scrutiny committee, with a good profile and the trust of the media commentators. Bipartisanship and confidence are the keys. Regulatory reform will proceed. It is your task, ladies and gentlemen, to ensure that democratic principles are not set aside in the headlong rush to greater efficiency!

Endnotes

1 Grabosky, PN and Braithwaite, J, *Of manners gentle: Enforcement strategies of Australian Business regulatory agencies* (1986, Oxford University Press, Melbourne), p 1.

2 Gore, Al, *The Best Kept Secrets of Government*, (September 1996, US Government Printing Office).

3 New South Wales Government, *Regulatory innovation: Regulation for results - Discussion paper* (May 1996), Foreword.

4 Grabosky, PN, "Using non-governmental resources to foster regulatory compliance", *Governance: An International Journal of Policy and Administration*, Vol 8, No 4, October 1995, 527 at p 527. Similar themes are also discussed in Grabosky, PN, "Green markets: Environmental regulation by the private sector", *Law and policy*, Vol 16, No 4, October 1994, 419. For similar views from an alternative source, see Jonson, PD and Jonson EP, "Financial regulation and moral suasion", *Quadrant*, July-August 1994, 85 at p 89.

5 Grabosky (note 1), p 543.

6 Grabosky (note 1), p 544.

7 Grabosky (note 1), p 545. This idea was also taken up by the Chairman of the Environment Protection Authority (Victoria), Dr Brian Robinson, in a speech to the Australian Centre for Environmental Law on 2 July 1996, entitled "ISO 14000: Eagle or albatross", at pp 2-3.

8 Grabosky (note 1). p 533.

9 Deighton-Smith, Rex, "Co-operative Approaches to Regulation - The Good, The Bad and the Future", draft speech made available by the author.

10 Ibid.

11 *Subordinate Legislation Act 1994* (Vic), section 6.

12 There are "exceptions" and "exemptions" to the RIS process, under sections 8 and 9 of the *Subordinate Legislation Act 1994* (Vic). The exceptions include that the proposed statutory increases fees in respect of a financial year by an annual rate that does not exceed the annual rate approved by the Treasurer and that the proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal. The exemptions are that the proposed statutory rule (a) would not impose an appreciable economic or social burden on a sector of the public; or (b) is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme; or (c) is of a fundamentally declaratory or machinery nature; or (d) deals with administration or procedures within or as between departments or declared authorities within the meaning of the *Public Sector Management Act 1992* (Vic); or (e) that notice of the statutory rule would render the proposed statutory rule ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed statutory rule. Subsection 9(3) also provides an exemption if the Premier specifies, in writing, that in the special circumstances of the case, the public interest requires that the proposed statutory rule should be made without complying with the RIS procedures.

13 *Subordinate Legislation Act 1994* (Vic), sections 7-12.

14 Legislative Instruments Bill 1996 (Cth).

15 This term is defined in clause 5 of the Legislative Instruments Bill. In essence, it covers all forms of what we would generally refer to as "delegated legislation".

16 Legislative Instruments Bill 1996 (Cth), Explanatory Memorandum, paragraph 41.

17 O'Chee, Senator Bill, "Sir Humphrey Appleby is alive and well: the Legislative Instruments Bill 1996", Paper given at the Fourth Commonwealth Conference on Delegated Legislation, (Wellington, New Zealand, 11 February 1996).

18 Set up under the *Parliamentary Committees Act 1968* (Vic).

19 Office of Regulation Reform, *Regulatory alternatives* (undated), pp 14-38.

20 Scrutiny of Acts and Regulations Committee, *Second Report on Subordinate Legislation concerning: Port of Melbourne Authority (Transport, Handling and Storage of Dangerous Substances and Oils) Regulations 1992* (1993, Government Printer, Melbourne).

21 Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994* (1995, Government Printer, Melbourne).

22 The Office of Regulation Reform operates within the Department of Business and Employment.

23 See, for example, Scrutiny of Acts and Regulations Committee, *Seventh Report on Subordinate Legislation concerning: Environment Protection (Scheduled Premises and Exemptions) Regulations 1994* (195, Government Printer. Melbourne). In that Report, the Committee received evidence from the ORR that it had concerns about the RIS prepared by the Environment Protection Authority in relation to the relevant regulations.

24 Standing Joint Committee for the Scrutiny of Regulations, *Report on Bill C-62* (16 February 1995).

25 Standing Joint Committee for the Scrutiny of Regulations (note 18), p 1.

26 Standing Joint Committee for the Scrutiny of Regulations (note 18), pp 4-5.

27 Liberal Party of Australia (Victorian Division), Small Business Policy, p 8.

28 See Office of Regulation Reform, *Discussion Paper: Regulatory Efficiency Legislation*, pp 2-3.

29 See, for example, Environment Protection Authority, *Protecting water quality in Central Gippsland*, Publication 519, December 1996.

30 The relevant amendments are set out in the *Environment Protection (General Amendment) Act 1994* (Vic).

31 See, for example, Environment Protection Authority, *A question of trust - Accredited licensee concept: A discussion paper*, Publication 385 (July 1993); and Environment Protection Authority, *EPA Information Bulletin*, Publication 424 (February 1996).

32 Robinson, B, "Is seamless regulation possible', speech to Annual Conference of The Textile Institute, Southern Australian Section, 18 June 1996, p 6.

33 Robinson, op cit, p 6.

34 Robinson, op cit, p 6.

35 As advised by a representative of the EPA. Accredited licences have been issued to (1) Generation of Victoria Newport Power Station; (2) BHP Steel Pty Ltd; (3) Yarra Valley Water; (4) Kemcor Australia Pty Ltd; and (5) Yallourn Energy Ltd.

36 Robinson, B, "Is seamless regulation possible". speech to Annual Conference of The Textile Institute, Southern Australia Section, 18 June 1996, p 7.

37 National Road Transport Commission, *Alternative compliance: Discussion paper* (May 1994).

38 National Road Transport Commission, *Interim regulatory impact statement on alternative compliance options* (April 1995; revised May 1995).

39 The NRTC advised that 3 areas are currently being worked on: (1) an RIS is being developed in relation to evaluating the economics of delivery for mass management and maintenance; (2) a discussion paper will shortly be published on "Maintenance and mass management". It will include an alternative regulation framework, which is proposed to be with the Ministers in August 1997. It is planned that there will be a Bill to amend the *Road Transport Reform (Vehicles and Traffic) Act 1993* (Vic) to provide the "hooks" for the adoption of alternative compliance mechanism. The enabling legislation is to form a template framework for other jurisdictions to adopt, if so minded; and (3) a fatigue management program is to be introduced in the future. The first stage is compiling the principles for the RIS, which is being undertaken by Queensland Transport.

40 See, for example, "The hidden cost of red tape", *The Economist*, 27 July 1996, p 11.

41 See, for example, "Over-regulating America: Tomorrow's economic argument", *The Economist*, 27 July 1996.

42 Quoted in Jay, A *The Oxford Dictionary of Political Quotations* (1996, Oxford University Press, Oxford), p 52.

43 Quoted in Bennet, MP, Andrew F, "Delegated Powers, Uses and Abuses of Regulations", paper delivered at the Fourth Commonwealth Conference on Delegated Legislation, Wellington, New Zealand, February 1996.

44 Victoria and New South Wales, for example. If the Legislative Instruments Bill 1996 (Cth) is enacted, the same can be said of the Federal jurisdiction in Australia.