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THE BANGALORE PRINCIPLES AND THE INTERNATIONALISATION OF AUSTRALIAN LAW

*Glen Cranwell**

Treaties are not *directly* incorporated into Australian domestic law by the international act of ratification or accession by Australia. A treaty per se does not form part of domestic law unless and until it is incorporated by legislation and, in the absence of such legislation, it cannot create rights in or impose obligations on Australian citizens and residents. However, there have been important developments in recent years in the relationship between domestic law and international treaties. The High Court has shown a willingness to use treaties in the interpretation of statutes and in the development of the common law.[1] This is particularly so in the case of international human rights principles as they have been expounded, and developed, by international and regional bodies. More recently, the Court found that ratification of a treaty could give rise a legitimate expectation that the Commonwealth executive would adhere to the terms of the treaty, giving rise to rights of procedural fairness.[2] An expression that seems to encapsulate the modern approach to the use that may be made by judges of international human rights principles is found in the so-called Bangalore Principles.

On 28 February 1988, a judicial colloquium on the domestic application of international human rights norms was convened in Bangalore, India, by the former Chief Justice of India, PN Bhagwati. The colloquium, attended by nine judges and two jurists,[3] adopted a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms.[4] The Bangalore Principles acknowledged that in most of the countries of the common law world such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. After recounting the universal character of fundamental human rights and the guidance concerning their scope to be derived from international human rights instruments and jurisprudence,[5] the statement concludes that there has been:

> a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.[6]

The thesis of the Bangalore Principles is not that international legal norms on human rights are incorporated, as such, as part of domestic law. Still less is it that domestic judges are entitled to override clear domestic law by reliance upon such international norms. In terms, the Bangalore Principles declared:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

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> However where national law is clear, and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
>
> It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms.[7]

The statement then calls for practical measures to promote knowledge of international human rights norms throughout the judiciary and the legal profession. It urged the provision of necessary texts, case law and decisions to law libraries, judges, lawyers and law enforcement officials.[8] It acknowledged the 'special contribution' which judges and lawyers have to make, in their daily work of administering justice, in fostering 'universal respect for fundamental human rights and freedoms'.[9] It recognised that the application of international norms would need to take fully into account local laws, traditions, circumstances and needs.[10]

The Bangalore Principles have been re-affirmed at subsequent similar judicial colloquia with minor amendments.[11] According to the Abuja Confirmation the process envisaged by the Bangalore idea involves nothing more than the use of the

> well established principles of judicial interpretation. Where the common law is developing or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards ... Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and as a source of accepted moral standards involves no such intrusion.[12]

For some time, the cause of the Bangalore Principles was prosecuted by only a few judges in Australia. Principally among them was Justice Kirby, then the President of the New South Wales Court of Appeal and the only Australian judge to attend this and successive colloquia.[13] As a result of the Bangalore meeting Justice Kirby gained an 'important insight' that he had 'tended to ignore the international dimension'.[14] In many criminal and civil cases, Justice Kirby has referred to international human rights norms. The cases have included:

- a case considering international obligations in a bankrupt's right of access to the courts;[15]
- a case recognising international obligations in relation to the independence and impartiality of the judiciary;[16]
- a case recognising the international right of an accused to a speedy trial;[17]
- a case recognising the right of a litigant to a court interpreter in civil proceedings;[18]
- a case recognising the recoverability of the cost of legal representation;[19]
- a case recognising the reasonableness of a fine for contempt of court;[20]
- a case recognising the right to legal representation in criminal trials;[21]
- a case recognising the right of an accused to question witnesses whose evidence might be exculpatory;[22] and
- a case recognising the right of an accused to use of property for the defence of criminal proceedings.[23]

Justice Kirby lamented the judicial caution in the process of internationalisation of Australian law. However, in 1992 the High Court gave its imprimatur to the use of unincorporated treaties in *Mabo v Queensland (No 2)*.[24] In the course of explaining why a discriminatory doctrine, such as that of terra nullius, could no longer be accepted as part of the common law of Australia, Brennan J (with the concurrence of Mason CJ and McHugh J) said:

> The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[25]

The participation by Justice Kirby in the formulation of the Bangalore Principles is reflected in numerous extra-curial comments and judicial references by Justice Kirby to international human rights norms. Apart from Justice Kirby, no Australian judge has made explicit reference to the Bangalore Principles. Yet Justice Kirby described the Bangalore Principles as containing 'nothing revolutionary' in terms of well-established principles of statutory interpretation.[26]

Brennan J, in *Dietrich v R*,[27] explained that the judiciary do update and repair the defects of the common law but only so as to keep the common law current in the context of 'contemporary values of the community'. He explained that 'contemporary values' which justify judicial development of the common law are not transient or inspired by an interest group's campaign but are the 'relatively permanent values of the Australian community'.[28] Brennan J stated that 'a concrete example of contemporary values is given by Art 14(3)(d) of the International Covenant on Civil and Political Rights'.[29]

This approach is in many respects similar to the use made of treaties as a source of 'public policy', a practice that has given rise to longstanding judicial controversy in Canada.[30] 'Public policy' may refer to a set of background rights or principles that are indefeasible by interests external to those of the right-bearer, and that are the preserve of neither the common law nor statute because they are the common substrata of both.[31]

In a paper delivered before his retirement as Chief Justice of Australia, Sir Anthony Mason referred to the idea behind the Bangalore Principles. Sir Anthony stated that the High Court did not hold the view that *any* gap in the common law should be filled through the use of international conventions.[32] Principles of international law might be ranked according to their suitability for use as an interpretative aid. A particular rule's 'fit' with existing domestic law, and the culture in which that law operates, can provide a yardstick by which international law norms, which are too vague or too contested for use as an interpretative aid, can be excluded. Unthinking adoption of an incorporationist approach might only lead to the replacement of traditional Australian sources of law with traditional international sources of law, which the Court perhaps fears will delegitimise the common law in the eyes of the Australian public.

Although little use has been made of unincorporated treaties outside the field of human rights, within that field judicial interpretation is increasing likely to narrow the gulf between international norms and Australia's domestic law. This is to be seen both in the interpretative rules and, more dramatically, in administrative law. The law regulating the relationship between treaties and domestic law is far from settled. Of the administrative law cases where reference to international human rights norms is made, the analysis shows that in all but a handful of cases such references were simply references, not forming part of the ratio of the decision and formally making no difference to the outcome of the case. As Kirby J emphasised in *Newcrest Mining (WA) Ltd v Commonwealth*, 'the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution''.[33] The full evolution of the technique described in the Bangalore Principles has not yet been achieved.

Endnotes

1 See Glen Cranwell, 'Treaties and Australian Law - Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law and Justice Journal* 49, 52-60, 71-4.
2 Ibid 60-71. See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
3 Amongst the participants were: Mr Anthony Lester QC, now Lord Lester of Herne Hill; Justice Rajsoomer Lallah, now Chief Justice of Mauritius; Justice Enoch Dumbutshena, then Chief Justice of Zimbabwe; and Judge Ruth Bader Ginsburg, now a justice of the Supreme Court of the United States. Justice Kirby attended from Australia.
4 The Bangalore Principles are published in Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 531-2.
5 Ibid Principles 1-3.
6 Ibid Principle 4.
7 Ibid Principles 7-9.
8 Ibid Principle 9.
9 Ibid Principle 10.
10 Ibid Principle 6.
11 See J Starke, 'Judicial Colloquium of April 1989 at Harare, Zimbabwe, on the Domestic Application of International Human Rights Norms' (1989) 63 *Australian Law Journal* 497; 'Abuja Confirmation of the Domestic Application of International Human Rights Norms' (1992) 18 *Commonwealth Law Bulletin* 298; 'Balliol Statement of 1992' [1992] *Australian International Law News* 104; Lord Lester, 'The Georgetown Conclusions on the Effective Protection of Human Rights through Law' [1996] *Public Law* 562.
12 'Abuja Confirmation of the Domestic Application of International Human Rights Norms', above n 11, 301.
13 For a personal reflection of the influence of the Bangalore Principles on the exercise of the judicial function, see Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View From the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363.
14 Ibid 364-5.
15 *Daemar v Industrial Commission of NSW* (1988) 12 NSWLR 45.
16 *S & M Motors Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358.
17 *Jago v District Court of NSW* (1988) 12 NSWLR 558.
18 *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.
19 *Cachia v Hanes* (1991) 23 NSWLR 304.
20 *Smith v R* (1991) 25 NSWLR 1.
21 *R v Greer* (1992) 62 A Crim R 442.
22 *R v Astill* (1992) 63 A Crim R 148.
23 *DPP (Cth) v Saxon* (1992) 28 NSWLR 263.
24 (1992) 175 CLR 1.
25 Ibid 42.
26 Kirby, above n 13, 374.
27 (1992) 177 CLR 292.
28 Ibid 319.
29 Ibid 321.
30 *Re Drummond Wren* [1945] 4 DLR 674; *Re Noble and Wolf* [1948] 4 DLR 123, affirmed [1949] 4 DLR 375.
31 See Ronald Dworkin, *Taking Rights Seriously* (1977) 81-130. See also Brian Fitzgerald, 'International Human Rights and the High Court of Australia' (1993) 1 *Proceedings of the Australian and New Zealand Society of International Law* 85, 95-6.
32 Sir Anthony Mason, 'Towards 2001 - Minimalism, Monarchism or Metamorphism' (1995) 21 *Monash University Law Review* 1, 9.
33 (1997) 147 ALR 42 at 147.

WHO IS A REFUGEE, HOW ARE THEY PROCESSED AND THE GOVERNMENT REFORMS

*Robert Lindsay**

When one listens to Professor Appleyard's analysis of the numbers of refugees worldwide, now over 22 million[1], the inadequacy of the international community both to agree on joint measures to tackle this problem, and the legal definition of a refugee, over which so much legal learning has been poured, one is conscious that lawyers must fit Spengler's definition of the specialist who tries never to make small mistakes while moving towards the big fallacy.[2]

This paper seeks to define what constitutes a refugee in the legal sense, how Australia has applied that definition, the procedures by which an application for refugee status is made; and then discuss the Howard government's recent legislative amendments and how these reforms affect both the procedures for applying for asylum and the definition of a refugee itself.

The Background History to the Definition of a Refugee

Border control by countries is a phenomenon of the last hundred years. Before the first world war passports, identity papers, even driving licences were almost unknown. People moved from country to country and were treated as a source of 'communal enrichment'. It was the massive displacements in the early twentieth century; of one million Russians fleeing the Bolsheviks, the exodus of Armenians from Turkey in the early 1920s, those who fled Germany in the 1930s because they opposed National Socialism; and the Iron Curtain coming down after the World War II with the flight of political dissidents to the west,[3] that brought about an ever increasing awareness that border control and the rules governing admission, were matters of critical governmental importance.

Following World War II the United Nations was set up, and in 1948 the Universal Declaration of Human Rights was passed, article 14 of which stated that 'everyone has the right to seek and enjoy another country's asylum from persecution'. The right to seek asylum was not accompanied by any assurance that the quest would be successful. The Declaration did, however, pave the way for the 1951 Refugee Convention which defined the refugee as any person who:

> as a result of events occurring before 1st January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.[4]

Article 33 of the same Convention forbad the return of a refugee to the frontiers of territories where their life or freedom would be threatened.

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The Convention also included provisions about dual nationality; the circumstances in which a person may cease to be a refugee; extradition of persons who have committed serious non political crimes, and where a person has already obtained refuge in a safe third country.

In 1967 there was a Protocol[5] signed by over a hundred countries including Australia which achieved the universalisation of the convention definition by removing from the definition the words which are underlined in the quotation above. The requirement that the claim relate to events before 1st January 1951 was therefore eliminated.

The nature of the definition of a refugee approved by the United Nations reflected the emphasis of the developed western nations upon protection of human rights and, in particular, the definition sought to safeguard those who needed protection on grounds of political dissidence such as those who sought to escape Stalin's tyranny in Eastern Europe. The definition yielded nothing to the concerns of third world countries in connection with those who seek refuge from generalised civil war or natural disasters. As the High Court recently explained:

> The definition ... does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention.

The Court also said:

> No matter how devastating may be epidemic, natural disasters or famine, a person fleeing them is not a refugee....

Refugee Law in Australia

By signing the international Refugee Convention, Australia did no more than undertake to implement the terms of the Convention, but legal implementation rested upon parliament being ready to honour the international undertaking. The Australian parliament did pass legislation to permit those who 'engage Australia's protection obligations under the Refugee Convention'[6] to obtain a protection visa provided also such persons passed certain health and character tests as well as satisfying the Minister for Immigration that he or she had taken all possible steps to avail himself or herself of a right to enter and reside in any country apart from Australia.[7]

Since 1989 there have been a series of judgments by the High court expounding the meaning of the Convention definition. The degree of persuasion is that there must be a 'real chance of persecution' - this may be as low as 10%[8] for it is difficult to ascertain on often scanty information what the prospect of persecution really will be. A 'real chance' is one that is not far fetched or remote.[9]

The determination of persecution is made at the time of decision as circumstances in the country of origin may have changed since departure. Likewise there may be a prospect of circumstances changing in the future. The language of the Convention tells against the construction that 'once a refugee always a refugee', and hence the government has decided to make protection visas for certain classes of refugees, such as those arriving by boat, 'temporary protection visas' that give the holder no right to permanent residence and, should the situation in the country of origin change for the better, would result in the temporary visa holder being returned from where they came. For example this may preclude many Afghans from obtaining permanent residency in Australia.

A fear of persecution is where an applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm though

not every deprivation of guaranteed freedom would do so.[10] Therefore it has been conceded that enforced sterilisation in China of parents who wish to have children outside the 'one child policy' may amount to 'persecution' though such persons will find it difficult to show they are being persecuted for a convention reason, ie because they belong to a recognised social group.[11]

Clearly a threat to life or freedom may constitute persecution but it is not confined to a threat to life and liberty. It could arise from loss of employment because of political activities, denial of access to the professions or to education, or the imposition of restrictions traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement. In so far as some of these people may be described as 'economic refugees' nonetheless they do fall within the legal definition of a 'refugee'.[12]

Recently the High Court held that a third child of unmarried parents who would if returned to China have been deprived of essential benefits such as health care, education and basic foods under Chinese law did therefore suffer 'persecution'.[13] However it remains a critical question in each case whether persecution is for a Convention reason:

> whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct (but) .... on whether it discriminates against the person because of race, religion, nationality, political opinion or membership of a particular social group.[14]

So the Chinese couple who had one child, and feared sterilisation under Chinese law if they had a second, were held to be 'persecuted' but not for a Convention reason because such parents did not form a recognisable social group. Conversely the third child of unmarried Chinese parents, deprived of essential benefits did qualify because such children form a recognisable social group in China. Legal definitions may make for such fine distinctions.

The Procedure for Processing Refugees

The early and mid 1990s saw arrival by sea of many Vietnamese and Chinese. Indeed one of the striking changes has been in nationality profile in more recent years of the boat arrivals. Now arrivals are mainly from middle eastern countries such as Iraq, Iran and Afghanistan and parts of Africa such as the Sudan.

Following the border wars between Vietnam and China at the end of the 1970s many ethnic Chinese, who had been settled and brought up in Vietnam, were expelled from Vietnam and refuge was sought by them in China. Many were not actually 'settled' in China by the United Nations Commissioner for Refugees and did not receive household registration without which access to housing, education, health care and employment was restricted. One such group of over 100 ethnic Chinese put up cardboard shacks in China on the beach front for a time before the Chinese authorities sought to move them on. The group decided to buy a boat (it was apparently before the days of people smugglers) and set sail, only to be intercepted in November 1994 near Ashmore Reef by the naval and customs authorities, and brought into Darwin for an overnight stay before being flown to the Port Hedland detention centre. Here they were held in quarantine for a time and interviewed by officials from the Department of Immigration. Each detainee was asked to fill in a bio data form which sought information about their family, whether or not they had been settled by the UNHCR, and why they had come to Australia. Each was asked, through an interpreter, about why they had come to Australia and why they had left China. A solicitor belonging to a refugee agency had unsuccessfully sought access to the detainees. The solicitor was not granted access because the department said no one within the centre had sought legal assistance. In February 1995 the Centre Manager told the detainees they would be returned to China. An amendment to the *Migration Act*, introduced the same month prohibited Sino-Vietnamese, to which class the detainees belonged, from applying for refugee status. All the

detainees, 49 men, 37 women, and 32 children joined in a court action which went to the High Court.[15]

In the opinion of the Department, a view supported by the judges, there was no obligation upon the Department to allow a lawyer access to the detainees because it was held that none of the detainees at the relevant time had asked for a lawyer. Only if they had done so was there then a statutory[16] or common law obligation on the department to allow a lawyer to see them. Although the Chinese maintained they had been misled into believing the bio data forms they filled in were valid application forms for refugee status, the Department took the view that only if the Department considered the interviewee said enough 'to engage Australia's protection obligations' would a form to apply be provided to the detainee. In the view of the Department none of the detainees said sufficient to raise a possibility that they were genuine refugees and, accordingly, no valid form was provided to allow them to apply before a February 1995 amendment to the law was introduced, which prohibited any valid application from a Sino Vietnamese being considered.

The majority in the Federal Court decided that, without the proper forms being supplied by the department to the detainees, no valid application could be made for refugee status under the *Migration Act* and, therefore, their claims for protection under the *Migration Act* must fail. However, it was implicit in what the detainees had said to the Department officers as to why they had fled Vietnam, and their lack of protection in China, that they might be refugees, and therefore it did appear that the detainees had engaged Australia's protection obligations and should have been given the relevant forms. However the prohibition upon applications by Sino Vietnamese meant that it was too late for them to have lodged valid applications for consideration after February 1995.

The dissenting judge in the Federal Court, Carr J, considered that there was an obligation upon the department, as a matter of procedural fairness, to have informed the detainees that if they wished they could request legal assistance (which would no doubt have resulted in the provision of the relevant form to make a valid application). His Honour said this about the circumstances of the applicants' arrival:

> I should not be taken to have ignored the practical realities of the situation in which the DIEA (Immigration Department) officers were placed. They were faced with boatload after boatload of arrivals, totalling several hundreds of people within a fairly short period. Processing even one refugee application consumes a great deal of time and resources. Multiplied by several hundred this might well have appeared to be an administrative nightmare. Nevertheless, recent cases in this court have demonstrated that the DIEA can, when required, quickly mobilise and, by employing well organised and coordinated procedures rise to such an occasion or series of occasions.
>
> In the present matter ... the officers may, when they finished their work, have felt that they had dealt with the (detainees) efficiently and expediently (probably on instructions from more senior officers in the DIEA's Canberra office). I doubt they would have felt that (the detainees) had been treated fairly.[17]

Since that case was decided in 1996 there has been some changes in procedure, but the Department remains the decider of whether or not detainees have said enough to be provided with the necessary form to apply. Once supplied, the applicant's claim is considered by a delegate of the Minister and if unsuccessful, the claimant has a further right of review by the Refugee Review Tribunal. Until the recent amendments there was also a right of further review on questions of law by the Federal Court: first, by a single judge, and then by a court of three Federal Court judges. In rare cases there may be a further appeal to the High Court. All this may take considerable time and may well result in a feeling of exasperation by departmental officers who are seeking to arrange return of detainees.

The Coalition Reforms

It was the intention of the Government to achieve some reforms of the system. This led to the introduction of seven new Bills into the Federal Parliament in 2001.

One of the Bills passed into law means asylum seekers in boats, boarded off Cocos or Christmas Island in the Indian Ocean and Ashmore Reef and Cartier Island in the Timor Sea, do not have a right to apply for asylum in Australia.[18] These measures are not new amongst nations who signed the Convention. An eminent international jurist Professor Goodwin Gill had said as long ago as 1996 :

> The developed world has expended considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others ... the intention may be either to forestall arrivals or to allow those arriving to be dealt with at discretion, but the clear implication is that, for States at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment.[19]

The absence of a right of appeal against most decisions of department officials does not instil confidence that the process is impartial and transparent.

Another Bill passed into law removed most rights of appeal from the decision of the Refugee Review Tribunal to the Federal Court subject to very limited exceptions for those who are still processed in Australia.[20]

In introducing the Bill the Minister for Immigration, Mr Ruddock, explained that recourse to the Federal Court and High Court had been trending upwards from 400 applications in 1994-5 to around 1,640 in 2000-01. So, too, the cost of litigation had increased from $9.5 million in 1997-8 to $15 million in 2000-01. He said that of those cases which proceed to appeal the decision of the Tribunals is upheld in about 90% of cases.[21]

Those who conduct cases on behalf of refugees in the Federal Court would maintain that review to the Federal Court, at least on questions of law, should be preserved. Yet there is truth in what the Minister says about the cost, and often the futility, of much of the Federal Court litigation. Those who appear for the Minister in the Federal Court find that many of the applicants who appeal have no understanding of the principles that govern such appeals nor do they understand the court procedures. The effectiveness of an adversary system such as ours depends upon an approximate parity of resources between the competing litigants. Where asylum seekers are often without legal assistance and have no grasp of the language, let alone the legal principles in which the proceedings are conducted, the process comes close to a farce. The counsel for the Minister is often called upon to present the law for both sides. Although there is a court interpreter provided, the submissions of the Minister's counsel, supplied to an applicant before the hearing, may not be understood by the applicant and if they have no lawyer may not even be translated for them to comprehend. In these circumstances, an elaborate appeal system becomes futile, and to provide the resources for the applicant to be fully seised of the law and procedures would mean a large increase in the budget, with the consequential argument that applicants would be receiving a level of legal assistance certainly not available to Australian residents. On the other hand, keeping applicants in the dark about when their applications will be resolved, how the legal system works, and what is likely to occur to them in the end must increase tension and suspicion leading to demonstrations and hunger strikes.

Other reforms include restrictions on the legal definition of a refugee. Persecution for one of the five Convention reasons must now be the 'essential and significant' reason for the persecution. It is no longer enough that it was a contributing cause. Persecution itself is now redefined and certain human rights violations may not now be included and it is yet to be

seen how far serious harm includes some forms of mental harm.[22] Conduct is to be disregarded if engaged in by a person in Australia, unless the Minister is satisfied that the applicant did not engage in it to strengthen their refugee claim.

The Future of the Convention and Australia's Role

The Government has expressed its dissatisfaction with the Refugee Convention definition. However, it is difficult to get international consensus for rapid change. It seems unlikely Australia will contract out of the Convention. Whatever it does the refugee problem will not go way.

The Government may reasonably claim that electoral support for these reforms has been overwhelming while critics of government policy can only decry a public attitude that approves such laws, and, that if a country's laws truly reflect the spirit of its peoples, something is badly wrong with the spirit of Australia. On the other hand government can argue that our humanitarian program is generous because about 12,000 refugees are accepted from overseas camps each year. Furthermore Immigration Department officers have been far more ready than their counterparts in other countries to meet and debate these issues with government's critics.

At the heart of the debate is the question of mandatory detention after initial quarantine and identity processes have been completed. The sheer volume of refuge seekers may necessitate revision of this policy unless the Government can obtain international cooperation to obtain a more equitable distribution amongst nations for asylum seekers. In Europe the three circles initiative, whereby there is a degree of burden sharing amongst the states may need a parallel here. The reconstruction of Afghanistan may lend impetus to international cooperation. At the very least one may hope that the level of media and public understanding may be increased, and that those who argue for and against the Government's policies will try and balance fairly the competing demands of humanitarian concern with those of border regulation.

Endnotes

1 It is estimated there are 11.5 million international refugees and 20-25 million internally displaced persons forced to leave their homes for the same reason. Peter Nygh Refugee Conference Papers, Nov 2000, p140.
2 O Spengler, *The Decline of the West*, Knopf, New York, 1947.
3 James Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991 at 1-6.
4 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva at 28th July 1951.
5 The Protocol relating to the Status of Refugees done at New York at 31st January 1967.
6 *Migration Act* 1958 (Cth), s36(1).
7 *Migration Act* 1958 (Cth), s36(3).
8 *Chan Yee Kin v MIEA* (1989-90) 169 CLR 379 at 429.
9 *Chan*, Mason CJ at 389.
10 *Chan*, Mason CJ at 388.
11 *Applicant A v MIEA* (1996-7) 190 CLR 225.
12 *Chan*, McHugh J at 430-1.
13 *Chen Shi Hai* v *MIMA* (2000) 170 ALR 553.
14 *Applicant A*, McHugh J at 278.
15 *Fang v MIEA* (1996) 135 ALR 583.
16 *Migration Act*, 1958 (Cth), s256.
17 *Fang v MIEA* at 607-8.
18 Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.
19 Guy S Goodwin Gill, *The Refugee in International Law*, Oxford, Clarendon Press, 2nd ed, 1996.
20 *Migration Legislation Amendment (Judicial Review) Act* (2001).
21 Second Reading of the *Migration Legislation Amendment (Judicial Review) Bill* 2001, Wed 26th September 2001.
22 *Migration Legislation Amendment Act (No. 6) 2001.*

INTERPRETATION - AN AUSTRALIAN-AMERICAN COMPARISON

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The United States Supreme Court's decision in *Chevron USA Inc v Natural Resources Defense Counsel, Inc*[1] (Chevron) has been hailed as one of the most significant decisions in American administrative law.[2] It has been seen to represent a dramatic improvement on prior attempts to grapple with the proper scope of judicial review of agency interpretations of statutory provisions.[3] Under Chevron (which gave its name to the doctrine of judicial deference), the circumstances in which courts must defer to agency interpretations of statutes were dramatically expanded. The idea that deference on questions of law is sometimes required was not new. However, prior to Chevron, courts were said to have such a duty only when Congress expressly delegated authority to an agency 'to define a statutory term or prescribe a method of executing a statutory provision'.[4] Outside this narrow context, deference was not mandatory but was an exercise of judicial discretion depending upon multiple factors that courts evaluated in light of the circumstances of each case. The Chevron test was seen to establish a straightforward approach to a traditionally complicated issue in administrative law.[5] Put simply, the court first decides whether the statute resolves the specific issue or is silent or ambiguous with respect to the issue. Should the court determine that the statute is silent or ambiguous, it then affirms the agency's interpretation of the statute if that interpretation is 'reasonable'.

To appreciate the impact of Chevron, it is first necessary to look briefly at the pre-1984 situation of judicial review of agency interpretation of statutes. The Chevron doctrine of judicial deference and how it has affected United States administrative law, its strengths and its failings will then be examined. The issues in Chevron, the decision itself and how it promulgated the notion of judicial deference will be looked at in detail. The paper will also analyse how the Chevron decision has been applied and the reaction it has received – both good and bad – over the years. The paper will also contrast the United States experience with that of Australia. It will be seen that the situation in Australia for judicial review of agency interpretation of statutes is quite different, for the concept of judicial deference in the American sense has never really taken hold in Australia. Rather, in Australia the situation is almost the opposite. The paper concludes that while there are some positive and useful guidelines in the doctrine of judicial deference, the doctrine is not suitable for universal application.

The pre-1984 situation

Prior to 1984, the United States Supreme Court appeared to maintain two inconsistent lines of cases when reviewing agency interpretations of statutes which they administered. One approach is illustrated in *National Labor Relations Board v Hearst Publications*.[6] In Hearst, the issue was whether newsboys were 'employees' within the meaning of the *National Labor*

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Relations Act[7] (NLRA). The newspapers had refused to bargain collectively with the newsboys who then turned to the National Labor Relations Board (NLRB) for protection. The NLRB ruled that the newsboys were employees within the definition in the National Labor Relations Act. A Court of Appeals examined the question and said that the newsboys did not fit within the statutory term employees. The Supreme Court, however, reversed the appellate court's decision and affirmed the agency's decision. In reaching its decision, the Court noted that the term employee is broad, has no precise meaning and was not specifically defined by Congress. The Court concluded that Congress intended that the term take 'colour from its surroundings', that is, the meaning of the term should depend on its relationship to the statute in which it appears and the broad purposes of that statute.[8] This became known as the 'deferential rational basis test'[9] and was applied in a number of cases until 1983.

The second line of cases is exemplified in *Packard Motor Car Company v NLRB*,[10] (Packard). While the facts of the case were similar to those in Hearst, in that the NLRB had to define the term employee, the Court did not agree with the NLRB's legal approach to this case. Packard is often considered to be at odds with Hearst, for in Hearst the Court deferred to the NLRB's construction of the term while in Packard, the Court construed the term independently of any consideration of the Board's term.

For forty years the Supreme Court allowed these two inconsistent lines of cases to exist without making any attempt to reconcile or distinguish the two. When an issue concerning the construction of an agency-administered statute was raised, the Court applied one line of cases and ignored the opposite, alternating between the two lines without supplying any doctrinal guidelines to explain why one test rather than the other should be applied.[11]

The Chevron decision

Chevron has, as indicated above, been hailed as a landmark decision. Certainly, it has had a profound impact on United States administrative law for it 'forged the analytic framework for assessing the validity of an administrative agency's construction of the statute that it is charged with administering'.[12] It appeared at the time of its issuance to represent a dramatic resolution of longstanding tensions inherent in judicial review of administrative law, in favour of broader deference to agency interpretations of statutory terms. With Chevron, the Supreme Court established a new two-step approach to judicial review of agency interpretations of provisions contained in statutes delegating regulatory power to an agency. Step one of the notion of judicial deference arises from the following part of the judgment:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[13]

Step one of the process is straightforward for it involves the court determining whether Congress has addressed the precise question at issue. The inquiry into legislative intent should focus first on the plain language of the statute. If the answer is not found in the statute itself, the court should look to the legislative history of the provision. If the language of the statute indicates that Congress has resolved the policy issue that corresponds to the interpretative issue before the court, the court's duty is to enforce the congressional policy decision against the agency.

The second step in the Chevron test is probably more controversial and the source of some of the problems which have arisen upon application.

> If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to

> the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[14]

Taken literally, this is an instruction to reviewing courts not to attempt to interpret ambiguous language in statutes which delegate power to agencies. According to Davis and Pierce,[15] if the statute is ambiguous, Congress has not resolved the policy issue presented, and the agency is therefore the appropriate institution to resolve the policy issue in accordance with the philosophy of the incumbent administration. The reviewing court retains a limited role in the policy making process to ensure that the agency's interpretation of the policy is reasonable.

The Supreme Court rebuked the Circuit Court for the expansive role it assumed in reviewing EPA's policy decision. In the Court's words, the Circuit Court 'misconceived the nature of its role' for 'federal judges – who have no constituency – have a duty to respect policy choices made by those who do'.[16] The Court emphasised that judges are neither experts in the field nor members of 'either political branch of government'.[17] When Congress has not made a policy decision itself, but has delegated that decision to an agency, that agency can 'properly rely upon the incumbent administration's views of wise policy to inform its judgments'. In the Court's words:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[18]

The Court concluded with the unequivocal statement that:

> The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.[19]

The facts in Chevron

The single issue in Chevron was the proper interpretation of the word 'source' as the term is used in the 1977 amendments to the Clean Air Act[20] (the Act). The Act requires the Environmental Protection Agency (EPA) to impose emission standards on each 'stationary source' – ie a source of air pollution producing more than 100 tons of pollutants annually.[21] Consequently, the interpretation of 'stationary source' is critical for regulating emissions. In 1981, the EPA changed its interpretation of 'source' to refer to the entire plant rather than individual smokestacks within a plant. Under this much broader definition, known as the 'bubble' concept, the EPA treated each polluter as a single source rather than regulating each individual smokestack. Thus, a company could shift emissions among smokestacks to meet EPA guidelines and the EPA has limited control over individual smokestack pollution.

The Natural Resources Defense Council (NRDC) challenged the EPA's definition and argued that the statute's legislative history and policies supported the more narrow smokestack definition. The D.C. Circuit however, found that the language and legislative history of the statute did not indicate conclusively how 'source' was to be defined and invalidated the agency's ruling. The Supreme Court reversed the D.C. Circuit Court's decision and affirmed the EPA's new interpretation of 'source' using the following reasoning. The language of the statute and its legislative history indicated that Congress never addressed the issue of whether 'source' was to be interpreted to mean each part of a plant or an entire plant. The EPA's new interpretation furthered one of the two principal goals of the 1977 amendment – permitting industrial growth. There was no evidence available concerning the impact of the new interpretation on Congress's other major goals improving air quality. Hence, EPA's choice of interpretation reflected a pure policy decision in an area in which Congress delegated EPA power to make such policy decisions.[22]

Reaction to Chevron and its application

Initially reaction to Chevron was favourable. It was described as 'the leading case on the subject' of statutory construction; a 'case which all appellate judges these days bear firmly in mind in reading statutes'.[23] Two years later, Chevron's message was reiterated and strengthened in *Young v Community Nutrition Institute*.[24] In the first three years after its issuance, Chevron was cited in approximately 400 cases.[25] Cynthia Farina said that 'Chevron's justification for choosing deference was spare but powerfully direct' coming as it did after decades of repeated scholarly and judicial debate about the proper allocation of interpretative authority.[26] In Farina's view, Chevron invoked the principles of separation of powers and legitimacy by recognising that the choice of interpretative model is part of the large problem of reconciling agencies and regulatory power with the constitutional scheme. The opinion explained that courts must defer in order to respect the legislature's decision to entrust regulator responsibility to agencies and to ensure that the policy choices inherent in interpreting regulatory statutes are made by persons answerable to the political branches rather than by unelected judges.[27]

Chevron was applauded by Judge Kenneth W. Starr of the United States Court of Appeals for the District of Columbia as a 'good' decision for its jurisprudential provisions and also for its practical effects.[28] The jurisprudence of Chevron appealed to Starr for he felt it was inappropriate for Federal Courts to take a supervisory approach when reviewing agency decisions. He saw Chevron as vindicating the traditional function of judicial review. For him, Chevron confirmed the judiciary's role of declaring what the law is, but prevented the judiciary from going beyond the legitimate role and straying into the forbidden area of overseeing administrative agencies. In his eyes, Chevron affirmed the fundamental allocation of responsibility by forbidding the courts to engage in supervisory oversight of agencies when Congress had not spoken to an issue.[29]

On practical grounds, Starr saw Chevron as allowing agencies to use their expertise in interpreting the range of complex statutes which characterise the modern administrative state. This was so because where an agency has drafted a statute and shepherded it through Congress, the agency's understanding of the statute's language, its legislative history and its goals would be thorough and complete. Allied with this, is the technical expertise to be found in the agency. This is particularly so when a regulatory scheme is complex or statutory terms are broad and imprecise. Some statutes contain terms that are intentionally imprecise. Starr felt that Chevron quite properly recognised that such terms constitute an implicit but nevertheless valid delegation of authority to the agency.[30] In Starr's view, other practical advantages emanating from Chevron would be an improvement in agency proceedings by encouraging agencies to take more responsibility for interpreting the statutes they implement and an improvement in statutory draftsmanship.[31]

Interpretation difficulties

The language of Chevron has since posed difficulties for some scholars. Step one divides the statutory language into two categories 'clear' and 'ambiguous'. Justice Scalia's question of 'How clear is clear?'[32] indicates that ambiguity is a matter of degree. A further complication in this question is that what is ambiguous for one interpretative school is plain meaning to another. Justice Breyer sees problems in the interpretation of Chevron because of the language used.[33] Take for instance, the following extract from the decision:

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[34]

To him, the language used may be read as embodying a complex approach for it speaks of 'implicit' delegation of interpretative power and the word 'permissible' is general enough to embody a range of relevant factors. Yet he also feels the language may also be read as embodying a straightforward approach (as many other commentators also see it). The reviewing court has to simply decide whether the statute is 'silent or ambiguous with respect to the specific issue' and, if so, accept the agency's interpretation if it is 'reasonable'.[35]

While a straightforward interpretation may be seen to be attractive in the short term, Breyer did not see it as having a lasting presence. This is because there are many different types of circumstances, different statutes, different kinds of application, different substantive regulatory or administrative problems to allow judicial attitudes about questions of law to be reduced to any single simple verbal formula. The questions of statutory interpretation which may arise are too many and too complex to rely upon a single simple rule to provide an answer.[36]

Another reason why the straightforward interpretation of Chevron could be undesirable is that it may sometimes add unnecessary lapses of delay, complexity and procedure to a case. This could occur if a court believed that the statute was silent on the particular question, because if following Chevron, the court should then investigate if the agency had a reasonable interpretation of the words. However, if the court then found that the agency had no reasonable interpretation of the words and the agency had not considered the question in sufficient depth, the court would then remand the case to the District Court to give the agency a chance to develop a 'reasonable' interpretation of the statute. [37]

Some of the criticisms and attempts to limit Chevron result from a misunderstanding of the nature of the statutory interpretation issues that agencies and courts frequently must resolve. Pierce points out that, historically, interpretation of terms used in a regulatory statute has been characterised as an issue of law and that some commentators have distinguished between the proper scope of judicial review of issues of law and judicial review of issues of policy.[38] However, many issues of statutory interpretation require an agency to resolve policy issues rather than legal issues. Thus, the first step in the Chevron test requires a court to determine whether the interpretation of the statutory provision in question is an issue of law or an issue of policy. If the court determines that it is reviewing an agency's resolution of a policy issue, the court then moves to the second part of the test and affirms the agency's interpretation of the statutory provision if the agency's interpretation is 'reasonable'.[39]

In Chevron, the Supreme Court recognised that there are many different reasons why Congress declines to resolve policy issues.[40] Congress may have neglected to consider the issue; Congress may have believed that the agency was in a better position to resolve the issue; or for purely political reasons Congress may not have wanted to or been able to achieve the consensus necessary to resolve the issue.

However, some writers have pointed out that Congress resolves very few issues when it enacts a statute empowering an agency to regulate. In these instances, the vast majority of policy issues, including many of the most important issues, are left for resolution by the agency. Congress declines to resolve many policy issues by using statutory language that is incapable of meaningful definition and application. This is accomplished through the use of several different drafting techniques such as the use of empty standards and contradictory standards and lists of unranked decisional goals.[41]

This does present a problem for courts, for when they are faced with the task of interpreting imprecise, ambiguous or conflicting statutory language, they are sometimes required to resolve policy issues which Congress raised but failed to resolve. Similarly, an agency frequently makes policy when it interprets ambiguous or imprecise terms in the statute which grants the agency its legal powers. Pierce provides an illustration of this from Chevron. In

defining 'stationary source' to mean the whole plant rather than just an individual piece of equipment, the EPA did not 'interpret' the statutory language by determining that Congress intended 'stationary source' to mean a plant. Congress used the imprecise term 'stationary source' without defining the term at all. The EPA decided, as a matter of policy, that it would interpret 'stationary source' to mean a plant because in the agency's view such an interpretation would further Congress' conflicting goals.[42] Another factor which could influence an agency's policy would be the views of the current political administration.[43]

The question then arises as to which institution - the court or the agency – is more appropriate to resolve the policy controversy. The fact that agencies are more accountable to the electorate than courts is given as one reason why agencies are the more appropriate institution to resolve policy controversies. The reviewing court's attitude should be the same to an agency's policy decision whether the decision was made by interpreting an ambiguous statutory provision or by any other means of agency policy making. In keeping with Chevron's two steps, the court should affirm the agency's decision, which would include the agency's statutory interpretation, if the policy decision is reasonable. However, if the agency's policy is arbitrary and capricious, the court should reverse the policy decision. In the process of deciding if an agency's policy decision is 'reasonable' the court should review the decision making process by which the agency determined that its choice of policy was consistent with the statutory goals and the contextual facts of the issue in question.[44]

While Chevron has been cited many times and applied by both the Supreme and appellate courts,[45] the Justices of the courts do not seem to share a common understanding of the meaning of Chevron. The fact that there are multiple opinions in many cases discussing Chevron suggests that the Justices are divided on the proper approach to be taken by a court when reviewing an agency's interpretation of ambiguous statutory language. There have been instances when the Supreme Court has stated the Chevron test and applied the test to reach a unanimous opinion – e.g. *United States v Riverside Bayview Homes, Inc*[46]; *Chemical Manufacturers Association v Natural Resources Defense Council*[47]. However, in other instances, the Justices have divided concerning the meaning to be given to ambiguous language in an agency administered statute. In *INS v Cardoza- Fonesca*[48] the Justices reached different results through the application of Chevron. However, the dicta of *INS v Cardoza-Fonesca* reveals confusion among the majority in its understanding of Chevron. The confusion over the meaning of Chevron continued with *K Mart Corp v Cartier Corp*[49], a case which has no majority opinion, but two lengthy four-Justice pluralities and a brief opinion which formed the deciding vote. One of the pluralities stated that a court should use 'traditional tools of statutory construction' when reviewing an agency's construction of its statute. The plurality undertook a lengthy analysis of these 'traditional tools' – the structure of the statute, inferences of intent derived from statements of statutory goals, various canons of interpretation, and statements from legislative history. It did affirm the agency's construction of the statute, although according to Davies and Pierce, the opinion 'seems to be based more on the Justices' views of wise policy than on deference to the agency's views'.[50] The second plurality claimed to apply the 'strong' version of the Chevron test and reversed the agency interpretation. *K Mart Corp* is all the more intriguing and puzzling because several of the Justices who urged strong deference in *Cardoza- Fonesca* joined the second plurality opinion urging rejection of the agency's construction in *K-Mart Corp*.

Cracks in the Gloss

Thus, while the facts of the Chevron test appear clear, its application has not been smooth. The Supreme Court's decision in Chevron has been criticised on many grounds by scholars and judges. One ground for criticism has been that it violates the statutory command of §706 of the *Administrative Procedure Act 1946*[51] 'the reviewing court shall decide all questions of law' and is counter to the famous pronouncement in Marbury v Madison:[52] 'It is emphatically the province and duty of the judicial department to say what the law is'. However, Davis and

Pierce[53] counteract this criticism saying it is based on an inaccurate characterisation of the issues and a misreading of Marbury. They hold that once an agency or a court concludes that Chevron step one does not apply because Congress did not resolve the issue in dispute, the dispute becomes one of policy rather than of law. Further, they argue that the Marbury Court, like the Chevron Court, recognized that issues of policy are to be resolved by the politically accountable branches.[54]

Sunstein is adamant in his criticism of Chevron:

> ...the decision threatens, first, to confuse rather than clarify the law governing judicial deference to statutory interpretation by administrative agencies. Second and more fundamentally, I think the case threatens to undermine rather than promote separation of powers principles that have been with us for a long time.[55]

Sunstein details a number of problems he sees with Chevron and the notion of judicial deference. He sees that the judgment may be read two ways. The first is a 'strong' or literal meaning that the language of the case governs the reading and this reading proclaims a rule of judicial deference to administrative interpretation of statutes. The second way of reading the judgment is a 'weak' or more interpretative way which allows more in the way of judicial independence in reviewing statutes. He states categorically that:

> What Chevron threatens to do, with either a strong reading or a weak reading, is to undermine some separation of powers principles that have been around for a long time. ... It is filled with possibilities for errors. The courts make occasional mistakes. Nonetheless, that principle is built into the constitutional structure and is basically sound. Courts rather than agencies should be the interpreters of law. Courts have institutional advantages. That principle is, to some degree at least, threatened by the Chevron decision.[56]

Sunstein has maintained that the meaning of Chevron is not clear and thus makes application difficult. He sees conflict between the two steps. If Chevron recognizes that no deference is due when Congress has directly addressed the question at issue, courts will often approach issues of law independently. If however, Chevron requires deference whenever there is ambiguity, then the deferential approach required by Chevron is not acceptable. To him,

> the case for deference to agency decisions depends on congressional will, which in ambiguous cases is reconstructed on the basis of several factors, including the expertise of the agency, its relative accountability, and its ability to centralize and coordinate administrative policy. Because these factors have different force in different contexts, the appropriate degree of deference cannot be resolved by a general rule. The extent of deference should depend on the nature of the issue and, above all, on the applicability of distinctive administrative capacities.[57]

Breyer[58] is similarly dissatisfied with Chevron and argues that deference is inappropriate because 'the way in which questions of statutory interpretation may arise are too many and too complex to rely upon a single simple rule to provide an answer'.[59]

The longer term impact of Chevron

In recent years, there has still been confusion about the scope and domain of Chevron – to what sorts of statutes and what sorts of agency interpretations should the Chevron deference doctrine apply? While Chevron itself concerned environmental law and it was largely applied in environmental cases, there has been a push to extend the Chevron deference doctrine into other areas of law such as labour law and the law relating to securities and exchange[60] and customs law.[61] Merrill and Hickman[62] argue that as the Chevron doctrine has solidified and 'as government lawyers have relentlessly pushed for Chevron deference in new contexts, disputes have inevitably erupted over what kinds of statutes and what kinds of agency action trigger this strong deference'.[63] They detail four

cases which have confronted the Supreme Court in the 1999 and 2000 terms which question Chevron's domain and which reveal a lack of a unifying perspective in the Court's approach to Chevron. These four cases were: *United States v Haggar Apparel Co*,[64] *INS v Aguirre-Aguirre*,[65] *FDA v Brown & Williamson Tobacco Corp*,[66] and *Christensen v Harris County*.[67]

Two of these decisions involved questions regarding the kinds of agency decisions that are entitled to Chevron deference once the agency has been charged with administration of a statute. The other two involved questions about the strength of Chevron's presumption of delegated interpretational power and when this presumption can be overcome.[68] Of these decisions, *Christensen v Harris County*, is held to be the most important for it reveals deep divisions among the Justices about the basic principles that govern the scope of the Chevron doctrine.[69]

While Chevron appeared at the time of its issuance to represent a change in the direction of administrative law, there is increasing evidence to suggest that the apparently clear two-step approach in Chevron is not nearly as clear when it is applied. Analysis of step one has intensified to the point where judges will engage in extensive word battles to discern whether a given agency interpretation follows the will of Congress. The seeming advantages of simplicity and clarity achieved under Chevron have largely disappeared as courts have become more willing to make use of interpretative tools to delve more deeply into congressional intent.

When should Chevron not be applied?

It has been argued that there are some instances when Chevron deference should not apply. One instance where Chevron deference should not be applied is negotiated rulemaking.[70] Choo holds that: 'In addition to concerns about democratic legitimacy, courts can no longer presume that regulations formulated through private interest group bargaining embody either the agency's conception of the public interest, or an application of legal, technical, or policy expertise that is worthy of judicial deference'.[71] He continues that careful judicial scrutiny is particularly appropriate for negotiated rulemaking due to inherent problems surrounding the negotiation process. Such difficulties include ensuring the representation of relevant interests at the negotiating table and the potential for collusion among those who are present to distort statutory terms. Because of the nature of negotiated rulemaking, courts should decide independently all relevant questions of law that arise out of negotiated rules. 'Negotiated rules should be scrutinised objectively by a reviewing court for their conformity to statutory mandates as opposed to the normal deference accorded agency interpretations under the Chevron doctrine'.[72]

Davis and Pierce[73] list other situations when Chevron deference should not apply. These situations include informal pronouncements of position through formats Congress has not authorised for that purpose such as letters, briefs, guidelines or manuals. Chevron deference should not apply to agencies lacking power to make policy and it should also not be applied to interpretative rules.[74]

Merrill and Hickman's[75] study raises fourteen possible areas when Chevron should not be applied. Some of the situations include 'Does Chevron apply to statutes that are enforced by multiple agencies? Does Chevron apply to cross-referenced statutes?'[76]

The Australian situation

In Australia the system of judicial review of administrative action takes on a different hue from that in the United States. Justice Ronald Sackville[77] has identified two principles which have been accepted as fundamental in determining the proper scope of judicial review throughout the movements in Australian administrative law. These are, firstly, that:

> ... courts exercising powers of judicial review must not intrude into the 'merits' of administrative decision-making or of executive policy making. The second is that it is for the courts and not the executive to interpret and apply the law including the statutes governing the power of the executive.[78]

In *Attorney-General v Quin*[79] Brennan J cited Marshall CJ's dictum in *Marbury v Madison*:[80] 'It is, emphatically, the province and duty of the judicial department to say what the law is'.[81]

In discussing the role of the courts in judicial review, Sackville points out that while executive decision-makers must know and understand the law as it relates to the particular decision to be made, the decision-maker's view as to the meaning of the legislation governing their powers and functions counts for nothing as far as the courts are concerned for 'it is the judges who determine the meaning of the legislation, uninfluenced by the views of administrative decision-makers'.[82] This is the situation even though the construction of the legislation may turn on technical, economic or social considerations that the administrative agencies may have considered. The fact that the court may not be as well equipped as agencies to investigate and make judgments on these issues does not seem to matter either.[83] This may be contrasted with some of the American writings which see advantages in allowing agencies to use their expertise in interpreting statutes.[84] Sackville sees this as a paradox for 'Australian courts defer to decision-makers on factual and policy questions, even to the point of upholding obviously erroneous decisions. Yet they pay no attention to an agency's interpretation of the legislation it administers, even if the agency is peculiarly well-placed to analyse the issues'.[85]

The doctrine of judicial deference as defined by the Chevron decision in the United States has not really been accepted in Australia[86] and in fact was quite firmly rejected by the High Court in *Corporation of the City of Enfield v Development Assessment Commission*[87] (Enfield). Despite this, in the history of Australian jurisprudence, there have occasionally been hints to a doctrine of deference, though not necessarily in the exact same form as that conceived by Chevron. This section of the essay proposes to look at how a doctrine of deference has been perceived by the Australian judiciary and academic scholars over the years up to the dismissal of the doctrine in Enfield.

The High Court first enunciated a deference doctrine in 1945. In *R v Hickman; Ex parte Fox and Clinton*[88] (Hickman), the comments of Dixon J (as he then was), came to enshrine the notion that Parliament by enactment of a privative clause can direct the judiciary to adopt a deferential or non-interventionist role in the review of administrative action. His Honour held that the question of the validity of a decision to which a privative clause applies should be approached in the following way:

> No decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.[89]

The issue in Hickman was whether a road transport firm that was operating in the coal industry was subject to a specialist industrial tribunal. In discussing the meaning of the phrase 'coal mining industry' Dixon J held that the meaning might be gleaned from the common understanding of the phrase by those concerned with the coal industry and particularly with industrial matters. However, it is possible that there is not a common understanding of the expression. He held that if the application of the words was established by usage, it would be reasonable to:

> ... expect to find it evidenced by awards, determinations, reports and other papers dealing with the industrial side of coal mining. But we have not been referred to any such documents. On the contrary we have been left to ascertain as best we may what is the denotation of the very indefinite expression

> 'coal mining industry.' It is, I think, unfortunate that it has become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court must rest. As it is however, the question must be decided upon such considerations.[90]

This is a stark contrast to the United States system because as an integral part of the rule making process, agencies give meaning to ambiguous language in statutes in a variety of ways. The possibilities include legislative rules, adjudications, interpretative rules, policy statements, manuals, guidelines, staff instructions and opinion letters. It is through these means that agencies defend their interpretation of ambiguous language.

In Australia, one can look at judicial review for error of law to trace instances of deference although this is not necessarily the same intonation as the United States system. Aronson and Dyer[91] have formulated various models of judicial deference which they have classed as either 'covert deference' or 'overt deference'.[92] They define covert deference as being 'most easily achieved behind the applications of the extremely flexible distinction between an error of law on the one hand and an error of fact, value or policy on the other'.[93] 'Overt deference' to the opinion of the decision-maker is covered by several models. These range from judgments suggesting that an application for judicial review should be postponed until another body, tribunal or inferior court has had a chance to give its view of the law to judgments requiring the judicial review judge to abstain from granting a remedy even though they believe the decision-maker was wrong in law.[94]

An advocate of judicial deference to the legal opinions of specialist tribunals and administrators is Justice Kirby. *In Australian Broadcasting Commission Staff Association v Bonner*,[95] His Honour reasoned that there were sometimes good policy reasons for judicial deference to an administrator's interpretation of ambiguous statutory language. Such reasons included the superior and more detailed managerial skills of administrators who will usually be more in touch with legitimate and lawful policy considerations that are not able to be dealt with in proceedings before the courts, and the undesirability of courts becoming involved in the detail of administrative decisions.[96] In these circumstances, His Honour was referring only to an administrator's interpretation of its own Act for in such a context an administrator is more likely than a generalist court to be attuned to the subtleties of the whole Act and to the administrative consequences of competing possibilities of interpretation.[97]

The use of privative clauses in some industrial legislation gives some measure of protection from judicial review to industrial tribunals. Apart from protecting the decisions of industrial commissioners, registrars and courts, the use of privative clauses has some impact on the deference given to such tribunals. As a general rule, the deference influences the timing of judicial review of industrial bodies because would-be challengers are required to exhaust their remedies within the hierarchy of industrial tribunals before launching a judicial review application. One of the reasons given for this is that the work of the reviewing judge will be much easier in interpreting the relevant legislation if the challenger has exhausted all possibilities in the industrial hierarchy, because the reviewing court will have the benefit of a legal opinion from a specialist court with a much greater awareness of the legislation's detail, history and impact.[98] In some ways this has certain attractiveness about it and is similar to some of the reasons given to the acceptance of judicial deference in the United States.[99]

The reasons for resort to the industrial appeals system before applying for judicial review were detailed by Kirby P while President of the NSW Court of Appeal, in *Boral Gas (NSW) Pty Ltd v Magill*.[100] One of these reasons which supports deference is:

> It affords a proper place to the specialised tribunal which may have a superior advantage in ready knowledge of the developments of jurisprudence under scrutiny which this court does not initially

> enjoy. Furthermore, that tribunal frequently has a superior armoury of remedies at its disposal than this Court can offer.[101]

It is acknowledged that industrial cases are decided against a background of strong privative clauses and they must have some effect in encouraging a degree of judicial deference.[102] Such an example is given in *Public Service Association (SA) v Federated Clerks' Union (SA)*[103] when Deane J, though in dissent, argued for greater judicial deference to the decisions of industrial tribunals:

> Section 95 [the privative clause] manifests a legislative policy that, subject only to the exception in relation to 'excess or want of jurisdiction', the awards, orders and decisions of the Industrial Commission of South Australia should be immune from challenge or review in the ordinary courts. Such a legislative policy in relation to the decisions of industrial tribunals is commonplace in this country. ... Industrial tribunals, when they are not themselves specialist courts of law, customarily include members who either are judges of a court or are possessed of legal training and experience comparable to that required of an appointee to judicial office. Their functions commonly extend to the making of awards or orders which lay down general standards of conduct which bind whole sections of the community in their future conduct and relations. The efficient discharge of such quasi-legislative functions may well require departure from traditional curial methods and procedures. ... In a context where prompt action ... to prevent and resolve disputes is necessary in the public interest, there is much to be said for the view that such specialist industrial tribunals should be empowered to determine promptly and with finality the questions involved in the actual and potential industrial disputes which they are called upon to resolve. The delays and expense of proceedings in the ordinary courts of this country serve to reinforce such a policy and its rationale.[104]

As Justice Paul Stein of the NSW Court of Appeal has pointed out, the High Court rarely grants special leave to appeal in an environmental case 'partly because of the specialist jurisdiction often involved and also the preference for State Courts of Appeal to be the final arbiters of these issues, especially where the relevant law in the jurisdictions may vary considerably'.[105] However, one such grant was for Enfield.[106]

In Enfield, the High Court examined the Chevron doctrine of judicial deference. However, its examination concentrated on the deficiencies of the doctrine and made no mention of it attractions.[107] In dismissing the Chevron doctrine as not applicable the High Court said:

> In the written submissions, reference was made to the applicability to a case such as the present of the doctrine of 'deference' which has developed in the United States. However, this Chevron doctrine even on its own terms, is not addressed to the situation such as that which was before Debelle J. Chevron is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact finding at the administrative and judicial levels.[108]

The dismissal of the Chevron doctrine by the High Court was followed immediately by a re-affirmation of *Marbury v Madison*[109] and *Attorney-General (NSW) v Quinn*[110] as frameworks for judicial review in Australia.[111]

The High Court in Enfield did refer to a number of its earlier decisions which discussed whether a superior court should attach weight to a specialist tribunal's decision on matters peculiarly within their expertise, and qualified the earlier statements in a number of respects. The Court preferred to speak of the 'weight' which might be accorded the impugned decision, rather than of paying it deference. The weight which might be given to the decision would depend on circumstances which could 'include matters such as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning'.[112]

It is interesting to note, as Sir Anthony Mason points out,[113] that the High Court in Enfield did not make any reference to the comment of Dixon J in Hickman that the application of regulations should be determined according to some industrial principle or policy and not

according to legal rules.[114] This, in conjunction with a later comment of Dixon J on the powers of a Local Reference Board,[115] led Sir Anthony to the view that, 'within the area of constitutional power and within the limits of judicial review, it is possible to vest in the decision-maker a power to decide the limits of its jurisdiction'.[116] Sir Anthony continues that if:

> ... the decision-maker's opinion is made the statutory criterion and he addresses himself to the correct test and the relevant facts, his decision will stand unless, in an extreme case, Wednesbury unreasonableness can be established. This approach would seem to be different from Chevron or at least the High Court's understanding of Chevron as demonstrated in City of Enfield. The High Court did not treat the Chevron doctrine as resting on a legislative provision which makes the decision-maker's opinion the criterion.[117]

Conclusion

While Chevron initially appeared at the time to represent a dramatic resolution of tensions inherent in judicial review of administrative law in favour of a broader deference to agency interpretations of statutory terms, subsequent decisions such as *INS v Cardoza-Fonesca*,[118] *K Mart Corp v Cartier Corp*,[119] *Mississippi Power & Light Co v Mississippi*[120] have chipped away at the basic principle of judicial deference enunciated in Chevron. However, it would seem from the evidence presented in this paper, that the words of Robert Choo 'unless and until Chevron is effectively overruled, its legal and practical effect in promoting judicial deference to agency interpretations of law can hardly be disputed'[121] mean that the Chevron doctrine of judicial deference will be a part of United States administrative law for the foreseeable future.

In contrast, it could now quite safely be said that the general view is that the doctrine of judicial deference has no place in Australian jurisprudence although some commentators and academics would not be entirely happy with this. While Gummow J, one of the majority Justices in Enfield, has commented that 'the High Court has now turned its face against the adoption of any judicial deference doctrine derived from Chevron',[122] Sir Anthony Mason said that 'although the doctrine was not explicitly rejected, it is difficult to escape the conclusion the Court regarded the doctrine as amounting to an abdication of the judicial responsibility to declare and enforce the law'.[123] It would seem that comments such as these and the discussion on the United States situation, do not allow for a conclusion that the doctrine of judicial deference is suitable for universal application.

Endnotes

1 (1984) 467 US 837.
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4 *United States v Vogel Fertilizer Co* (1982) 455 US 16 at 24.
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16 (1984) 467 US 837 at 866.
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22 Pierce, Shapiro and Verkuil, above n 8 at 377.
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24 (1986) 476 US 974.
25 Pierce, n 3 at 302 (footnote 6).
26 C R Farina, 'Statutory Interpretation and the Balance of Power in the Administrative State' (1989) 89 *Columbia Law Review* 452 at 455.
27 Farina, above n 26 at 456.
28 K W Starr, 'Judicial Review in the Post-*Chevron* era' (1986) 3 *Yale Journal on Regulation* 283.
29 Starr, above n 28 at 309.
30 Starr, above n 28 at 310.
31 Starr, above n 28 at 311.
32 Hon Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) *Duke Law Journal* 511 at 520.
33 S Breyer, 'Judicial review of questions of law and policy' (1986) 38 *Administrative Law Review* 363 at 373.
34 (1984) 467 US 837 at 843.
35 Breyer, above n 33 at 373.
36 Breyer, above n 33 at 373 and 377.
37 Breyer, above n 33 at 378.
38 Pierce, above n 3 at 304.
39 Pierce, above n 3 at 304.
40 (1984) 467 US 837 at 865.
41 Pierce, above n 3 at 305.
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43 (1984) 467 US 837 at 865-866.
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45 see for example: S G Breyer, R B Stewart, C R Sunstein and M L Spitzer, *Administrative Law and Regulatory Policy: problems, text, and cases* 4th ed NY, Aspen Law and Business, 1999 at 256; O S Kerr, 'Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Court of Appeals' (1998) 15 *Yale Journal on Regulation* 1 at 30.
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47 (1985) 470 US 116.
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50 Davis and Pierce, above n 15 at 126.
51 5 USC §§ 551.
52 (1803) 5 US 87 at 111; 1 Cranch 137 at 177.
53 Davis and Pierce, above n 15 at 114.
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66 (2000) 529 US 120.
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MAKING THE RULES: A COMPARISON BETWEEN THE UNITED STATES AND AUSTRALIAN SYSTEMS

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This is a revised version of an essay submitted to a postgraduate course on Comparative Australian-Administrative Law at the Australian National University.

Introduction

To compare the system of rulemaking in the United States with the system employed in Australia is to compare two different systems that have developed along quite different lines. Greater emphasis is placed on rulemaking in the US as indicated by the extensive level of resources expended on the processes involved. Much of that emphasis is placed on the consultation processes which ultimately produce the final rule. A final rule can sometimes take two to three years to complete, longer in some cases. The consultation processes in Australia at federal level are ad hoc and usually confined to informal contacts or 'captured consultation'[1] and not prescribed in legislation at present. Resources are generally expended in Australia on the legislative program as a whole rather than on the rulemaking process in particular. The emphasis rests upon the making of primary legislation which often sets out the frameworks and detail of legislative schemes. Secondary or delegated legislation is most often concerned with the procedural aspects of such schemes and is seen as a part of a scheme and not an end in itself as in the US.

This paper compares firstly the process of creating rules in both systems and considers the factors bearing upon the success or otherwise of the ways in which rules are created, their complexities, how efficiently rules are made and how they operate in practice. Secondly, the paper considers the levels of scrutiny and accountability to which the rules are subjected and how those systems vary between the US and Australia. Thirdly, the paper will consider ways in which each system has endeavoured to improve their respective systems to cope with problems relating to increasing regulation of government programs. Also the question of whether it is viable to adopt aspects of another system without fully understanding the implications of how that system may work in practice will be considered.

Rulemaking in the United States

Administrative Procedure Act 1946

In the US, the system of rulemaking is governed by the *Administrative Procedure Act 1946 (APA)*. Section 551 of the APA defines a 'rule' widely to include:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organisation, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganisations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

The administrative state before the 1930s was relatively secure and had been growing steadily. However, in the 1930s Roosevelt's New Deal 'led to a tremendous expansion of federal regulatory power in areas that included securities markets, labour relations, trucking, and the airlines. By the 1960s and 1970s this grew to include regulation in the environmental protection, consumer and traffic safety and social welfare' areas.[2] The administrative bureaucracy had blossomed considerably and the APA was passed in 1946 to attempt 'to legitimise the vast delegations of power that had been made to administrative agencies.'[3] There was at this time a definite indication that 'the 'nexus of policymaking' in fact was shifting 'from the constitutionally designated branches of government to the bureaucracy.'[4] Judge Rehnquist had referred to the APA as a 'new, basic and comprehensive regulation of procedures in many agencies, as well as a legislative enactment that settled long-continued and hard-fought contentions, and enacted a formula upon which opposing social and political forces have come to rest.'[5]

Informal Rulemaking

The APA sets out the required procedures to be taken by agencies in promulgating rules using the process of informal rulemaking or adjudication. The 'notice and comment' procedures contained in s.553 have been the primary means of rulemaking since 1946 and focus on procedures which require extensive consultation processes. For example they require that agencies prepare a *Notice of Proposed Rulemaking* that is usually the initial proposal based on in-house expertise and informal contacts with affected parties.[6] In Australia the extent of research for and preparation of draft regulations at federal level generally rely on in-house expertise and informal contacts with affected parties to produce the final regulations although more complex legislative schemes obviously involve more consultation because of their complex nature and possible impacts on the states or economy generally.

In the United States, the notice of proposed rulemaking is published in the Federal Register (s.553(b) APA) and the public is given the opportunity to comment, usually a period of between three to six months. The agency will consider these comments and include any ideas considered worthy in the agency's view to be part of the new rule. A concise general statement also accompanies the rule which explains the factual and policy bases of the rule. (s.553 (c))[7] The 'concise and general statement' or preamble has become more lengthy in recent years since the courts in the 1970s, particularly in *Kennecott Copper Corp v EPA*,[8] demanded more reasoned elaborations to enable the court and the public to follow the agency's thinking when reviewing complicated rulemakings. The courts went further in *Portland Cement Association v Ruckelhaus*[9] *486 F 2d 375*, when it was held that the notice of proposed rulemaking must disclose an agency's methodology and supporting studies in order to allow the public an opportunity to criticise the data. The 'concise general statement' must explain the agency's reasoning on key points, respond to material comments by outsiders and explain alternatives chosen and rejected.[10]

The imposition of these procedural requirements on informal rule-making demanded that agencies promulgate rules based on information in the public record in order to enable courts to review the rationality of the resulting regulations. Although the process from the view of those regulated was made considerably fairer it did result in the process itself becoming more cumbersome and legalistic.[11]

'Informal rulemaking has the clear advantage of clarifying the law in advance.'[12] This is a major asset in the US system that doesn't have a parallel in Australia at the federal level as yet but there are some states in Australia that have included provisions in their legislation requiring consultation. For example in New South Wales and Victoria the regulatory impact process prescribed in legislation stipulates a requirement that proposed regulations be advertised in advance and submissions invited from interested parties.[13] The proposals

contained in the Commonwealth Legislative Instruments Bill relating to publication and notification of all instruments in the Federal Register as well as the requirement to publish proposals in relation to rules affecting business will assist the Commonwealth to advance to a comparable level consistent with developments already operating in other Australian states.

Although the APA does not address the model for rule-making with as much precision as it does for adjudication, probably because rule-making prior to 1946 was not as frequent, it does present a framework for a simple quasi-legislative model for rule-making.[14] Interested parties are given an opportunity to participate in the making of the rule through written submissions or, if the agency chooses, through a public hearing. The public comment and the records of hearings all become part of the public record. Once rules are made they are subject to judicial review in accordance with the 'arbitrary and capricious' standard in s.706 of the APA.[15] This process is fairer and more rational because as Andreen points out, it opens up the policymaking process to all interested persons.[16] The lack of formal consultative processes is a definite gap in the Australian rulemaking process at the federal level and one which the Legislative Instruments Bill proposes to address in relation to rules affecting business.

Formal Rulemaking

Formal rulemaking under the APA applies where statutes require that rules are 'to be made on the record after opportunity for an agency hearing' (s.553(c)). Sections 556 and 557 then apply and that procedure requires public notice of the proposed rule as in informal rulemaking but then the procedure follows on very much like a formal adjudication.[17]

Statutes rarely require that hearings be conducted prior to the making of rules of general applicability. An example of such a statute is the federal *Food, Drug and Cosmetic Act* (21 U.S.C. 801) which provides that 'agency action issuing, amending or repealing, specified classes of substantive rules may be taken only after notice and hearing and that 'the Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.'[18] These 'statutes usually require that the rules be formulated upon the basis of the evidentiary record made in the hearing.'[19] There are other statutes such as the federal *Seed Act* (7 U.S.C. 1561) that specify that hearings be conducted but do not have the further requirement of a decision 'on the record.'[20]

Negotiated Rulemaking – 'Reg negs'

In 1990 the *Negotiated Rulemaking Act* was passed as a way in which to counter the malaise in administrative law resulting, so Philip Harter contends, from 'a fundamental lack of consensus over appropriate rulemaking procedures and the nature of government regulations as a whole.'[21] He was commissioned by the Administrative Conference of the United States in 1982 to consider alternative methods of rulemaking to overcome the time and costs involved in informal rulemaking processes. The 'ossification' of the informal rulemaking process is a phenomenon written about prolifically. Basically it means that it is now much harder for an agency to promulgate a rule than it was twenty years ago.[22] This is mainly ascribed to the way in which 'hard look' review has developed and the way in which courts have acted aggressively in demanding requirements which cause the process to slow and in some cases disappear. The cause of 'ossification' in the informal rulemaking process is much disputed but the system has to a great degree 'ossified' in the past decade or so. Increasing complexities in the rulemaking process is illustrated by the example of the *Primary and Secondary Ambient Air Quality Standards* made under the *Clean Air Act* in 1970. At that time, they consisted of a single page in the Federal Register. The preamble in the 1987 revision of a single primary standard was 36 pages in the Federal Register,

supported by a 100 plus-page staff paper, a lengthy and costly million dollar Regulatory Impact Analysis and a multi-volume criteria document.[23]

It was envisaged that building consensus amongst interested parties to proposed rules using negotiated rulemaking would result in rules being made more expeditiously and without generating subsequent legal challenges.[24] It was thus seen as a cure-all for the 'ossification' process. The APA was consequently amended by adding a new sub-chapter concerned with establishing a framework, consistent with s.553 of the APA, to encourage agencies to use the process when it enhances the informal rulemaking process. The intent of the legislation was to authorise agencies to increasingly use settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration as a means of combating conflict and challenges to the rules.[25]

'Reg negs' have generated much enthusiasm and support in the executive and legislative branches of the federal government as an innovative, efficient and effective means of developing regulations.[26] So enthusiastic was the Clinton Administration that they passed the *Administrative Dispute Resolution Act 1996* which 'confirmed ...the use of collaborative processes and has recognized that these methods have just as much place in agencies' activities as do formal adjudication, notice and comment rulemaking, and other more formal procedures.'[27] Further sunset dates and special oversight or reporting requirements were eleminated in the *Negotiated Rulemaking Act.* The amendments give the Office of Management and Budget power to take action to expedite the establishing of negotiated rulemaking committees to ensure that bureaucratic requirements do not impede agencies from taking advantage of the negotiated rulemaking process.[28]

In 1993, the Clinton Administration issued Executive Order 12,866 directing that each agency explore the use of consensual mechanisms for developing regulations, including negotiated rulemaking.[29] The initiative was part of Al Gore's 'Reinventing Government' initiative that was designed to make Federal Government less expensive and more efficient and to change the culture of the national bureaucracy – to redesign, to reinvent, to reinvigorate the entire National Government – and to put the **M** back in OMB.[30] The Government clearly thought that these changes would overcome the problems besetting the system and breath new life into it. In practical terms, the Clinton Administration achieved the cutting of 640,000 pages of internal agency rules, agencies eliminated 16,000 pages of unnecessary federal regulations affecting businesses and rewrote another 31,000 pages into understandable, plain language.[31]

Rulemaking in Australia

Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903

The US system focuses very much on consultative procedures under the APA while the rule is being promulgated. Australia does not have legislation which dictates how rules are to be promulgated, that is, the manner in which the content is compiled. In the US the government is in fact developing the policy as it develops the rule. In Australia, the *Acts Interpretation Act 1901* and the *Statutory Rules Publication Act* set out the formal requirements for regulations and how they are published and the criteria to ensure that rules are validly made. They are purely procedural in nature.

The emphasis in Australia is on the making of primary legislation and that is where the resources are expended for the development of legislative schemes. In Australia it is the norm that 'an Act of Parliament will set out the broad scheme of a policy or program within a fairly detailed framework, with executive law-making confined to matters too technical, trivial, detailed or changing to justify the procedural solemnity and rigour of an Act of Parliament.'[32]

The delegated legislation is part of the primary legislative program that is put in place by the responsible Minister for the relevant portfolio.

The system controlling the making, scrutiny and publication of regulations has been in place for a long period of time. It has proved a stable and enduring system and as a result Australia is considered 'the possessor of the most advanced system of parliamentary scrutiny of delegated legislation.'[33] Although the system appears to have developed in an *ad hoc* way, the system as we know it now was settled by 1932 with the role of parliament firmly placed at the centre. Regulations are made and notified in the Commonwealth Government Gazette and laid before both Houses within 15 sitting days. Motions for disallowance of those regulations can be made within a further 15 sitting days of tabling. All these conditions fulfil s. 48(1) of the *Acts Interpretation Act 1901.*

During the last twenty years or so, other types of instruments have significantly increased in number. In 1987, section 46A was inserted into the *Acts Interpretation Act 1901* which considerably expanded the scope of federal parliamentary control in relation to these various types of instruments. If instruments satisfy the characteristics set out in s.46A and are referred to in the empowering legislation as being a 'disallowable instrument,' then they fall within the operation of the Act and are subject to the controls of parliamentary review in the same way as regulations are subject to review.

> The operation of this section (s.46A) requires a case by case consideration of the question whether an instrument has such legislative characteristics that it should be subject to parliamentary review. It is to the credit of Commonwealth legislators that there has been a generous attitude taken to the desirability of prescribing instruments as falling within this description. The result has been that the Senate now reviews more non-regulation instruments than those that fall within the traditional categories.[34]

The Commonwealth regime brings therefore, a great many of these instruments within the operation of the *Acts Interpretation Act 1901* and it is interesting to contrast this with the situation in Victoria, where the number of regulations falling within the definition of 'statutory rule' under the *Subordinate Legislation Act 1994*, is declining. In 1997, the Scrutiny of Acts and Regulations Committee dealt with 175 regulations but in 2000 it had decreased to 141.[35] The Inquiry into the *Subordinate Legislation Act 1994* in Victoria has suggested as a possible option for reform to adopt the definition of 'legislative instrument' contained in the Commonwealth Legislative Instruments Bill 1996 (No. 2).[36]

Parliament recognised from an early stage the need for direct parliamentary control over delegated legislation. Debate on the disallowance provision in the Acts Interpretation Bill 1904 was very much in favour of parliament maintaining its responsibilities over delegated legislation. Senator Gould commented in 1904 that he did 'not believe in giving the Executive powers which rightly belong to Parliament.'[37]

In 1931 the Scullin Government had tried government by regulation and pushed the system to the limit. It made regulations to give preference in employment to the Waterside Workers' Federation. The strategy employed by the Government was to table the regulations on the last of the 15 sitting days required for tabling and then re-enact the regulations after they had been disallowed. This process happened a number of times and they were re-enacted on the same day as Parliament was dissolved. The regulations were finally repealed by the Lyons Government on 8 January 1932.[38] In effect the strategy employed by the Scullin Government achieved what it had set out to do in relation to the Waterside Workers' Federation, and that was to give preference to the union. This they achieved for the greater part of 1931 with the consequence that the rival union was greatly weakened.[39]

There were a number of High Court cases generated as a result of the way in which the Scullin Government had manipulated the regulation-making process. One of those decisions

was *Victorian Stevedoring Co Pty Ltd v. Dignan*[40] which held the regulations to be within the legislative power of the Commonwealth Parliament principally because the 'delegation of legislative authority is an accepted feature of Anglo-Australian legal and constitutional development.'[41] Evatt J commented in his judgment that it was really a matter for Parliament to amend the legislation concerned and that the re-making of regulations did not exceed the Governor-General's statutory powers,

> Although the general power of the Governor-General to make the present regulations is derived from the *Transport Workers Act,* sec. 33(1) of the *Acts Interpretation Act* 1901-1930 shows that the power may be exercised from time to time as occasion may require. The Governor-General is the sole judge of the time and occasion, and his statutory powers and their exercise remain unaffected by the termination of a regulation previously made. It would be quite impossible for any Court to say for what period a disallowance of Regulation A should operate, so as to prevent the Executive Government from making a new regulation, B, to operate in substantially the same way as A. Indeed, the argument on this part of the case overlooks the fact that the power conferred on the Governor-General to make regulations is a continuing authority, which will endure until the statutes mentioned are repealed or amended.[42]

The situation of manipulating the time of tabling instruments discussed in *Dignan's* case[43] is still considered a problem in Australia today, and to combat this problem the Legislative Instruments Bill proposes that instruments be tabled within six sitting days after they are made or they cease to have effect. Governments at present can still benefit by 'dodging' the disallowance procedure for a while by tabling regulations on the last possible sitting day of the session or by making regulations during the parliamentary recess. This allows a period of operation before the rules are considered by Parliament. The fact that the legislation has been operating for some time may inhibit members and senators from moving its disallowance.[44] More recently the Howard Government tried a similar strategy when making the Workplace Relations Amendment Regulations in December 1998. The regulations attempted to implement an unfair dismissal exemption for small businesses employing 15 or fewer persons, legislation that had been before the Senate twice and had been rejected on both occasions.[45] The Parliament did not have an opportunity to consider the regulations until it sat again in February of 1999. Senator Faulkner commented in the disallowance motion that

> the Prime Minister and the Minister for Employment, Workplace Relations and Small Business will not accept the will of the Senate, of the parliament. They have subverted the parliamentary process and attempted to introduce the same unfair dismissal exemptions through the back door by regulation.[46]

The regulations were subsequently disallowed in February 1999.

Dignan's case was also interesting in that it contrasted the rulemaking power and its exercise in the United States system with that of Australia. Sawer states that 'the regulations were challenged on the basis that the nature of the delegation of power to the Executive was so broad that it infringed the principle of separation of powers.'[47] However, the Court rejected that notion on the grounds that according to the 'gradual course of decision any sharp separation of legislative from executive powers had been rejected.'[48] The High Court considered the US system to be quite different from the way in which rulemaking power is delegated and exercised in Australia; and Sawer comments that

> the American doctrine requiring the delegating Act to set out standards or principles for the delegate body to observe did not apply in Australia. It was agreed that complete abdication of legislative power by parliament would be unconstitutional, and it was suggested that delegation of a whole head of power might be; some stress was placed on the relation between parliament and executive in the Anglo-Australian system of responsible government, from which it appears that wide delegation to bodies other than the Governor-General-in-Council might be differently regarded.[49]

Dixon J pointed to the distinction made in the US between a delegation of power to make a law that involves a discretion and conferring a discretion as to its execution.[50] In the US

when legislative authority was delegated to agencies the delegating Act was required to provide guidance and set out standards so as to avoid problems associated with the separation of powers doctrine. The Supreme Court has justified the delegation of power by saying that as long as the delegation of power is done within the confines of the delegating Act, then separation of powers doctrine is not infringed particularly if the courts are able to 'ascertain whether the will of Congress has been obeyed.'[51] Dixon J in Dignan's case referred to Justice Holmes and his 'dissenting opinion in *Springer v. Government of the Phillipines Islands*[52] has doubtless lent support to the notion that many of the consequences of the separation of powers are avoided in substance, although acknowledged in form.'[53] In Australia the delegation of authority is made under a statute to the Governor-General who is empowered to make regulations under a range of legislation. Usually the power is delegated in general terms but sometimes it refers to either a specific activity or enumerated activities. By contrast, an agency in the United States such as the Environmental Protection Agency (EPA) has power to decide if rules are needed within a particular area such as 'Clean Air' and its associated range of matters related to air quality standards. The statute does not specify areas or enumerate particular activities where the EPA can make rules – that is the province of the agency to decide under its delegation.

The actions by the Scullin Government in 1931 resulted in major changes to the rulemaking system at the time. After they lost power in 1931, the *Acts Interpretation Act 1904-1930* was amended and section 10A was inserted. This section prohibited the re-making of regulations which had been disallowed by either House of Parliament within six months after the date of the disallowance.[54] Parliament thereby reasserted its control over the process and this is embodied in a statement by the Acting Attorney-General Senator McLachlan that

> Having regard to the fact that the power is vested in Parliament, no government should have the right to bring into operation a regulation that has been disallowed by either House of Parliament unless a resolution for its disallowance has been rescinded.[55]

The other significant development in 1932 was the setting up of the Senate Standing Committee on Regulations and Ordinances which was intended to provide parliamentary machinery for the routine examination of the steadily growing number of instruments tabled in accordance with the *Acts Interpretation Act*.[56] The idea that Parliament is superior to the executive in the making of regulations has not really varied from that time and rulemaking has remained closely aligned with the parliamentary process since then. The system has worked reasonably well and difficulties with the system appear to have come about as a result of the evolution and diversity of various kinds of legislative instruments, that is more properly described as an explosion.[57] Problems arise in Australia because this proliferation of instruments does not 'fit easily within the existing processes and procedures for scrutiny.'[58]

Australia's system in comparison with that of the US keeps delegated legislation very much a part of the parliamentary process whereas in the US the role of Congress is almost non-existent. Indeed 'Congress is incapable of monitoring the rulemaking process closely enough to keep agencies accountable,'[59] because of the large and complex nature of the regulatory system.

Scrutiny Mechanisms

United States

In the United States all three branches of government jealously guard their review roles in relation to rulemaking.[60] The nature of the review by each branch is very different and the extent varies between the branches

Judicial Review

The judicial branch has developed a procedure known as 'hard look' review which gained momentum during the 1970s. The reviewing court is

> obliged to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies and pointed to adequate support in the record for material empirical conclusions.[61]

Rules can be set aside under the APA if they are found to be 'arbitrary or capricious' or if there is an 'abuse of discretion.' Judge Leventhal who first referred to the term 'hard look' review in *Citizens to Preserve Overton Park v. Volpe*,[62] considered that 'the court does not make the ultimate decision but insists that the official or agency take a 'hard look' at all relevant factors.'[63] The Supreme Court also considered that 'the inquiry is to be searching and careful, the ultimate standard of review is a narrow one.'[64] This 'probing' standard of merits-oriented review first enunciated in *Overton Park* has become known as the 'hard look' doctrine of judicial review.[65]

In Professor McGarity's opinion, the 1970s saw an aggressive judicial approach toward 'hard look' review with a tendency to define issues in terms of political value judgments rather than relying on agency expertise in matters. Some major agency rulemaking initiatives were stymied by numerous judicial remands as a result.[66] He considers that the impact upon agencies was to impede their freedom to facilitate the rulemaking process and with detrimental effects, to the extent that agencies now are extremely conscious of the possibility of judicial reprimands and the consequences to the agency if that should happen. Agencies tend to be 'constantly 'looking over their shoulders' at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking record.'[67] This has forced some agencies to abandon rulemaking in favour of case-by-case recalls.[68] Professor McGarity illustrates his discussion with an example involving the EPA where he points to the dangers involved when stringent judicial review in effect goes counter to the public interest. When the EPA was attempting to develop standards for industrial dischargers of pollutants in accordance with the then 'best practicable technology available' in the 1970s, they were constantly thwarted by judicial reprimands. The result was that the EPA gave up in all but one case and ultimately, it failed to develop 'best practicable technology' standards for most of the pollutants in most of the industries for which it had a judicial remand.[69] In McGarity's view 'the predictable result of stringent 'hard look' judicial review of complex rulemaking is 'ossification.''[70]

Congressional Review

McGarity considers that Congress has not implemented a regularised institutional role for itself in reviewing individual rulemaking efforts.[71] These rulemakings are equivalent to regulation making in Australia. Similarly to the Australia system, Congress has the opportunity under the *Congressional Review Act* to review final regulations issued by federal agencies. Rules that may attract the attention of the Act are those with an annual economic impact of $100 million or more, where consumers may be affected by major increases in costs and prices or where there is the possibility of a significant adverse impact relating to employment, productivity, competition or investment. The Act provides a 60-day window for Congress to accept or reject the final regulation and as well such congressional action is subject to presidential veto.[72]

Congressional authorization committees, Bryner contends, can have a number of non statutory means of oversight and control of agency rulemaking by the use of hearings, investigations and the requesting of agency and program reports. However such activities

seem more oriented toward broad policy issues rather than inquiries into agency implementation programs.[73] 'The potential for effective oversight is constrained by the limited power and resources of oversight committees and by the difficulty they face in challenging an agency with influential friends and supporters elsewhere in Congress.'[74] The result is that these committees are not able to provide systematic or careful oversight of agency rulemaking activities. 'But such time consuming, uncoordinated effort provides only a narrow kind of accountability and one that might often run contrary to the intent of law and the extent to which rules and regulations are applied fairly and consistently.'[75] However McGarity considers that such ad hoc review by interested committees 'cannot be understated,'[76] and provides a useful deterrent to the abuse of power by agencies.

A significant legislative technique to control delegated legislative powers by Congress was the legislative veto. The legislative veto was exercised through a number of statutes and empowered one or both Houses to override delegated agency decisions by passing a resolution that annulled the action that had been taken by agencies under their delegated power. Schwartz likens the process to tabling legislative instruments before Parliament.[77] However, although the process is similar to disallowance procedures in Australia, the structure is quite different because the power to veto lies within statutes and is not part of the congressional process that applies to all legislation. Bryner considered it an attractive tool for Congress because

> it enabled Congress to delegate responsibility for making difficult policy choices and blame for politically unpopular ones, and claim credit for acting in response to political demands in reversing unpopular actions. The legislative veto allowed Congress to permit presidential judgment, discretion and initiative while safeguarding its own prerogatives and served as a practical basis for compromise over the division of authority and responsibility between the legislature and executive in areas of shared constitutional jurisdiction and political conflicts and disagreements. It often induced compromise on particularly intractable policy disputes.[78]

However the legislative veto was declared by the Supreme Court in 1983 in *Immigration and Naturalization Service v. Chadha*[79] to violate the constitutional requirement of the separation of powers.[80] The veto was said to 'violate the Presentment Clause that requires all legislation to be presented to the President before becoming law. Secondly, it violated the requirement that no law can take effect without the concurrence of both houses of Congress.'[81] 'It meant that the 200 or so statutory provisions that included legislative vetoes were void.'[82] However, even after *Chadha*, Congress can still undo initiatives directly by statute or by limitations placed on agency appropriations.[83]

In Coglianese's opinion Congress can and does affect regulations through appropriations bills, hearings and oversight which may explain why the *Congressional Review Act* has effectively lain dormant for five years until recently when it was used by Congress and President Bush to repeal an Occupational Safety and Health Administration (OSHA) ergonomics rule.[84] It is not possible for Congress to scrutinise every single rule. The sheer volume of rules produced precludes that happening. For example in the five year period from 1996 to 2001, federal regulatory agencies issued 20,000 new rules.[85] The role of Congress then is very different to Parliament's role. Rules are not scrutinised by Congress as part of a regularised process but if Congress disagrees with a rule it can pass a statute to reverse its effect as is the case in Australia or it can invoke the *Congressional Review Act* that is subject to presidential veto. Congress can also alter an agency's jurisdiction to curtail certain rulemaking efforts.[86] There appears to be much duplication of effort if Congress should disagree with an agency's view on how a policy should be approached and implemented, the agency then has to recommence the rulemaking process to produce a rule with which all branches are happy.

Presidential Review

The 1980s witnessed increasing influence in direct presidential review of delegated rulemaking. This resulted in Reagan's push to 'regain control' over a runaway bureaucracy, according to McGarity.[87] Executive Order 12,291 required agencies to submit all rules to the Office of Management and Budget (OMB) for review. Agencies cannot consider new rulemaking initiatives or send proposed or final rules to the Federal Register without OMB approval. The OMB process was the vehicle by which presidential micro-management of the rulemaking process took place. President Bush continued this practice and assigned in 1990 control of the process under Executive Order 12,291 to the Council on Competitiveness. The Council was chaired by the Vice President and composed of key economic and legal advisers such as the Secretaries of Commerce and the Treasury, the Attorney-General, the Director of OMB, the Chairman of the Council of Economic Advisers and the President's Chief of Staff.[88] Taking account of the nature of the system and the fact that agencies can decide for themselves what rules they need to make, the Executive has had to build some accountability mechanisms back into the system of rulemaking to ensure that its policy initiatives are implemented by the agencies.

Another requirement that was implemented by Executive Order 12,498 was to create a 'regulatory agenda' of all executive branch rulemaking initiatives. Every agency is required to submit its rulemaking initiatives planned for the year to OMB for approval. If the OMB does not include any of the items on the agenda, the agency is then not able to proceed with a notice of proposed rulemaking.[89] OMB's review, in McGarity's opinion, has proved to be far more intrusive than either judicial or congressional review but many would argue that with the President and Vice President as part of the review function as well as being elected officials 'helps foster public accountability.' McGarity considers this situation is ideal in principle as the President who is at the 'apex of government' can provide the OMB and the Council on Competitiveness with a 'unique perspective' on policymaking in the federal bureaucracy. So in theory the Executive are in a better position to implement policy across the Executive Branch, to ensure its consistency, and 'to help prevent agencies from acting at cross-purposes with one another.' [90] However in practice there is not much accountability by elected members of the Executive and instead the reviewing function tends to fall to unelected bureaucrats in the OMB and the Council on Competitiveness.

The result of delegation of rulemaking power to agencies by Congress appears to have spawned a very powerful organisation in OMB. McGarity's view is that 'the OMB sometimes attempts to supplant its own judgments for congressional policy judgments, they also attempt to substitute their own judgments in the very highly technical areas of science, engineering and economics for that of the agencies to whom Congress has delegated responsibility.'[91] In cases where this has occurred, it indicates a serious flaw in the way in which accountability mechanisms are intended to operate.

Significant rulemaking initiatives of great importance to the agencies, industries and beneficiary groups concerned can take years to be approved and in some cases may not be approved. McGarity points to an example with the EPA in connection with one of its rulemaking exercises, concerning important corrective action governing the extent to which hazardous waste disposal facilities must clean up existing contamination, seemed to cause conflict with OMB, so much so, that the agencies took two years to argue over the content of the rule.[92] Clashes are not confined to agencies, OMB also clashes frequently with congressional subcommittees who jealously guard their influence over agency rulemaking as well. The effectiveness and the potency of the rulemaking system is grossly affected by such stoushes and it would appear that it is quite amazing when an agency is able to finalise rules that relate to complex and technical areas having travelled the maze of regulatory requirements from all branches of government. It seems that the system is overburdened

with review. It would appear that 'ossification' cannot be solely laid at the door of the judicial branch.

Australia

Luckily for Australia, the system of rulemaking is closely aligned to the Parliamentary process and operates in a more coordinated and cohesive fashion. The reason is that Parliament authorises the making of a specific delegation of power under various statutes and although approval is made to make delegated legislation in a particular subject area, 'it should not be assumed to give the executive government an absolute discretion to make whatever legislation it thinks fit.'[93] As Barwick pointed out in *Giris v Federal Commissioner of Taxation*[94] that while there is no doubt that 'the Parliament may delegate legislative power it may not abdicate it.'[95]

In the US on the other hand, Congress delegates a general rulemaking power to agencies to make rules in particular subject areas, and in these situations informal rulemaking procedures apply. A delegation of power in the US under a statute that requires a rule to be made on the record after an agency hearing dictates that the formal rulemaking procedure will be used as set out in the APA. By contrast, in Australia a particular statute will indicate a delegation of power to the Executive and specify the subject area in which the agency may make rules and also specify the type of instrument to be made under that delegation. Although Parliament may not want to legislate directly in relation to those delegated matters, it is only logical that Parliament should wish to retain a supervisory capacity over how the delegation of power is exercised.

The tabling of delegated legislation is the primary way in which Parliament can maintain control of the way in which powers of delegation are used. As the tabling process is part of Parliamentary procedure, the Minister responsible for tabling the legislation can be held accountable for any concerns which the Parliament may have relating to the exercise of the power. If one or other of the Houses is concerned with the nature of the delegated legislation, a motion of disallowance can be put forward. Although Bernard Schwartz likened the legislative veto to disallowance of legislative instruments in Australia, they are really quite different as the disallowance procedures are built into the *Acts Interpretation Act 1901* and apply to all regulations and instruments of a legislative nature falling within the operation of s.46A. By comparison, the legislative veto provisions of Congress were contained in some statutes but not all.

Scrutiny Committees in Parliament provide an extremely useful filter process for delegated legislation. A fixed definite procedure is followed once instruments have been tabled. There appears to be no systematic approach in the US as there is in Australia in relation to the activities of parliamentary legislative scrutiny committees. Senate Standing Order 23 (2) states that all regulations, ordinances and other instruments made under the authority of Acts of Parliament which are subject to disallowance or disapproval by the Senate are referred to the Senate Standing Committee on Regulations and Ordinances.[96] The importance of the Committee to the parliamentary process, as Pearce and Argument state is that it has become an integral part of the legislative process. It engages in technical legislative scrutiny and applies parliamentary standards to ensure the highest quality of delegated legislation.[97] It has the power to recommend that any instruments or parts of instruments may be disallowed. This is rare as any concerns are almost always dealt with by the responsible Minister concerned after being approached by the Committee.

The Committee is responsible for ensuring that delegated legislation meets certain criteria and that it does not trespass upon certain fundamental rights and principles.[98] It ensures that the legislation accords with the terms of the statute, that it does not impinge on personal rights and liberties, and that those rights are not dependent on administrative decisions

which are not the subject of merits review and that it does not contain matters that are more appropriately dealt with in primary legislation. The Scrutiny of Bills Committee established in 1981 ensures as part of its responsibilities that bills do not inappropriately delegate legislative powers.

Like the US and the OMB, the Office of Regulatory Review (ORR), now part of the Productivity Commission within the Treasury portfolio, aims to perform a similar role within the Executive in applying compliance mechanisms. Issues of regulatory reform have formed a major part of the government's review on competition policy. The ORR vets and reviews regulations to ensure they are properly formulated and do not impose undue costs on business and the community.[99]

The Government's law and justice policy statement in 1998 had also foreshadowed a consultation process in relation to regulatory activity and part of that would include a requirement for a regulatory impact statement. Such statements indicate matters such as the objectives of the proposed regulation, the alternatives for achieving those objectives, the costs and benefits for each alternative and the reason for the adoption of the measure advanced.[100] This proposal was contained in the Legislative Instruments Bill 1996 (No.2) however, as the bill did not pass the Senate, the Government accordingly set up the ORR within the Treasury portfolio.

Regulatory Impact Statements (RISs), very like the US equivalent, are required for legislation which have an impact on business. The aim is to encourage all departments to consider all possible alternatives and their associated costs and benefits and to choose the alternative with the maximum positive impact upon the economy.[101] Aspects of the US system have clearly been utilised in relation to the creation of the ORR although the Commonwealth has followed Victoria's lead. Perton considers that the RIS is an important addition to the process:

> the RIS process strengthens our democracy. Whilst there are many avenues for the citizen and organisations to lobby in respect of Bills in the Parliament, the RIS process offers the only genuine public input into the regulatory process. The process is seen as more important today than ever before because many more substantive issues are being left by Acts to be realised in subordinate legislation. This makes the need for public justification of regulatory proposals much greater, as they are not debated in the public arena, that is, the Parliament.[102]

In the Commonwealth, RISs are required to be tabled in Parliament. The Office of Regulation Review, before the regulatory proposal and RIS go to Cabinet for approval advises on the adequacy of the RIS. A weakness was highlighted by the Inquiry into the *Subordinate Legislation Act 1994* in Victoria concerning the Commonwealth system where it commented that although 'the Commonwealth requires that RISs be tabled in Parliament, there is no requirement that the RIS produced for Cabinet be the same as the RIS tabled in Parliament.'[103]

The involvement of the courts in the promulgating of rules is quite alien to Australia's system. The courts become involved after the legislative instruments have become operational and where individuals or groups are affected by the operation of those legislative instruments. In *Shanahan v. Scott*[104] the High Court held that regulations cannot extend the operation of a statute :-

> [a general regulation making power] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.[105]

The issue of procedural fairness has arisen in a number of cases relating to the delegated legislative process. The view of the courts is encapsulated in a statement by Brennan J in *Kioa v. West,* that 'the legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for the interests of all members of the public are affected in the same way by the exercise of such a power.'[106] Dunphy, however, makes the point that 'Brennan J saw no reason for ruling out the application of the principles of natural justice in relation to exercises of legislative power which singled out individuals by affecting their interests in a manner that was substantially different from the manner in which the interests of the public at large are being affected.'[107] Generally though, the 'courts have declined to extend the doctrine of natural justice to apply to the formulation by the executive of rules of a legislative character.'[108] If the courts did interfere it could be interpreted as trespassing upon the executive's right to implement its policies.

There is the possibility that delegated legislation can be challenged on the basis of unreasonableness. Pearce considers that there is now a 'greater willingness' on the part of the courts to consider the possibility of a ground of unreasonableness as indicated by two successful decisions in 1992 however, since then the 'courts continue to be reluctant to find delegated legislation invalid on unreasonableness grounds,'[109] 'principally because it involves the court in what is largely a subjective assessment of the 'reasonableness' of the provision.'[110]

Strategies to Improve Rulemaking Processes

United States

In the United States the *Negotiated Rulemaking Act* passed in 1990 was hailed as a cure for the 'malaise' that beset federal rulemaking during the 1980s. Congress established the procedural guidelines encouraging the use of 'reg negs' and permanently reauthorized the Act in 1996. The Act does not require agencies to use formal negotiated procedures for rulemaking, but rather authorises a procedure to enable agencies to bring interested parties into the rulemaking process before it issues a proposed rule.[111] 'Vice-President Al Gore's National Performance Review enthusiastically endorsed 'reg neg' as a means of reducing the time taken to promulgate a rule and the costs involved in litigation and non-compliance. Judge Patricia Wald considers ' reg neg by far the most innovative and revolutionary aspect of ADR' as applied to matters of public law.'[112]

The reasons for such enthusiasm are many and varied. Statistics were quoted while the bill was before Congress to imply that the current system of rulemaking had to be improved and something done quickly by the Government. It was said that 'roughly 80% of the 300 regulations issued each year by the Environmental Protection Agency ended up in court.'[113] This figure has been bandied about by numerous people and was attributed also to former EPA Administrator William Ruckelshaus who also claimed 30% of that 80% of rules were significantly changed as a result of litigation.[114] These statistics seem to have taken on a life of their own and have greatly influenced the decisions taken concerning the push for negotiated rulemaking in the US. However, Coglianese points out in his empirical study of conventional and negotiated rulemaking outcomes that in interviews conducted with EPA staff that 'no systematic analysis of these figures underlay these claims. Rather, it was based on a ball-park estimate of the number of rules published in the agency's regulatory agenda and a similar estimate of the number of petitions handled by the Office of General Counsel.'[115]

Coglianese's investigation and comparison of the two systems led him to the conclusion that 'negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation.'[116] The 'hype' in the literature implies that negotiated rulemaking is the norm. In

fact, of the 3,762 rules finalised in 1996 only seven were negotiated rules, a percentage of 0.19% for that year.[117] The average time taken for an EPA rulemaking exercise using informal rulemaking procedures is approximately three and a half years from the development of an initial proposal to the promulgation of a final rule.[118] Coglianese examined the 35 regulatory negotiations to date. The shortest required half a year and the longest nearly seven years.[119]

Coglianese points out also that care needs to be taken when comparing figures for informal rulemaking and negotiated rulemaking. Even though rulemaking at the EPA takes about the same amount of chronological time, much more concentrated amounts of time are demanded by the negotiated rulemaking on the part of the agency and non-agency participants.[120] 'The negotiated rulemaking process contains all the elements of the conventional procedure, but in 'reg neg' all of them are compressed into one pre-emptive, intense, time consuming negotiated interaction.' [121]

'Negotiated rulemaking, distinguished by its search for consensus, has been an oversold solution to an overstated problem.'[122] There are some recognised disadvantages to using negotiated rulemaking. Coglianese considers that the process fosters more conflict than it reduces, particularly in the areas of decisions relating to the membership of the negotiated rulemaking committee, the consistency of final rules with negotiated agreements and the potential for an overall heightened sensitivity to adverse aspects of rules.[123] He also considers it very difficult to maintain the fragile consensus through the various stages of a negotiation given the realities of the federal regulatory process. A consensus reached during the early stages of a negotiation may not manage to come through all the situations that may cause it to unravel.[124] He questions the need to reach absolute consensus when learning may be equally well achieved in discussion-oriented sessions.[125]

Other concerns with the process relate to the way in which the process may 'subtly subvert the basic, underlying concepts of American administrative law, that is the agency's pursuit of the public interest through law and reasoned decisionmaking. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law.'[126]

Concerns have also been raised that the process would be contrary to the non-delegation doctrine relating to the 'potentially unlawful or unconstitutional delegation of legislative authority to private entities', a factor rejected most strongly by the Supreme Court in *Schechter Poultry v. United States* .[127] The argument involves the role of the agency as sovereign actor charged with the responsibility of pursuing the public interest. However in negotiated rulemaking the role of the agency is reduced to the 'level of a mere participant in the formulation of the rule and essentially denies the agency any responsibility beyond effectuating the consensus achieved by the group.'[128] In effect the agency has subtly shifted its function, from that of sovereign decisionmaker to that of an interested party to the negotiation. Choo refers to a comment by Judge Posner in *USA Group Loan Services v. Riley* where he dubbed 'reg neg' as 'a novelty in the administrative process and likened an advance commitment by an agency to abide by a consensus developed by a negotiating committee to 'an abdication of regulatory authority to the regulated...'[129] These concerns are associated with 'the implicit delegation from Congress to make law, consistent with the agency's authorizing statute. The statute is not just a brake or anchor on agency autonomy, it is the source and reason for the agency's actions.'[130] To that end Funk considers the theory and principles of regulatory negotiation are inconsistent with the theory and principles of the APA.[131]

Australia

The Legislative Instruments Bill proposes a number of enhancements to enable our existing system to better cope with the untenable aspects relating to delegated legislation that have crept into our system, such as the volume and complexity of quasi-legislation now in existence. The Bill recommends that all subordinate legislation be covered by the legislation to 'provide greater certainty about the regime applicable to legislative instruments.'[132] It will help overcome the very great problem of 'secret' legislation that is virtually inaccessible to the public as much of it is not subject to the *Statutory Rules Publication Act 1903* and therefore is not published.[133] It will force the Executive to direct its focus away from using non-disallowable instruments as a way of governing, that is now seen, suggests Argument as 'perhaps part of the deliberate plan to avoid the unwelcome attention of the Parliament.'[134]

As all legislative instruments are included within the operation of the bill, they will all be subject to parliamentary scrutiny. This will have a very positive impact on the array of delegated legislation that is 'currently in a parlous state.'[135] The overall impact of the Bill, Argument contends is that a legislative instrument;

> would be subject to an ordered and stringent regime in relation to drafting, publication, registration, scrutiny and in some cases, public consultation. It is also important to note that, if an 'instrument that is of a legislative character' is not made in accordance with the provisions of the Bill then it may be unenforceable.[136]

The mandatory consultation process for delegated legislation impacting upon business is a new innovation in the system at the federal level. The proposals are closer to the systems in New South Wales and Victoria that appear to mimic the 'notice and comment' procedure in the US system. The bill will require 'notification of a proposal to make a legislative instrument affecting business and the development of a legislative instrument proposal containing analyses of the need for the regulation, the costs and benefits of it and alternative ways of achieving the objectives of the proposal.'[137] The process is seen as a way of identifying defects within the proposal and dealing with them before the instrument is made. Pearce is concerned that there is likely to be more public involvement and influence on the content of the secondary form of legislation than there is on the primary legislation.[138] Although the bill adopts procedures that exist presently in New South Wales and Victoria in relation to consultation, it still needs to be borne in mind that difficulties exist when making comparisons between very different systems such as the US and Australia. The placing of greater emphasis on rulemaking processes in Australia than existed previously could create problems by making it a very costly exercise to produce legislative instruments. The nature of the relationship of rules to the parent statute that authorises their creation is also quite different in each country. Pearce's concern about the paradox will be a very real concern when the Bill becomes an Act. As the Australian system operates in quite a different way in practice to the way in which the US system operates, care needs to be taken when adopting aspects of a system, and how transplanted aspects affect the balance of the existing system.

The Legislative Instruments Bill would direct rulemaking into a consultative environment that leaves primary lawmaking lacking the same degree of openness. While consultation is a good thing and will result in better rules, the system needs to be balanced between primary and secondary law making. The balance needs to be commensurate with the importance attached to each of the processes as currently exists or perhaps the increased complexities in the system of rulemaking will justify that the whole system needs to be reassessed so that there is a more rigorous treatment of legislative instruments. This means that the primary legislative process may also need to be examined to address any apparent imbalance. However, as Asimov states 'parliamentary control is an ineffective check against ill-considered rules'[139] and consultation that is mandatory for important rules does provide

accountability by allowing those parties most affected by the rules to have a say and to ensure public input into more complex rulemaking activities in a more structured and logical way.

If Australia is going to adopt aspects of the US system it has to be more receptive of the fact that the US system is very much focused on 'openness' and adhering to democratic principles (or tries to) where the public interest is considered paramount. When consultation is part of the statutory process in rulemaking, greater accountability is ensured and the process will be made more consistent with the concept of procedural fairness.[140] However the process of consultation should not be seen as a substitute for parliamentary scrutiny in relation to disallowance, where representatives of all Australians have an opportunity to comment on the content of rules. There is no need to have all three branches scrutinising legislation to the same degree as in the US unless it is controversial. The operation of consultative procedures, alternative compliance mechanisms such as the ORR and parliamentary scrutiny procedures should produce rules of high quality.

The courts have a role to play where interests of individuals are threatened, particularly in situations where certain government 'ministers do not want their regulations reviewed.'[141] Some of the proposals in the Legislative Instruments Bill are cause for concern as well, particularly those provisions that allow the Attorney-General to issue a conclusive certificate to the effect that an instrument is not legislative without any parliamentary scrutiny of the instrument concerned. The bill also proposes to exclude the Senate's scrutiny for certain types of instruments such as regulations that provide for national legislative schemes, as well as certain quarantine proclamations and migration instruments.[142]

Conclusion

A number of innovative aspects of the US system can and should be adopted in relation to rulemaking but it is important that the context from which those perceived innovations come is well understood and compensated for when grafting them into the Australian system. Care should be taken in this process with a view to possible ripple effects into other branches of government. There should be some idea of the extent of the burden it may place on the court system if it has to become more involved in protecting the rights of affected individuals in relation to delegated legislative decisions. There is no benefit to be gained by placing increased burdens on the judicial system in relation to rulemaking at the expense of dispensing with the parliamentary system that has endured and works well. Caution should be exercised so as to ensure that the parliamentary scrutiny procedures are not eroded and their importance downgraded.

Although the quality of rulemaking has improved with compliance mechanisms in place within the executive, all three branches of government should ensure that there is not a shift away from the parliamentary process which is the ultimate forum where all legislative activity takes place. Although tensions exists between the legislature and the executive, there is room for compromise and the Legislative Instruments Bill will ensure 'a significant shift in control over delegated legislation back towards Parliament.'[143]

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