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The *Hardiman* principle

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THE HARDIMAN PRINCIPLE

1. INTRODUCTION

For historical and, in Australia, constitutional reasons, it is the courts that are the final arbiters of what the law is. And, at least in the federal sphere, it is the duty of the executive, including administrative tribunals and regulators, to obey the law as declared by courts exercising federal jurisdiction.¹

But must they passively accept these determinations?

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13 concerned a challenge to the powers and procedures of the Australian Broadcasting Tribunal (ABT) when holding a public inquiry into whether a proposed share acquisition would result in a person unlawfully holding a controlling interest in three commercial television licenses. At issue was whether the ABT could place arbitrary time-limits on the cross-examination of witnesses by a party to the inquiry, and whether the ABT had failed to discharge its statutory task by not adducing certain evidence.

Prerogative writs were sought against the ABT in the High Court. Despite the fact that there was already present another party to argue against the application for relief, the ABT actively defended its decision. The Court unanimously criticised the ABT's stance – it said:

... Mr Hughes was instructed by the [ABT] to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the tribunal in this court is not one which we wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the tribunal.²

The *Hardiman* principle therefore concerns the degree to which decision-makers can act as contradictors in proceedings challenging their own decisions. But there are many difficulties associated with its application. Today I want to draw attention to recent cases that have expanded the reach of this principle, both in terms of the kinds of bodies, and the kinds of proceedings, it applies to.

¹ *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 at [3]-[7] (Allsop J, Stone and Edmunds JJ agreeing); *Federal Commissioner of Taxation v Salenger* (1988) 19 FCR 378 at 387-388 (French CJ); *Nowicka v Superannuation Complaints Tribunal* [2008] FCA 939 at [23] (Sundberg J).

² *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).

2. WHICH DECISION-MAKERS DOES THE RULE APPLY TO?

Tribunals in the nature of court substitutes

Given the language used by the High Court it was generally understood that the *Hardiman* principle was targeted at ‘tribunals in the nature of court substitutes’³ – that is, tribunals that exercise **adjudicatory** functions between parties (usually by conducting hearings, often in public, where evidence may be produced and witnesses examined).⁴

There is a logic to this. Judicial review proceedings against tribunals are, in substance, akin to statutory rights to appeal against decisions of courts on questions of law, and courts are not themselves usually parties to such appeals.⁵ As a Canadian judge has observed:

There ... seems to be something inherently wrong for a [tribunal] such as this, which performs quasi-judicial duties, to act in an adversarial fashion to defend its decisions on appeal, or, as here, to try to reinstate its decisions when it has been overruled by an intermediate appeal tribunal ... For the [tribunal] to then prosecute or defend the appeal from its own decision seems almost as incongruous as for a trial judge ... to do so, which of course would be unthinkable.⁶

The *Hardiman* principle has been applied to various federal tribunals, including the Human Rights and Equal Opportunity Commission (HREOC),⁷ the Takeovers Panel,⁸ the Company Auditors and Liquidators Disciplinary Board,⁹ the Australian Securities and Investments Commission (ASIC),¹⁰ and the Native Title Tribunal.¹¹

Extension to ‘one-party’ cases

At least one commentator, however, questioned the basis for restricting the *Hardiman* principle to tribunals. She said:

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- ³ E Campbell, ‘Role of respondents to applications for judicial review’ (1998) *Australian Journal of Administrative Law* 5 at 7.
- ⁴ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [42] (Ashley J).
- ⁵ E Campbell, ‘Appearances of courts and tribunals as respondents to applications for judicial review’ (1982) 56 *Australian Law Journal* 293 at 294.
- ⁶ *Re Workmen’s Compensation Board of Nova Scotia and Treige* (1976) 72 DLR (3d) 246 at 252-253 (Coffin JA). As to the appropriateness of a tribunal appealing against a successful judicial review challenge, see *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 at [43] (Basten JA).
- ⁷ *Commonwealth v HREOC* (1995) 3 FCR 74 at 84-87; *Elekwachi v HREOC* (1997) 79 FCR 271 at 273-274; *Commonwealth v HREOC* (1998) 76 FCR 513 at 526-527, 513, 537-539.
- ⁸ *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77 at [27].
- ⁹ *Bourke v Companies Auditors and Liquidators Disciplinary Board* [1998] FCA 742.
- ¹⁰ *Capricornia Credit Union Ltd v ASIC (No 2)* [2007] FCAFC 112; *BTR Plc v Westinghouse Brake and Signal Co (Aust) Ltd* (1992) 34 FCR 246 at 265 (Lockhart and Hill JJ).
- ¹¹ *Donnelly v Registrar, National Native Title Tribunal* [2000] FCA 1330 at [12].

The [*Hardiman*] principle was stated by the High Court ... almost as an aside in the space of a few lines. No justification is provided in the case-law for application of the principle to tribunals but not to other administrative decision-makers. ... The claimed rationale of the *Hardiman* principle – a concern to avoid an appearance of bias in the tribunal if the court remits the matter for re-hearing – equally supports its extension to other administrators to whom a matter may be remitted after judicial review.¹²

This comment would prove to be prescient. In *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93, the plaintiff sought judicial review of the Regulator's determination of tariffs chargeable by electricity distributors. Ashley J accepted that *Hardiman* was dealing with tribunals exercising adjudicatory powers between two parties. In those cases, he pointed out, there would always be a natural contradictor in judicial review proceedings.¹³ But his Honour also said there was:

... good reason for giving the *Hardiman* principle operation in certain 'one party' cases. [I]n such a case, where there is prospect of remitter, a concern as to the fact or appearance of partiality could arise. It would not be a concern that the decision-maker was or appeared to be favourably disposed to one of two parties: but rather that the decision-maker was or appeared to be unfavourably disposed to the prosecutor.¹⁴

Ashley J took the view that *Hardiman* 'sensibly' applied to 'one party' cases where the decision-maker is bound to accord procedural fairness, the application for relief raises the prospect of remitter, and there is a public interest as would justify the intervention of the Attorney-General.¹⁵ However, he accepted that where the Attorney-General did not intervene and no law officer or other public official is heard by the court, the decision-maker 'should characteristically assist the court, particularly upon the question of power, and in doing so adopt as little of the role of partisan as possible'.¹⁶

TXU Electricity was followed by Sackville J in *Community Television Sydney Ltd v Australian Broadcasting Authority (No 2)* (2004) 136 FCR 338. In that case the Australian Broadcasting Authority (ABA) successfully defended proceedings seeking to have set aside a broadcasting licence allocation decision. There had been two applicants for the licence, and the successful applicant was named as a respondent alongside the ABA. Despite this the ABA went beyond the provision of assistance in the form of submissions explaining its powers and the operation of the relevant legislation. Sackville J noted that the ABA 'resisted the applicant's claim by addressing and attempting to refute each of its arguments. In other words, it became

¹² M Allars, 'Reputation, power and fairness: a review of the impact of judicial review upon investigative tribunals' (1996) 24 *Federal Law Review* 235 at 245.

¹³ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [42].

¹⁴ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [45].

¹⁵ This qualification was taken from Brennan J's judgment in *Fagan v Crimes Compensation Tribunal* (1982) 150 CLR 666 at 61-682.

¹⁶ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [43]-[44].

a protagonist in the proceedings.¹⁷ The ABA nonetheless contended that *Hardiman* was confined to ‘quasi-judicial proceedings’ where the relevant body is ‘exercising an adjudicatory function in the context of proceedings *inter partes*, [not where it] is performing a regulatory role’.¹⁸ Sackville J rejected these arguments. He noted that, had relief been granted:

... the [ABA] would have had to decide, in effect, between CTS and TVS, the only two applicants for the licence who met the statutory criteria. While the judicial review proceedings in this Court did not call for the intervention of the Attorney-General, there was a contradictor present, prepared to advance arguments in opposition to CTS’s claim for relief. In these circumstances ... the principle in *Hardiman* applied and the [ABA’s] role in the proceedings should have been consistent with that principle.¹⁹

The effect of these decisions appears to be that the *Hardiman* principle will apply where an administrative decision-maker is required to accord procedural fairness, the application for relief raises the prospect of remitter, and **either**:

- there is a contradictor present prepared to oppose the claim for relief;²⁰ or
- where there is no contradictor, the public interest warrants intervention by the Attorney-General (or other law officer or public official).

Only if there is no contradictor and no intervention is an active role justified, and even then that role should be limited to what is necessary to assist the court. The decision-maker should rarely, it appears, act as a protagonist.

3. TO WHAT PROCEEDINGS DOES THE RULE APPLY?

The High Court’s comments in *Hardiman* were targeted at judicial review proceedings. However, as the Court has elsewhere pointed out, ‘questions concerning the *ultra vires* activities of public officers and authorities are often determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes such as that provided by the [ADJR Act]’.²¹

¹⁷ *Community Television Sydney Ltd v ABA (No 2)* (2004) 136 FCR 338 at [5], referring to the principal judgment: (2004) 136 FCR 316 at [6].

¹⁸ *Community Television Sydney Ltd v ABA (No 2)* (2004) 136 FCR 338 at [14].

¹⁹ *Community Television Sydney Ltd v ABA (No 2)* (2004) 136 FCR 338 at [13].

²⁰ *R v Gough; Ex parte Key Meats Proprietary Ltd* (1982) 148 CLR 582 at 597-598 (Murphy J); *Giniotis v HREOC* [2000] FCA 1954 at [8] (Gyles J); *Sordini v Wilcox* (1982) 42 ALR 245 (Northrop J). See, also, *McCord v Benefits Review Board, US Department of Labor*, 514 F 2d 198 at 200 (1975), where the court held that body being reviewed should appear to defend if there would be no other party to ensure ‘the proper adversarial clash requisite to a case or controversy’.

²¹ *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [17] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

Merits review tribunals and multi-level review

Does *Hardiman* apply to decision-makers appearing before merits review tribunals, such as the Administrative Appeals Tribunal (AAT)?

In *Re New Broadcasting Ltd and Australian Broadcasting Tribunal* (1987) 12 ALD 1, Davies J (then President of the AAT) was critical of the limited assistance provided by counsel for the ABT in the proceedings before it. He said that the ‘normal and desirable course’ in the AAT was for the decision-maker to play an active role in examining and cross-examining witnesses and putting substantive arguments. *Hardiman* was considered but said not to apply because the AAT ‘seldom’ referred a matter back to the primary decision-maker for reconsideration. In the ‘overwhelming proportion of cases’ the AAT considers for itself what the correct or preferable decision should be. It was also desirable, in his view, to have the primary decision-maker’s ‘specialised knowledge’ on hand. Further, non-participation by the decision-maker might force the AAT to take an active role in questioning witnesses and adducing evidence, a role which did not sit well with its function of providing an impartial hearing.²²

However, in *Geographical Indications Committee v O’Connor* (2000) 64 ALD 325, a contrary view was taken. The Committee had been directed by the AAT to take a limited role given there were other parties present who could defend its decision. In proceedings seeking to overturn that direction, the Committee argued that the applicant and joined parties would be motivated by commercial self-interest, and that it, as ‘guardian of public interest and policy issues’, was required to take an active role to ensure its enabling statute was ‘interpreted in a principled manner ... and to assist the [AAT] to come to the best decision’.²³ The Full Court of the Federal Court disagreed, holding that *Hardiman* did apply to the proceedings, at least:

... where there were other parties before the [AAT] who it could be expected would adopt the role of contradictor, and who could be expected to add whatever evidence was necessary to the ‘T documents’ to fully inform the [AAT] on relevant matters.²⁴

Unlike Davies J, the Full Court considered *Hardiman* applicable because remittal to the original decision-maker was ‘more than a theoretical possibility’.²⁵

The most recent decision on this issue is *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45. In that case the Victorian Court of Appeal referred to the regulator’s decision to take no part in review proceedings before the Victorian Civil and Administrative Tribunal (VCAT) as ‘a misapprehension of its role as the

²² *Re New Broadcasting Ltd and ABT* (1987) 12 ALD 1 at 11-12.

²³ *Geographical Indications Committee v O’Connor* (2000) 64 ALD 325 at [14] (von Doussa, O’Loughlin and Mansfield JJ).

²⁴ *Geographical Indications Committee v O’Connor* (2000) 64 ALD 325 at [35].

²⁵ *Geographical Indications Committee v O’Connor* (2000) 64 ALD 325 at [45].

primary decision-maker'.²⁶ According to the Court of Appeal, the presence of other contradictors 'is no guarantee that all relevant matters will be canvassed' and therefore does diminish the appropriateness of the decision-maker taking an active role. Nor did the Court think the impartiality of the primary decision-maker would be jeopardised by active participation, so long as it did not 'engage in curial tactics'.²⁷ Further, the power to remit the matter to the primary decision-maker is 'rarely exercised' and so the decision-maker 'is seldom called upon to carry out the decision-making process afresh'.²⁸ Importantly, the Court recognised that:

Part of the rationale for such participation is that the decision-maker has a unique contribution to make to the review. The decision-maker is the repository of the powers and responsibilities conferred on it by the legislative scheme under which it made the relevant decision. As administrator of that scheme, the decision-maker has experience, knowledge, and expertise possessed neither by the [VCAT] nor by any adversary party appearing in the review proceeding. The decision-maker is the only party to the review proceeding whose participation is governed – exclusively – by the aims and objectives of the statutory scheme.²⁹

So there is now conflicting intermediate court authority on whether *Hardiman* applies in proceedings before merit review tribunals. The AAT, however, as a federal body, would have to follow the ruling of the Full Court of the Federal Court.³⁰

In fact the issue gets more complicated. *Capricornia Credit Union Ltd v Australian Securities and Investments Commission (No 2)* [2007] FCAFC 112 involved an appeal on a question of law from the AAT, which had upheld a decision made by ASIC. The Full Court noted that, had the appeal been successful, there would be the possibility of the matter being referred back to the AAT. Further, they noted, pursuant to s 43(1) of the *Administrative Appeals Tribunal Act 1975*:

... it was at least theoretically possible that the [AAT] would remit this matter to [ASIC] for further consideration. ... We consider that the view of the High Court as expressed in *Hardiman* should have informed [ASIC] in deciding upon the role which it would play in these proceedings, **both in the [AAT] and on appeal to this Court.**³¹

²⁶ *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45 at [27] (Warren CJ, Maxwell P and Osbourne AJA).

²⁷ *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45 at [32] and [33], citing *Transport Accident Commission v Bausch* [1998] 4 VR 249 at 259-260 (Tadgell JA, with whom Batt and Buchanan JJA agreed).

²⁸ *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45 at [37].

²⁹ *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45 at [29]-[31].

³⁰ In 2005, however, a new s 33(1AA) was inserted into the *Administrative Appeals Tribunal Act 1975*. It reads: 'In a proceeding before the [AAT] for a review of a decision, the person who made the decision must use his or her best endeavours to assist the [AAT] to make its decision in relation to the proceeding.' It is not yet clear, however, whether this amendment is sufficient to overturn *Geographical Indications*.

³¹ *Capricornia Credit Union Ltd v ASIC (No 2)* [2007] FCAFC 112 at [13] (Dowsett, Edmonds and Besanko JJ) (emphasis added).

So it appears that *Hardiman* should apply to a primary decision-maker both in proceedings in the AAT and in subsequent judicial review proceedings against the AAT's decision.

Other curial proceedings

Yet there have been hints that *Hardiman* may stand for an even broader proposition about the conduct of regulators in court proceedings, whether or not they may in fact be called upon to remake a decision.

Recently, Telstra mounted a challenge in the High Court to the 'access' provisions in Part XIC of the *Trade Practices Act 1974*, alleging they effected an acquisition of property other than on just terms.³² The case proceeded by way of questions reserved for the High Court about the validity of Part XIC. No particular decision was being challenged and there was no prospect of the matter being referred back to the ACCC.

Both the Commonwealth and the ACCC prepared submissions defending the validity of Part XIC. At the start of the hearing Gummow J asked:

GUMMOW J: Why is the [ACCC] to be heard at all on these sort of questions? ... Remember the Australian Broadcasting Tribunal got into trouble once?³³

The next day the following exchange took place:

KIRBY J: I am just curious why a body which takes on under its statute a semi-neutral and regulatory responsibility has ... an interest in the matter.

MR YOUNG: This case, your Honour, goes to the legal operation of Part XIC. ... We are the specialist body charged with the administration and enforcement of Part XIC ... This case is not directed towards any particular decision or conduct of the ACCC, it is a case about the legal operation of the provisions of Part XIC ... which, relevantly, my client is charged with the administration of. ... We ... have a direct interest in putting legal submissions as to the meaning and operation of the relevant legislation.

HAYNE J: That is to advocate a particular construction of the Act? What role is it of the regulator to advocate a particular construction, rather than simply to administer the law as ultimately determined?³⁴

These comments, and the context in which they were made, suggest that the *Hardiman* principle may be simply one aspect of a broader rule about the conduct of regulators in court proceedings, at least where the dispute concerns the interpretation of legislation it has responsibility for. On the other hand the Court's comments may merely reflect the view that it is the proper role of the Attorney-General to defend the validity of Commonwealth legislation.

³² *Telstra Corporation Ltd v Commonwealth* [2008] HCA 7; 82 ALJR 521.

³³ *Telstra Corporation Ltd v Commonwealth* [2007] HCATrans 661.

³⁴ *Telstra Corporation Ltd v Commonwealth* [2007] HCATrans 663.

4. CONSEQUENCE OF BREACH

Where a tribunal, acting in accordance with the *Hardiman* principle, submits to the jurisdiction of a court, and the applicant succeeds in having its decision overturned, the general rule is that the tribunal will not have to pay the applicant's costs. As Wilcox J explained in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 77 ALR 609:

It seems to me somewhat hard for the courts at the one time to tell the tribunal that it should not actively intervene to defend its decision and, at the same time, to order the tribunal to pay costs if, without it having had an opportunity of defending its decision, the decision is held to be bad in law.³⁵

English authorities suggest that this general rule may extend to circumstances where the tribunal appears 'in order to assist the court neutrally on questions of jurisdiction, procedure [and] specialist case law'. So long as it stayed a 'neutral party' courts 'would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application'.³⁶ An exception to this is where tribunal not only made a mistake of law, but acted 'improperly, perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it is a flagrant instance'.³⁷ But the English and Australian costs rules diverge after that. In England:

... the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event ...³⁸

But in Australia, where a tribunal acts inconsistently with the *Hardiman* principle by acting as a protagonist in proceedings challenging its decisions, and the tribunal **wins**, it will generally be penalised by the rejection of its application for an order of costs against the unsuccessful applicant³⁹ – unless, perhaps, no objection is taken to the active role by the other parties at the outset.⁴⁰

I should stress that this penalty only applies if the tribunal does not act within the confines of *Hardiman*.

³⁵ *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 77 ALR 609 at 612.

³⁶ *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; 1 WLR 2739 at [47] (Brooke LJ, Longmore LJ and Sir Martin Nourse agreeing); *Re Michael*; *Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231(S) at [18] (Parker J, with whom Malcolm CJ and Anderson J agreed).

³⁷ *R v Liverpool Justices*; *Ex parte Roberts* [1960] 1 WLR 587 (Lord Parker CJ).

³⁸ *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2739 at [47]; *Llanidloes Licensing Justices*; *ex parte Davies* [1957] 1 WLR 809 at 808-809 (Lord Goddard CJ).

³⁹ *Community Television Sydney Ltd v ABA* (2004) 136 FCR 316 at [88], and (2004) 136 FCR 338 at [16]-[18]. See E Campbell, 'Award of costs on applications for judicial review' (1983) 10 *Sydney Law Review* 20 at 24, citing an earlier English authority: *R v Marlow (Bucks) JJ*; *Ex parte Schiller* [1957] 2 All ER 783 at 785.

⁴⁰ *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 at [36], [43] and [111].

In *Bankstown City Radio Co-operative Ltd v Australian Communications and Media Authority* [2007] FCA 2053, the applicant sought judicial review of the Australian Communications and Media Authority's (ACMA's) refusal to renew its radio broadcasting licence. Given the nature of the decision there was no other natural contradictor, but ACMA was clearly concerned about overstepping its role and so the judgment records that ACMA approached the court seeking guidance as to whether the Attorney-General should be notified of the matter in order to allow him to consider whether he should intervene.

The court did in fact make orders providing for the parties to notify the Attorney-General, but he declined to participate. Sackville J said:

In these circumstances, I think that it was not inappropriate for ACMA to assist the Court by explaining the bases for its decision not to renew [the applicant's] licence and by briefly addressing the arguments advanced by [the applicant]. To the extent that this involved ACMA acting as a contradictor by opposing the relief sought by [the applicant], I think the course was justified by the unusual circumstances. I appreciate that if [the applicant's] arguments were to succeed, its application for renewal of the community broadcasting licence would probably be remitted to ACMA for further consideration... Nonetheless, I think it was consistent with the *Hardiman* principle for ACMA to take the measured approach it adopted in the proceedings.⁴¹

Despite these comments his Honour gave the parties an opportunity to make further submissions as to costs. Ultimately his Honour agreed with ACMA that, in light of the fact that its submissions were calculated to assist the Court and went no further than necessary in opposing the applicant's case, ACMA should be treated as an ordinary litigant and should be awarded its costs.⁴²

Apart from the cost implications, the only other real risk a decision-maker runs by overstepping the mark is judicial criticism.⁴³ It is unlikely that a court could preclude a party from filing evidence or making submissions in a judicial review proceeding, especially where there is no other natural contradictor.⁴⁴ However a court may order that a remitted matter be heard by a differently-constituted tribunal.⁴⁵

5. CONCLUDING REMARKS

Should decision-makers be allowed to take a more active role?

Ultimately, the role a tribunal should take in judicial review proceedings will depend on the nature of its statutory functions. A regulator may have a **special national**

⁴¹ *Bankstown City Radio Co-operative Ltd v ACMA* [2007] FCA 2053 at [5]-[6].

⁴² *Bankstown City Radio Co-operative Ltd v ACMA (No 2)* [2008] FCA 89.

⁴³ See, e.g., *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [112]; and [2007] FCA 603 at [9]-[14] (Rares J).

⁴⁴ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [56]-[71].

⁴⁵ *Commonwealth v HREOC* (1998) 76 FCR 513 at 526-527 (Burchett J), 531 (Drummond J), 539 (Mansfield J).

role in ensuring a court is presented with submissions covering all the relevant jurisdictional issues.⁴⁶ And in claims against the **public purse** it may be appropriate that the body representing the purse be an active opponent against the claim.⁴⁷ But a mere statutory **right to appear** and be heard in proceedings generally will not necessarily displace the effect of *Hardiman*.⁴⁸

But there are cogent reasons for giving decision-makers a greater role in defending their decisions in judicial review proceedings. Decision-makers are often best placed to make submissions on their jurisdiction and procedure.⁴⁹ Even where there is a contradictor prepared to oppose the claim for relief a tribunal may have different views on how the relevant legislation operates, and may therefore wish to raise different issues. Decision-makers will also generally be concerned with the precedent value of the outcome. For the other parties:

... victory in the instant case will often be the only objective. Unless [they have] a definitive interest in the enunciation by the reviewing court of guidelines for the future, because of an expectation that [they] will be dealing with the respondent agency in the future, [they] will not have much incentive to assist the reviewing court in reaching a reasoned conclusion which is fully informed about the broader, public interest considerations upon which the respondent might wish to rely if afforded customary adversarial rights.⁵⁰

Attorney-General / Commonwealth intervention

That is why, in cases where the private parties will not adequately 'expose all aspects of the case' it is said to be desirable for the Attorney-General or the Commonwealth to intervene as an adversary.⁵¹ However there are some difficulties with this approach.

⁴⁶ See, e.g., *BTR Plc v Westinghouse Brake and Signal Co (Aust) Ltd* (1992) 34 FCR 246 at 265, where Lockhart and Hill JJ held that ASIC had properly made submissions on its jurisdiction and the interpretation of the corporations law given it had a special national role in enforcing that law. Even then ASIC was cautioned against making submissions on issues which other parties could properly address. However, the Federal Court has not been entirely consistent in its approach to other regulators seeking to press interpretations of statutes they administer: see, e.g., *Commonwealth v HREOC* (1995) 41 ALD 27. Nor was this case referred to by the Full Court in *Capricornia Credit Union Ltd v ASIC (No 2)* [2007] FCAFC 112, referred to above.

⁴⁷ *Fagan v Crimes Compensation Tribunal* (1982) 150 CLR 666 at 682 (Brennan J).

⁴⁸ *Cairns Port Authority v Albietz, Information Commissioner (Qld)* [1995] 2 Qd R 470 (Thomas J); *Commonwealth v HREOC* (1998) 76 FCR 513 at 526-527 (Burchett J), 531 (Drummond J), 539 (Mansfield J).

⁴⁹ DJ Mullan, 'Recent Developments in Nova Scotian Administrative Law' (1977) 4 *Dalhousie Law Journal* 467 at 494.

⁵⁰ E Campbell, 'Appearances of courts and tribunals as respondents to applications for judicial review' (1982) 56 *Australian Law Journal* 293 at 298.

⁵¹ *Re City of Dartmouth* (1976) 17 NSR (2d) 425,440 (MacKeigan CJ).

It is clear that the Commonwealth or the Attorney-General can take the role of substantial contradictor to ensure compliance with the *Hardiman* principle.⁵² But the applicant cannot oblige them to accept that role simply by naming them as respondents.⁵³ The approach the Commonwealth or Attorney-General takes is therefore more a matter of policy than law.⁵⁴

But it is unreasonable, in my view, to require a court and parties to consider, each time an administrative decision is challenged and there is no other contradictor, whether the Attorney-General should be notified. It is true that s 18 of the ADJR Act gives the Attorney-General a right to intervene but it is rarely exercised.⁵⁵ In any event the substitution of the Attorney-General as a contradictor may produce a symbolic rather than substantive difference to the conduct of the proceedings, especially if the Attorney-General's instructions come from the primary decision-maker.⁵⁶

Maintaining impartiality

The link between the *Hardiman* principle and the rule against bias also has not been fully explored:

Attention needs to be given to the conclusions reached by the High Court in *Laws v Australian Broadcasting Tribunal* [(1990) 170 CLR 70] that corporate action by a tribunal in conducting litigation need not give rise to an appearance of bias on the part of the individual tribunal members, that a tribunal may undertake to be differently constituted in the event that it re-hears a matter, and that the doctrine of necessity may require that the tribunal not be disabled by the common law bias rule from performing its statutory functions.⁵⁷

It is not clear why issues of bias cannot be determined after the matter has been remitted back to the tribunal. Parties can, after all, waive their right to allege bias, and, in any event, alleging bias, even apprehended bias, is a serious act.

In any event, there is nothing inconsistent, in my view, with an administrative decision-maker maintaining its impartiality while playing an active role in

⁵² See, for example, *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 81 ALR 166.

⁵³ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [50] (Ashley J).

⁵⁴ Although they may be criticised for not assisting: *Peacock v HREOC* [2005] FCAFC 45 at [32]: 'Regrettably, and for reasons that we cannot fathom, the Commonwealth declined to assist.' (Weinberg, Jacobson and Lander JJ); compare *Ugur v HREOC* [2007] FCA 2066 at [2] and [6] (Gyles J).

⁵⁵ See, e.g., *Dunstan v von Doussa* [2008] FCA 97 at [14] (Flick J).

⁵⁶ *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 at [79] (Ashley J).

⁵⁷ M Allars, 'Reputation, power and fairness: a review of the impact of judicial review upon investigative tribunals' (1996) 24 *Federal Law Review* 235 at 245.

proceedings challenging its decision so long as it does not 'engage in curial tactics'.⁵⁸

In *Chevron US Inc v Natural Resources Defense Council Inc*, 467 US 873 (1984), the United States Supreme Court posited a rule of deference to a government agency's interpretation of the legislation it has responsibility for. The theory is that if Congress did not directly speak to a precise question:

... the court does not simply impose its own construction on the statute ... 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.⁵⁹

Australian courts have not adopted *Chevron*. Nonetheless its existence in the US demonstrates that it is possible to have, in a country subject to a strict separation of powers doctrine, an administrative law system where agencies may advocate particular constructions of their powers without risking the appearance of bias.⁶⁰

Despite this I think there is some merit in the rationale for *Hardiman* so long as it only applies to tribunals exercising adjudicatory functions between parties. There will almost always be another contradictor in those cases. Applying *Hardiman* more broadly, however, fails to differentiate between court-like tribunals, which must maintain an impartial and dignified stance, and administrative decision-makers 'charged with the development and implementation of policies under a very broad statutory framework'.⁶¹

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⁵⁸ *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45 at [33]. Government bodies are bound to act as model litigants in all circumstances: *Scott v Handley* [1999] FCA 404 at [43]-[46] (Spender, Finn and Weinberg JJ).

⁵⁹ *Chevron US Inc v Natural Resources Defense Council Inc*, 467 US 873 at 842-843 (1984) (citations omitted).

⁶⁰ See R Sackville, 'The limits of judicial review of executive action – some comparisons between Australia and the United States' (2000) 28 *Federal Law Review* 315.

⁶¹ DJ Mullan, 'Recent Developments in Nova Scotian Administrative Law' (1977) 4 *Dalhousie Law Journal* 467 at 495-496; compare *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [12] (Gaudron and Gummow JJ).