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THE HARDIMAN PRINCIPLE:
The role of decision maker as contradictor in judicial review

Michael Rennie
6 St James Hall Chambers

INTRODUCTION

1. Together with the Model Litigant Obligation, the *Hardiman* Principle defines the parameters within which decision makers must conduct themselves in judicial review proceedings. Although it is a principle of the conduct of proceedings rather than the substantive administrative law, it is a vital component of understanding the battleground of administrative law litigation.

2. Briefly stated the principle holds that tribunals and decision makers may be restricted from acting as a full contradictor in review proceedings before a Court, in case such a role could damage their impartiality in subsequent proceedings or dealings with the applicant. Any submissions by such an agency may be limited to the relevant powers and procedures for the decision under review. Like any good legal principle there are limits and exceptions to its application.

3. Clearly decision makers and tribunals need to be aware of these limits and exceptions due to the adverse consequences that can arise from being found to have breached the principle. As suggested above, there is a close relationship to the Model Litigant Obligation, a "*Hardiman*" breach is often coupled with a complaint that the government agency has acted contrary to that obligation. Such criticism is often unpalatable for a government agency, even on the basis of the internal reporting obligations alone.

4. Further, a finding that the *Hardiman* Principle has been breached is also tantamount to a finding that the government contradictor made submissions that should not have been made, thereby lengthening the proceedings needlessly and exposing all parties to excessive costs even if the decision under review was upheld. The successful government agency that has had its decision affirmed may be required to pay the costs of the appellant on the basis that its submissions went 'too far'. Government rates do not apply when a respondent agency is ordered to pay the applicant's costs.

5. It is also useful for experienced applicant representatives to understand the obligation in detail, primarily to know when to raise the issue and when to stay silent. As suggested above, properly deployed a successful submission that the government has breached the *Hardiman* Principle can limit the extent to which the Court will have regard to large swathes of the decision maker's case, and make substantial progress in an argument for costs.

6. However, a misplaced allegation of a *Hardiman* breach can have the same damaging forensic effect as any other misplaced allegation of misconduct in litigation. An allegation improperly made risks the alleging party looking like a whinger with a lack of judgment. Under such circumstances an advocate's ability to persuade the Court as to the strengths of your substantive case may suffer.

7. It is also possible that we are seeing a slight shift in the way in which Courts are applying the *Hardiman* principle. As we shall see, recent considerations of the principle appear to be withdrawing somewhat from a blanket suggestion that tribunals and decision makers should sit out any merit or judicial review proceedings.

8. This paper attempts to briefly examine:

   a. the origins of the principle from the decision *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 (***Hardiman***);

   b. the current boundaries, exceptions and limits to the principle;

   c. some of the criticisms of the principle that have arisen as well as some discussions as to how it might evolve in the future; and

   d. recent detailed considerations of the principle in:

      i. discussions in the Court of Appeal and High Court in the proceedings between Margaret Cunneen SC and ICAC; and

      ii. the Federal Court's response to a *Hardiman* complaint in *Apple Inc v Registrar of Trade Marks* [2014] FCA 1304.

THE ORIGINS OF THE PRINCIPLE

Background to the dispute in *Hardiman*

9. *Hardiman* concerned an application to the Australian Broadcasting Tribunal (**the Tribunal**) for approval of an acquisition of half of the share capital of a company that held a commercial television licence.

10. At the time, a person contravened s.92 of the *Broadcasting and Television Act 1942 (Cth)* if that person had a prescribed interest (more than 5% of the shares in a licensee) in 3 or more commercial television licences. The prohibition extended to holdings held through a number of different companies. This made it possible for certain acquisitions that appeared unrelated to cause a shareholder to, whether deliberately or otherwise, contravene s.92. The Act permitted a person to apply to the Tribunal for approval of the transaction where such an acquisition procured a contravention of s.92.

11. In this case Control Investments Pty Ltd (**Control**), a subsidiary of News Corporation Ltd (**NewsCorp**), purchased half of Ansett Transport Industries Ltd (**ATI**). A subsidiary of ATI held a commercial television licence, Channel 10 Melbourne. NewsCorp also held interests in other commercial television licences. The Tribunal was convened to enquire:

a. Whether the acquisition would result in any person holding a prescribed interest under s.92; and

b. Whether the change of ownership and control of the licensee was in the public interest.

12. The Australian Labor Party (the **ALP**) appeared at the hearing before the Tribunal. The ALP argued that before making the transaction Control / NewsCorp had acquired a prescribed interest and contravened s.92, and that breaches of the criminal law had occurred as a result of the transaction. The ALP was not in a position to lead evidence to prove that case of criminal conduct, but stated that the evidence before the Tribunal was sufficient to raise the question, and that therefore the Tribunal was obliged to investigate further. For the purposes of the hearing, the ALP considered that it was entitled to cross-examine witnesses on the basis of the concerns that it argued arose from the material available.

13. Disputes arose during the conduct of the hearing between Counsel for the ALP and the Tribunal about these issues and primarily:

a. the extent to which the ALP was entitled to make a case of criminal conduct within the context of the hearing or whether the Tribunal was obliged to conduct such an inquiry itself; and

b. whether the Tribunal was able to limit the ALP's cross-examination of witnesses to 30 minutes or less.

14. Nicholson QC's cross-examination of Mr Murdoch brought the matter to a head. The Tribunal applied the 30 minute limit, but invited counsel to apply for an extension. Nicholson QC, for the ALP, insisted that he had a right to continue to cross-examine without applying for an extension and indicted that he expected to go quite some time. The Chair of the Tribunal, Bruce Gyngell, reiterated that the Tribunal was entitled to set such limits as it wished on cross-examination. Nicholson QC stated that in the circumstances there was little purpose in his client continuing to be represented before the Tribunal.

15. The ALP withdrew from the hearing and sought an order *nisi* for mandamus and prohibition against the Tribunal and Control in the High Court.

16. From a vantage point some 35 years later, it appears that the subtext behind all of the action was tantamount to an allegation by the ALP that the Tribunal was abdicating its obligation to regulate media concentration laws. Presumably it did not help that the Chair at of the Tribunal and the key decision maker at the hearing, Bruce Gyngell, had been a busy and successful television executive prior to taking up his position as Chair.[1] The ALP did not make any submissions or allegations of an apprehension of bias or make allegations of any form of corruption, nor is any made here. The ALP's submissions merely focussed on whether the Tribunal had adequately fulfilled its statutory functions, but the stakes were comparatively high.

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[1] http://en.wikipedia.org/wiki/Bruce_Gyngell – "*During the 1970s Gyngell was the head of many television networks in Australia, including the Nine Network, the Seven Network and also as deputy chairman of ATV in the United Kingdom. He was also the first chief executive of the Special Broadcasting Service (SBS) in Australia during the 1980s. Gyngell also created the Australian Broadcasting Tribunal, the forerunner of the Australian Broadcasting Authority, and was its first chairman in 1977.*" After his time at the Tribunal, Mr Gyngell continued his television career in the UK.

The case before the High Court

17. The ALP, the Tribunal and Control / NewsCorp were all represented in the High Court. The head note to the case records both the key submissions made on behalf of the Tribunal, and the cautions given to the Tribunal by Mason & Gibbs JJ as follows:

> *[Mason J. It is unusual for the Tribunal in proceedings of this kind to present a substantive argument.]*
>
> *[Gibbs J. The Tribunal is assuming the role of an active party.]*
>
> *The application raises important questions about the procedures the Tribunal should follow.*
>
> *[Gibbs J. The Court considers that the most convenient course will be for you to state your submissions in a summary form without elaboration.]*
>
> *The Tribunal was entitled to set a time limit on cross-examination subject to an overriding discretion to extend it in appropriate circumstances. Counsel's refusal to apply for an extension and his withdrawal from the hearing disentitles the prosecutors to relief. ... The time limitation did not infringe the rules of natural justice. The Tribunal could impose it under Div. 3 of Pt II. The Tribunal did not insist upon the panel system of cross-examination. The inquiry was only concerned with whether the applicant would be in breach of s. 92 as a result of approval of the transaction. Questions of breaches by other persons were irrelevant. The Tribunal was entitled to insist on legally admissible evidence in appropriate cases, and to stop counsel from seeking to establish by cross-examination breaches of the Act and the criminal law, particularly when the alleged offences were not specified. ...* (Case references omitted).

18. The *ratio decidendi* of the decision concerned the operation of s.92 and whether the Tribunal had properly discharged its functions in the conduct of the hearing. Briefly the conclusion was that there was a potential breach of s.92 on the facts, and the Tribunal had not properly discharged its functions. Despite calling the inquiry correctly on appropriate terms of reference, at hearing the Tribunal had attempted to narrow its inquiry to less than its statutory obligation and place an onus on parties before it, such as the ALP, to prove wrongdoing rather than investigate issues for itself. The order *nisi* for mandamus was granted.

19. The statement that has come to be referred to as the *Hardiman* principle was technically *obiter* and not central to the order that was made. Nevertheless it was *per curiam*, in that it was made unanimously by the Court and has thus been considered binding authority. The Court comprised Gibbs, Stephen, Mason, Aickin and Wilson JJ and they stated at pp 35 to 36 of the decision:

> *There is one final matter.* [Counsel for the Tribunal] *was instructed by the Tribunal to take the unusual course of contesting the prosecutors'* [the ALP's] *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 would 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.

20. If we accept that the subtext to the original complaint and the conduct of the hearing was a concern that the Tribunal had participated in a white wash in relation to serious breaches of media concentration rules, it would seem that the High Court unanimously shared that concern. As stated above, the High Court concluded that there was a serious risk that s.92 had been contravened and that the Tribunal had improperly tried to narrow its inquiry so that it did not have to grapple with that issue. The fact that the Tribunal had appeared to defend itself, rather than let its actions speak for itself perhaps deepened that concern. NewsCorp was present as a contradictor, and appeared more than capable of defending its interests.

21. For my part, this context helps explain how the statement we now refer to as the *Hardiman* principle came to be made. In that sense it was a special criticism levied against a government agency that had failed the "optics" test. The Tribunal was wrong at law, and it was wrong in such a way that could be expected to damage the public's confidence in such institutions. In my opinion the High Court held concerns about the Tribunal's judgment and did not hold back from saying so.

THE CURRENT BOUNDARIES OF THE PRINCIPLE

Impartial submissions about powers are OK

22. The statement in *Hardiman* itself provides two key limits on the principle:

    a. The principle is concerned to prevent damage to the impartiality of a Tribunal or decision maker in subsequent proceedings between it and the applicant. The risk arises because a typical grant of relief in administrative law may well be remittance to the original decision maker or tribunal to make or re-make a decision according to law. Impartial roles in courts of review may remain available.

    b. In exceptional cases submissions about the powers and procedures of the decision make may be appropriate. An example of such exceptional circumstances might be where it was appropriate for the Tribunal to adopt a role as *amicus curiae* to assist the Court. "Exceptional circumstances" could therefore have a meaning along the lines of "when it is useful to the Court and not otherwise".

23. Therefore impartial submissions that an agency had jurisdiction and authority to exercise statutory powers as a matter of construction may be an exception to the principle. The key restriction is against the agency becoming partisan, or a protagonist interested in the outcome rather than the means to reach it.

24. This is perhaps the most important message for government agencies. It also resonates with the application of the model litigant principle: government agencies should be interested in preserving the effectiveness of government functions rather that contesting specific results. They should be happy to win on a question of principle but lose on the particular facts. As a model litigant, a government agency is the best and fairest player, professionally disinterested in the result of the decision, but concerned to make sure that the decision was made in the best manner available and above all, according to law.

Extending the principle from Tribunals to decision makers generally and merits review

Applying the rationale to expand the application of the principle

25. For many years it appeared relatively settled that the principle only applied to adjudicatory tribunals that would make a decision on the basis of adversarial processes before it. The rationale held that a tribunal that replicates the function of a Court in certain circumstances should be held to behave in a manner similar to a Court when its decision is under appeal. The adversarial parties before the adjudicating tribunal were equipped to provide the court of review with an appellant and a contradictor to defend the decision under review.

26. However, in 1996 Margaret Allars suggested that the rationale of the principle, to avoid an appearance of bias in the event of a re-hearing, also applied to decision makers to whom a decision could be remitted after judicial review.[2]

27. In 2001, in *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93 (***TXU***) at [42] and [43], Ashley J held the following two factors illustrated the modern application of *Hardiman*:

    a. the availability of a natural contradictor to assist the Court was important, but not necessarily determinative;

    b. there was a need for a decision maker, even in the absence of another natural contradictor, to ensure that it acted as impartially as possible so as not to suggest that he or she was disposed for or against the applicant for review.

28. On that basis, the *Hardiman* principle applied to the Office of the Regulator-General (**ORG**), even though the ORG was a decision maker rather than a tribunal and there was no other obvious contradictor before the Court. The ORG was obliged to afford TXU procedural fairness and there was a reasonable prospect that the ORG would be called upon to make decisions that would affect TXU again in the future. In light of the stage of the proceedings in which this decision was made,[3] Ashley J had prescribed an impartial role for the ORG for the remainder of the case and cautioned the ORG not to depart from it.

29. This represented a substantial expansion of the principle. Every administrative decision maker is obliged to provide procedural fairness. Any application for merit or judicial review could result in remittance of the decision to be made again.

Recognition of the expanded application in the Federal Court

30. In *Geographical Indications Committee v O'Connor* (2000) 32 AAR 169; [2000] FCA 1877 (***Geographical***), the Full Federal Court upheld directions from the Administrative Appeals Tribunal (**the AAT**) that limited the GIC to something akin to a *Hardiman* role in merit review proceedings before it. In that case another contradictor was present and the President of the AAT made directions confining the GIC to submissions as to the public interest and to provide to the Tribunal any further material at its disposal which may be necessary for the AAT to reach the correct or preferable decision. The Full Federal Court noted *Hardiman*,

[2] Allars M, "Reputation, power and fairness: a review of the impact of judicial review upon investigative tribunals" (1996) 24 Fed L Rev 235 at 245,

[3] *TXU* was an interlocutory hearing specifically brought to determine the extent to which the ORG was the proper contradictor and able to participate fully in the proceedings.

noted that the directions under appeal envisaged a role potentially much broader than that prescribed by *Hardiman* and held that there was no error of law apparent in those directions in the circumstances.

31. Sackville J (as his Honour then was) endorsed the Victoria decision of *TXU* as being correct in *Community Television Sydney Ltd v Australian Broadcasting Authority (No. 2)* (2004) 136 FCR 338. In that decision Sackville J expressly rejected the argument that *Hardiman* was confined to quasi-judicial proceedings.[4]

32. In *Capricornia Credit Union Ltd v ASIC* [2007] FCAFC 112 (***Capricornia***), the Full Federal Court took the issue considerably further. The matter concerned a costs application in relation to an appeal from a decision of the AAT on merits review of a decision made by ASIC. The traditional role for decision makers before the AAT is to defend the merits of the decision under review as a full participant, ASIC had adopted that role. Dowsett, Edmonds and Besanko JJ unanimously held that:

    a. There was a theoretical possibility under s.43 of the *Administrative Appeals Tribunal Act 1975 (Cth)* (**the AAT Act**) that the AAT could remit the decision back to ASIC;

    b. The Full Federal Court could also remit the decision back to the AAT, who could also further refer it back to ASIC;

    c. On that basis *Hardiman* applied to ASIC's conduct of the appeal in the Full Federal Court;

    d. Even though the appellant hadn't raised an objection to ASIC's role, ASIC's participation in the proceedings was inappropriate;

    e. Though successful, ASIC was only entitled to costs which it would have incurred if it had made a submitting appearance.

33. It is relevant to note that in this case there was a contradictor present in the Full Federal Court other than ASIC, a competitor of Capricornia's. The Full Court found that this contradictor was able to fully elucidate all of the issues in the appeal.

34. Nick Gouliaditis has suggested that amendments to the AAT Act in 2005 may have overtaken *Geographical* and were possibly overlooked in *Capricornia*.[5] Section 33(1AA) of the AAT Act now reads:

> ***Decision-maker must assist Tribunal***
>
> *(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.*

35. Further, s.30(1)(b) states that the person who made the decision is to be a party to any proceedings before it, and s.39(1) provides that, subject to certain public interest immunity and national security matters:

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[4] *Community Television Sydney Ltd v Australian Broadcasting Authority (No. 2)* (2004) 136 FCR 338 at [10] to [13].

[5] Gouliaditis N, "The Hardiman principle: Revisited" (2012) 19 AJ Admin L 152, at 158.

"... every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents."

Victoria winds back the scope of the application to merits review

36. In 2008 the Victoria Court of Appeal took what appeared to be the polar opposite approach to that of the Full Federal Court in *Capricornia* the year before.[6] In *Macedon Ranges Shire Council v Romsey Hotel* (2008) 19 VR 422 (***Macedon Ranges***) the Victorian Court of Appeal expressed the desirability of the decision maker continuing to play a role in the proceedings, to assist the court or tribunal of review make the best decision available, despite there being an available contradictor.

37. The decision maker in that instance was a regulating body, the Victorian Commission for Gambling Regulation (**VCGR**). VCGR was charged to investigate and assess applications before it in accordance with the public interest. It had rejected an application by the Romsey Hotel to install a certain number of poker machines. Romsey successfully sought merits review in the Victorian Civil and Administrative Tribunal (**VCAT**). The local council then appealed VCAT's decision to the Victorian Court of Appeal.

38. Under the VCAT Act, the decision maker was a party to the VCAT hearing, and therefore a party to the appeal.[7] VCGR had made a submitting appearance both before VCAT and in the appeal, referring explicitly to *Hardiman* as they did so. The Victorian Court of Appeal held that VCGR had misunderstood what *Hardiman* had required of them in the circumstances.

39. The Court of Appeal noted that decision maker was joined to the proceedings as a consequence of the VCAT Act and acted under an obligation to assist VCAT in the review of the primary decision. It stated that in meeting that obligation, it is entirely proper for the decision maker to actively support the merits of the decision under review.[8] Active participation was important when there was no other contradictor. However, the presence of a contradictor did not preclude the decision maker from playing an active role or "diminish the appropriateness" of playing such a role.[9] A government agency may well put different submissions to the Court from those of private competitors seeking to prevent the other gaining an advantage in the marketplace.

40. VCGR was in a position of special expertise. An unrelated contradictor would not necessarily be equipped to make the specialist submissions that the agency could make in those circumstances.[10] Where it could, the government agency could withdraw or submit to the review, where it had something to add, that role was still useful to the Court.

41. Importantly VCGR did have something to add in this case. It had access to survey data that was relevant to the decision that neither the local council nor the hotel could obtain. VCGR could draw this relevant material to the Court's attention and had the expertise to

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[6] Gouliaditis N, "The Hardiman principle: Revisited" (2012) 19 AJ Admin L 152, at 158 suggested the Full Federal Court and the Victorian Court of Appeal were in conflict on the issue.
[7] The position is similar in the AAT as noted above.
[8] *Macedon Ranges Shire Council v Romsey Hotel* (2008) 19 VR 422 at [29].
[9] *Ibid* at [30].
[10] *Ibid* at [31].

appropriately assist the Court with submissions as to the inferences to be drawn from that evidence, but it had not done so.

42. The Court of Appeal distinguished *Hardiman*, or at least limited its breadth, on the basis that *Hardiman* concerned judicial review proceedings where *Macedon Ranges* involved merits review. In merits review the primary decision maker is in a unique position to assist the Tribunal make the best decision in the circumstances, and the decision maker is rarely called on to carry out the decision making process afresh.[11]

43. VCGR should have played an active role but had got it wrong by staying on the sidelines.

New South Wales attempts to reconcile the authorities

44. The NSW Court of Appeal considered this issue in *Commissioner of Police v Fine* [2014] NSWCA 327 (***Fine***). The Court consisted of Bathurst CJ, Beazley P and Ward JA and considered the apparent disconnect between *Geographical*, *Capricornia* and *Macedon Ranges*.

45. The Commissioner of Police (**the Commissioner**) had applied to the Liquor and Gaming Authority (**the Authority**) for a long term banning order against Mr Fine under s.116AE(3)(a) of the *Liquor Act 2007 (NSW)*. Mr Fine was banned from entering certain high risk venues. Mr Fine sought review in the NSW Civil and Administrative Tribunal (**NCAT**). The Authority entered a submitting appearance. The Commissioner applied to be joined to act as contradictor but was refused at first instance and again at an Appeal Panel of NCAT. The Commissioner appealed to the Court of Appeal.

46. The Commissioner had submitted to the Appeal Panel that *Hardiman* prevented the Authority from acting as contradictor in the proceedings, and in those circumstances it was appropriate that the Commissioner be joined to the proceedings to serve the purpose of the proper contradictor. The Appeal Panel ruled that the Authority was not required to enter a submitting appearance and could act as contradictor and in those circumstances it was not necessary to join the Commissioner.

47. The Court of Appeal considered the body of relevant authority and reconciled the case law as follows:

    a. Having regard to the terms in which the High Court made its observation in *Hardiman*, it may not be appropriate to characterise it as a principle of law;

    b. As a comment on what might be appropriate, the underlying reason was the danger of compromise to the impartiality of an adjudicative body;

    c. It is not unusual and may be desirable for a decision maker to play an active role in merits review before bodies such as the AAT, VCAT and NCAT. Decisions were rarely remitted from these bodies, as they stand in the shoes of the original decision maker, and it was useful to have a contradictor for the purposes of the hearing;

[11] *Ibid* at [37]

d. However *Geographical* made it clear that the presence of the decision maker was not desirable or useful if another contradictor was available who would be expected to fulfil that role adequately;

e. *Macedon Ranges* was not authority for the proposition that the availability of the decision maker had the consequence that other parties should not be joined, nor that the decision maker should always be an active party in merits review. The important point of distinction was that the relevant authority in that case had expertise that the other available contradictor did not, and for that reason it was desirable that VCGR play an active role;

f. In the present case, the Authority did not have capabilities that the Commissioner did not;

g. The Appeal Panel had made an error at law in conflating the statutory test under s.44 of the *Civil and Administrative Tribunal Act 2013 (NSW)* with the principles in *Hardiman* as to restrictions on the role of contradictor. The Commissioner was a proper party that should have been joined under that section whatever role the Authority took in the NCAT hearing, whether it complied with *Hardiman* or not.

48. In essence *Fine* attempts to reconcile the caselaw about whether there is a role for decision makers in merits review on the basis of whether they are capable of adding anything. As a practical matter this capability is assessed in hindsight, after the parties have attempted to make all of the relevant submissions in the matter that can and should be made. If a decision maker chooses to bat on when there is an available contradictor, they should be very concerned to "add value" to the proceedings and to distinguish themselves from the other contradictor. Failure to do so would be a reliable indicator that a *Hardiman* criticism would be made as a precursor to a costs order.

Does *Hardiman* limit avenues of appeal?

49. In *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446, Mr Shaw was successful at first instance, obtaining an injunction against PIC continuing its investigations into Mr Shaw's conduct. PIC and the Commissioner of Police appealed against this injunction successfully in the Court of Appeal, but Basten JA referred to *Hardiman* in his criticism of PIC and the Commissioner adopting an active role in the appeal, at 456 to 457, [40] to [43]. In Basten JA's view the Attorney-General for NSW was the proper contradictor and the proper appellant.

> *40. A question was raised by the respondent (in the course of oral submissions) as to the propriety of the Commissioner being an appellant and thus an active party seeking to assert an expansive view of his powers. ...*
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> *41. On their part, the appellants said the Commissioner should not have been joined as a defendant below. However, for either appellant to play an active role could be seen to be inconsistent with a proper approach of neutrality on the part of a decision-maker and especially one who has continuing functions which might be exercised adversely to the respondent: see R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13. As the Court stated (at 35–36):*

> *"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."*
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> *A similar point was made by Gaudron J and Gummow J in Oshlack v Richmond River Council (1998) 193 CLR 72 at 77[12].*
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> *42. Both the Commission and the Commissioner, being active parties, may be seen to be defending an opinion they have expressed in relation to jurisdiction, pursuant to which they had accepted submissions made by counsel assisting the investigation and had rejected submissions made for the respondent. An active role may be seen to be of particular concern in circumstances where counsel assisting had opened in a manner which the primary judge described as unfortunate, as having a "sensationalist flavour" and as carrying a tone of "jury rhetoric" rather than disinterested inquiry: see Shaw v Police Integrity Commission (2005) 222 ALR 530 at 532[11]155 A Crim R 345 at 348 [11].*
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> *43. It was undoubtedly appropriate that the Commission be joined as a party, as orders were properly sought against it: see SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 79 ALJR 1009215 ALR 162, per McHugh J at 1018 [43]; 173 [43] cf per Gummow J at 1027 [90]-[91]; 185 [90]–[91], per Kirby J at 1037 [153]; 199 [153] and Hayne J at 1041 [180]; 204 [180]. The reasoning of Gummow J turns specifically on the statutory and constitutional context, but the result must obtain generally, absent a special statutory provision to the contrary. As the appellants submitted, it was not necessary nor appropriate to join the Commissioner by name: see Brown v Rezitis (1970) 127 CLR 157 at 169(Barwick CJ) and Kerr v Commissioner of Police and Crown Employees Appeal Board [1977] 2 NSWLR 721 at 724–725 (Moffitt P). The proper active defendant in the proceedings below should have been the Attorney-General for the State of New South Wales. If an appeal had been thought appropriate, the Attorney was the appropriate appellant.*

50. Basten JA was alone on this issue. Giles JA expressly distinguished himself from this criticism of PIC at 456 [36], and Hodgson JA agreed with Giles JA. In his explanation, Giles JA noted that it was Mr Shaw who had joined the Commissioner as a respondent to his application for the initial injunction. Mr Shaw had not protested at that stage that both the Commissioner and PIC were restrained in their ability to respond to his suit. In those circumstances there seemed no reason why PIC and the Commissioner should not obtain their costs in the appeal in the usual way.

51. It was also important to Giles JA that PIC happened to be right and won the appeal. Accordingly it was not necessary to comment on the role that PIC should have played in the conduct of the appeal. To the victor went the spoils, by which I mean costs.

52. I consider this to be a caution by Giles JA against using a *Hardiman* submission in a way that might be perceived as tactical.

53. In light of this decision *Hardiman* does not appear to limit avenues to appeal *per se*. Even in making his criticism of PIC, and effectively in dissent on the *Hardiman* issue, Basten JA did

not say that PIC was prevented from raising the appeal against the injunction. His Honour also agreed that PIC succeeded in the substance of the appeal against that order. The only penalty other than judicial criticism was potentially in relation to costs, that PIC as the successful appellant would not be entitled to the normal amount of costs that would otherwise follow the event.

Other cost consequences of *Hardiman*

54. As has been discussed, the potential consequences for a government agency are judicial criticism, whether the agency does too much, or in the case of *Macedon Ranges* - too little, and an adverse costs order. By adverse costs order I mean more than costs following the event. If the government agency loses, a participating respondent must pay the costs of the applicant in any event. The adverse costs consequences on a *Hardiman* basis are where the decision under review is upheld, but the government agency is ordered to pay the applicant's costs *anyway* on the basis that the government respondent conducted itself inappropriately in the litigation.

55. There is another corollary to the *Hardiman* principle, where a government respondent abides by the limits of *Hardiman* and enters a submitting appearance it would not ordinarily be subject to a costs order against it. Wilcox J noted this effect of *Hardiman* in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No. 3)* (1987) 77 ALR 609 and stated the following at 612:

> *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 decisions and, at the same time, to order the tribunal to pay costs if, without having had an opportunity of defending a decision, the decision is held to be bad in law. I would not wish to prescribe any categorical rule, but I indicate my opinion that only in an unusual case should the court order that the tribunal pay costs, where there are contending applicants for a licence who have been the parties actively debating the matter before the court. I say this, of course, notwithstanding the fact that, in the particular case, the court might hold that the tribunal fell into error and thus, like an inferior court whose decision is reversed on appeal, that it was, in one sense, the cause of the litigation occurring.*

Criticisms and possible further evolution of the principle

The role of the Attorney-General

56. A common point of reference in a number of cases since *Hardiman* is the option of the Attorney-General intervening as if it was on a serious question of law, or taking the place of the decision maker or Tribunal as the proper contradictor. Ashley J,[12] Sackville J[13] and Basten JA[14] have each referred to it, and the Administrative Review Council has suggested codification of the Attorney's role in the area might be appropriate.[15]

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[12] *TXU*.
[13] *Community Television Sydney Ltd v Australian Broadcasting Authority (No. 2)* (2004) 136 FCR 338
[14] *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446
[15] The Administrative Review Council suggested that one option to consider to reform the application of the *Hardiman* principle would be to implement a statutory obligation to notify the Attorney-General of proceedings brought under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* and s.39B of the *Judiciary Act 1903 (Cth)*: Administrative Review Council, *Federal Judicial Review in Australia* (September 2012) p. 194.

57. With great respect, I suggest that such calls for intervention by the Attorney-General display a pre-occupation with the how the executive should respond to legal issues that does not reflect the modern realities of the functions of the Attorney-General.

58. For present purposes let us agree that the Attorney-General's department, at either State or Federal level, would reliably and consistently refrain from politicising a particular issue and would fulfil the role of intervener on the question of law independently, or at least arguably more independently than the government agency whose decision is under review.

59. My point is that the Attorney-General's department is no longer the central repository of legal expertise in modern government. The Attorney-General remains the first law officer of the executive arm of government, but the Attorney-General, or the Solicitor-General, or counsel assisting the Solicitor-General for that matter cannot be everywhere at once or across every obligation, function or power of the executive in a detailed and comprehensive way. The structure of the Administrative Arrangements Orders, ministries, departments and subsidiary agencies depend on a certain level of decentralisation of expertise in relation to the day to day functions of the specific agencies involved.

60. The modern Attorney-General sets standards of conduct in litigation for government agencies and establishes reporting mechanisms for significant matters that have the potential to affect the operation of the whole of government and the greater public interest. These internal mechanisms may sound suspiciously similar to s.78B notices when described in this manner for a very good reason. However the modern Attorney-General is not directly involved, nor do they oversee every challenge of a decision by an executive agency.

61. I suggest that it is unlikely that such a modern Attorney-General, receiving notice of the administrative decisions in the cases listed above would have chosen to intervene in:

    a. A pricing decision by the ORG in *TXU*;

    b. A decision to allocate a broadcasting license in *Community Television Sydney Ltd v Australian Broadcasting Authority (No. 2)* (2004) 136 FCR 338;

    c. An injunction against police investigating allegations of criminal behaviour in *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446.

62. In each case, if asked, my expectation would be that the Attorney-General's department would instruct the relevant agency "You fix it, just don't mess it up."

63. Government agencies should not be punished with costs orders for a decision by the Attorney-General not to intervene. Sackville J recognised this in *Bankstown City Radio C-Operative Ltd v Australian Communications and Media* Authority [2007] FCA 2053 at [5] & [6]:

> *In my absence on leave, ACMA approached Lindgren J shortly prior to the hearing seeking guidance as to whether the Attorney-General of the Commonwealth should be notified of the matter in order to allow him to consider whether he should intervene. ACMA also sought the Court's guidance as to the proper extent of its participation in the proceedings. Lindgren J did not resolve the latter question, but directed ACMA to notify the Attorney-General of the pendency of the proceedings and the nature of the issues that it raised, in order to assist the Attorney-General in determining whether he*

wished to intervene. In the event, the Attorney-General declined the invitation to intervene in the proceedings.

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 BCR's community broadcasting licence and by briefly addressing the arguments advanced by BCR. To the extent that this involved ACMA acting as a contradictor by opposing the relief sought by BCR, I think the course was justified by the unusual circumstances. I appreciate that if BCR's arguments were to succeed, its application for renewal of the community broadcasting licence would probably be remitted to ACMA for further consideration (cf TXU Electricity, at [45]). Nonetheless, I think it was consistent with the Hardiman principle for ACMA to take the measured approach it adopted in the proceedings. I should add that Mr Weaver did not object to ACMA taking the approach it did at the hearing.

64. I would respectfully submit that:

    a. The Attorney-General choosing not to intervene was not an unusual set of circumstances. Of the number of administrative law proceedings involving the Commonwealth government alone, intervention by the Attorney occurs very rarely;

    b. Ideally ACMA should not have had to go through such an exercise to establish to the Court that it could validly participate as a proper contradictor and make submissions in the matter. ACMA was the named respondent. It should not have to seek the indulgence of the court to answer the case that is put against it.[16]

65. The identity of the government respondent should never be the issue in Court. The issue must always be about the submissions that are being made. Absent an impropriety in the submissions that have been put, and provided the proceedings are validly constituted, the Court cannot validly express a preference that a particular submission should have been made by someone else.

66. It is also difficult to see how changing the identity of the contradictor in such a way should have the particular consequence that the costs order would go another way. How can it be that, presuming that all submissions are equal, ASIC's successful defence of its decision would still allow the unsuccessful appellant to claim costs, but the Attorney's successful defence of ASIC's decision would not? I submit that the rationale of impartiality behind *Hardiman* does not justify a costs outcome that hinges on who makes the submission rather than the objective nature of the submission itself.

Is Hardiman too quick to apprehend bias on the part of a decision maker?

67. Inherent to the underlying rationale of *Hardiman* is the concern that a government agency would harden its mind against an appellant were the decision under review remitted back to that agency, or at least appear to do so. Would a fair minded and informed member of the

[16] I note that Sackville J does not necessarily depend on such steps being taken in order to allay any concerns about the role adopted by ACMA. His Honour refers specifically to the nature of ACMA's measured approach, which must include the submissions put, in determining that ACMA had not departed from the *Hardiman* principle.

public form a reasonable apprehension that the decision maker would not bring a fair and impartial mind to the resolution of the dispute in these circumstances?[17]

68. As a starting point, it seems difficult to extrapolate that *only in exceptional circumstances* would neutral submissions about procedures and powers be permitted to avoid an apprehension of bias. It seems that the basic presumption would rather be that a decision maker to whom a decision is remitted would conduct themselves as a model litigant, applying procedural fairness as required by law and presumably recently informed of the correct legal test to be applied in the circumstances as a result of the appeal court's involvement in the matter. On that basis the operation of *Hardiman* could effectively be reversed, only in exceptional circumstances would a valid apprehension of bias arise.

69. As Gouliaditis points out, as at 2011 enquiries made during the course of *XX v Attorney-General (NSW)* [2011] NSWSC 658 at [50] (***XX***) could not identify a single instance where *Hardiman* has been used as a basis for an application of bias on the part of the decision maker.[18]

70. Accordingly there appears to be a realistic possibility that *Hardiman* has operated as a constraint on the role of decision makers in courts of review, and as the basis for applications that costs not follow the event, more than it has operated to prevent any realistic apprehension of bias on the part of decision makers.

71. Despite its rationale, there appears to be a risk that *Hardiman's* use has been to hamper and inconvenience government litigants rather than improve the quality of administrative decision making. A closer scrutiny of the comparative impartiality of the submissions put by the decision maker, rather than a blanket concern derived from the source or identity making those submissions may assist courts apply *Hardiman* in a relevant and effective way.

Recent applications of *Hardiman*

***Apple Inc v Registrar of Trade Marks* [2014] FCA 1304**

72. While this was strictly an intellectual property decision rather than classic administrative law, the case concerned an appeal by Apple against a decision to reject a trade mark made by the Registrar of Trade Marks. The trade mark was sought for the words "App store". During the course of the *de novo* appeal, that is a fresh decision on the merits of the application, Apple made extensive criticisms of the Registrar's role as contradictor in the proceedings. Yates J does not specifically refer to *Hardiman* in relation to that aspect of the case. Accordingly the decision does not appear on any list of decisions that have considered *Hardiman*. However it is clear that the decision presents a useful and recent elucidation of the relevant concepts in the area. The decision was delivered on 3 December 2014.

73. Apple was ultimately unsuccessful in its attempt to claim ownership of that particular part of the English language and has chosen not to appeal. Yates J dealt with Apple's criticisms of the Registrar at the end of the judgement, in the final 3 pages as follows:

[17] *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684 at 693.
[18] Gouliaditis N, "The Hardiman principle: Revisited" (2012) 19 AJ Admin L 152 at 160.

THE ROLE OF THE REGISTRAR

241 Apple criticised the role played by the Registrar in this appeal. It submitted that the Registrar had adopted "an overly active role" in the appeal by obtaining evidence that was not before the delegate. Apple submitted that the Registrar had taken "the remarkable steps of obtaining her own expert evidence and also affidavit evidence from third parties". Of particular concern to Apple in this latter regard is the fact that some of the evidence obtained by the Registrar came from the solicitors acting for Microsoft Corporation in Australia, in circumstances where Microsoft Corporation has opposed Apple's corresponding application for the registration of APP STORE as a trade mark in the United States of America.

242 Apple also complained that the Registrar had objected to the admission of certain evidence and had "taken a partisan role that impermissibly seeks to defend the delegate's primary decision, rather than simply providing assistance to the Court on general questions of importance".

243 Apple submitted that, in an appeal such as the present, which concerns a decision of the Registrar where the applicant for registration was the only party before the Registrar, the Registrar should not:

- *adduce evidence that is additional evidence, obtained from third parties, that was not before the delegate, and*
- *seek to defend the delegate's primary decision.*

244 Apple submitted that, in such circumstances, the Registrar's role should be limited to dealing with questions of general importance that might be raised by the appellant's submissions.

245 As this is an appeal from the Registrar in which there is no party in opposition to the party bringing the appeal, the Registrar is a party to the proceeding: r 34.23 Federal Court Rules 2011 (Cth). In Merck & Co Inc v Sankyo Co Ltd (1992) 23 IPR 415 at 418, Lockhart J observed that when the Commissioner of Patents is in the same position, the Commissioner has "the full rights of a party", otherwise "there will be no-one to present a view contrary to that of the applicant in the court". The same must be true for the Registrar: see the definition of "Commissioner" in r 34.21. I do not accept, therefore, that the Registrar's role in the present appeal is the limited one described by Apple, although, in an appropriate case, the Registrar may choose to adopt that role. That said, I do not think that I should endeavour to state, as it were, the metes and bounds of how the Registrar should or should not proceed in an appeal such as the present one. This is because the circumstances of each such appeal will vary considerably and, in any event, reasonable forensic decision-making is not required to follow just one – and only one – course.

246 In the present appeal, a large body of evidence, including expert evidence, was adduced by Apple. The Registrar was not bound to accept either the completeness or the correctness of that evidence. If, as here, there was a genuine alternative case available on the facts or evidence which materially qualified the case brought by Apple, then that alternative case could only be advanced by evidence adduced by the Registrar

in the appeal, including by way of expert evidence, bearing in mind the nature of the proceeding as a hearing de novo. I do not think that the Registrar should be criticised for advancing a case for the Court's consideration. To deny the Registrar that opportunity would be to deny the Court the opportunity to make findings on an appropriately-informed basis. This is not to encourage the Registrar, as a party to such an appeal, to make the case before the Court more factually complex or extensive than it need reasonably be or to take other than appropriately measured steps in the conduct of the litigation. Quite clearly, appropriate judgment must be exercised in considering what evidence is truly necessary, and what forensic decisions should be taken, to fulfil the Registrar's role, which must be to take reasonable steps under the Act to protect the public interest in respect of the registration of trade marks in Australia. I do not think that the Registrar has over-stepped the mark in this case. Further, I do not accept that the Registrar has adopted a role in this appeal that could be properly described as "partisan".

247 Finally, I do not think that it would be fair to criticise the Registrar for adducing relevant evidence simply because it was given by two legal practitioners who were employed by the solicitors acting for Microsoft Corporation in Australia. It is an agreed fact that the deponents undertook the activities, about which they give evidence, in the course of their duties as employees of those solicitors, pursuant to instructions from Microsoft Corporation or from one of the companies in the Microsoft group of companies. However, the circumstances in which that evidence was either obtained by or came to be provided to the Registrar are not before me. Without at least knowing those circumstances, it would not be fair for me to infer, as Apple's submission suggests, that the adduction of this evidence involved some unstated impropriety on the part of the Registrar.

74. I would respectfully submit that his Honour's approach correctly focusses on the apparent impartiality of the Registrar's conduct and the content of the submissions made, rather than the status as the decision maker defending the decision under review.

Cunneen v ICAC; ICAC v Cunneen

75. At the time of writing the course outline for this presentation it looked like *Hardiman* might have had more of an airing in this case than has ultimately transpired. Now I would suggest that it illustrates two points made throughout this paper:

    a. There is a possibility that the breadth of application of *Hardiman* is on the retreat in recent considerations of the principle; and

    b. A party making a *Hardiman* submission against a government agency should be prepared to make a decision not to waste further gunpowder on the issue, lest it detract from the main argument.

76. The initial decision by Hoeben CJ at Common Law did not address *Hardiman* at all,[19] but it had clearly been agitated in the Court of Appeal. Basten JA, in the majority, dealt with it briefly in two paragraphs at [44] and [45], reproduced in full:

> *44. One other matter should be noted at the outset, namely that the Commission appeared as the active respondent in these proceedings. The Commission is certainly not a court, nor a tribunal in the usual understanding of that term. Rather, it is an investigative body which can hold inquiries and make reports to Parliament, amongst other functions. To the extent that it is required to exercise these functions, as it must do, impartially and without interest in the conduct or result of the investigations, it is undesirable that it become engaged in adversary proceedings with persons whose conduct is subject to investigation: see The Queen v The Australian Broadcasting Tribunal; Ex parte Hardiman [1980] HCA 13; (1980) 144 CLR 13 at 35-36. As the High Court stated, "[i]f 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."*
>
> *45. There is a qualification to that principle (although itself regarded as "exceptional") where the submissions to be made are limited to the powers and procedures of the tribunal. These principles should apply to the Commission. At least in so far as the matters to be dealt with are limited to statutory gateway to the exercise of its investigative functions, no issue arises as to the propriety of the Commission itself appearing and presenting legal argument as to the scope of its authority.*

77. Completely absent from his Honour's treatment of the principle in *Cunneen* is any reference to the role of the Attorney-General being the proper contradictor in relation to issues of the extent and breadth of the powers of an investigative government agency. This appears to be a different approach from that which his Honour took in relation to in *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 as discussed above. Though Basten JA does not appear to have explicitly stated as much, it appears that his Honour has changed his view about the desirability of intervention by the Attorney-General on behalf of investigating agencies arguing the validity of their powers.

78. Counsel for Ms Cunneen continued to raise *Hardiman* in the course of the application for special leave. It was raised in the context of scheduling as between a March or April hearing date, that *Hardiman* concerns might warrant the Attorney-General intervening to conduct the appeal rather than ICAC.[20] Counsel for ICAC was quick to counter the idea, stating that:

a. Basten JA rejected the point on the basis that the case went to the powers and procedures of ICAC; and

b. The result of a breach was an order for costs and does not affect standing or the ability to make submissions.[21]

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[19] *Cunneen and Ors v Independent Commission Against Corruption* [2014] NSWSC 1571. The transcript of the application for special leave in the High Court records counsel for ICAC stating that it was also raised at first instance.

[20] *Independent Commission Against Corruption v Cunneen & Ors* [201] HCA Trans 296 at [247] to [265].

[21] *Independent Commission Against Corruption v Cunneen & Ors* [201] HCA Trans 296 at [340] to [355].

79. The Attorney-General would only be called on to intervene if a constitutional issue was raised and s.78B notices issued.

80. Neither ICAC nor Ms Cunneen pursued the issue further in the High Court in written submissions. The transcript of the High Court's hearing in the matter does not contain any reference to *Hardiman* or concerns about ICAC's role as the proper contradictor.[22]

81. From our vantage on the sidelines of this argument it does appear that Ms Cunneen's team chose discretion as the better part of valour in relation to the *Hardiman* issue. We await the High Court's decision on the proper construction of the ICAC Act. However it does not appear that the High Court will use this case as the vehicle to make any further comments about the continued relevance of the *Hardiman* principle.

CONCLUSION

82. There is a possibility that a government agency could be "dammed if it do and dammed if it don't" under *Hardiman*. *Macedon Ranges* established that even sitting out the appeal is not a safe option. *Capricornia* demonstrated that regulators are not immune, even where their opponents do not object to their participation. The presence or absence of a contradictor has not proven to be a reliable guide either.

83. In those circumstances, I submit that the appropriate course for decision makers is not to retreat and not to fear criticism unnecessarily. *Hardiman* requires that a decision maker approach litigation carefully, even when dragged into it as the respondent to an appeal. A decision maker choosing to participate in such appeal proceedings should aim to be both impartial and useful. They should not remain active if they do not have anything distinctive to add. They should continue to be forthright in their efforts to pursue appeal rights and the right to be heard on matters that are relevant to the overall operation of the agency involved.

84. Developments since *Capricornia* suggest that the Courts have tacitly recognised that there is a role for decision makers in merits and judicial review. Calls for the Attorney-General to intervene do not seem to be made as often. Where *Hardiman* submissions have been made, the number of examples where the criticism has been found to be unwarranted seems to be on the increase. The basis for these findings appears to be a close regard to the actual submissions that are being made. Private parties opposing government that have made the criticism have missed the mark a couple of times. It is possible that such parties might not obtain the same protection from the principle that was previously thought to be available.

85. If this area of law is in a state of change, both government agencies and persons appealing their decisions should enter the field with a clear idea of what they want, and where the battle really lies. These guiding principles do not remove the risk of criticism from the Court, or ultimately being found to be in the wrong, but they do mitigate it.

Michael Rennie
6 St James Hall Chambers

[22] *Independent Commission Against Corruption v Cunneen & Ors* [2015] HCA Trans 047.