COMMENTARY

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Dr Allars is to be congratulated on a very comprehensive and scholarly paper relating to the developing principles of judicial review of the decisions and conduct of investigative agencies, particularly those agencies which possess coercive powers. I wish to make a few general points by way of comment on her paper. Some of these points supplement what Dr Allars is saying, others may give a different perspective on some of her arguments.

I agree with her that "we live in times of escalating activity" of investigative agencies. Whether those activities continue to escalate in a context of budget-related cut-backs in those agencies remains to be seen. I note that in recent times the heads of some of these agencies have gone on record expressing concern at the adverse effects of these cuts on their investigative work.

Investigative agencies with statute-based coercive powers are not a new phenomenon. Perhaps the most coercive of all statutory investigative powers have traditionally been exercised by revenue agencies. Many coercive powers under the Customs Act 1901 (Cth) go back to federation in 1901. Coercive powers exercised by the Commissioner of Taxation go back to the enactment of the Income Tax Assessment Act (Cth) in 1936. The coercive powers exercised by these agencies are, in some cases, more extensive than those exercised by more recently created bodies such as the National Crimes Authority, the Criminal Justice Commission and the Independent Commission Against Corruption.

For example, customs seizure warrants under s 198 of the Customs Act 1901 (Cth) can be issued by a Collector of Customs in a State or Territory without application to a magistrate or judge and are cast in very wide terms. Another feature of the customs warrant is that it remains in force until either the period specified in the warrant expires or the warrant is revoked. I am not familiar with the current practices of the Australian Customs Service in this regard, but years ago the warrants had an almost indefinite duration and effectively constituted permanent search warrants.

Strong coercive powers exist in unexpected areas. For example, pursuant to s 24 of the Dog Act 1966 (NSW), a council employee may be authorised by the council to enter land or premises at all reasonable times. There is no need to make out a case to a magistrate or judge for a warrant. Another example is s 6E(1) of the Poultry Processing

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Act 1969 (NSW), which requires poultry processors to answer questions asked by poultry inspectors.

I have always found it mildly puzzling that when these powers are granted to organisations to investigate serious crime it seems to generate great debate and controversy; but when similar powers are granted to agencies to investigate regulatory offences it attracts little or no comment. Some may argue that is because serious crimes involve long prison sentences and therefore potentially greater deprivation of liberty. However, some revenue offences also attract quite lengthy prison terms and it should not be forgotten that the Customs Act 1901 (Cth) contains the major offences and penalties relating to narcotics trafficking.

Dr Allars makes the following important observation at the beginning of her paper:

> [A]ccount is also taken of the fact that the social and political issues at the heart of these controversies are normally presented to a judge exercising judicial review in the context of an adversarial contest between an individual and a highly bureaucratised organisation armed with drastic coercive powers. ... It is understandable that the immediate interests of the plaintiff tend to loom large in such a contest, whilst a silent, innominate and vulnerable public whose interests are intended to be protected by the establishment and empowerment of the tribunal, remain unrepresented.

Notwithstanding the current and proper preoccupation with the rights of the individual, we need to be conscious of important societal interests which should also be taken into account in the administration of justice. The right of individuals in society to be protected from harm by others is often forgotten in the clamour for the rights of the individual. Further, the rights of victims and their families are becoming increasingly recognised.

The purpose of our system of justice is not just to protect the rights of the individual, important though those rights may be. The purpose of our justice system, as its name implies, is to administer and provide justice. In many cases this involves attributing weight to a number of competing legitimate interests (both individual and societal) and endeavouring to reconcile those interests to achieve a just result.

Our courts grapple with these tensions on a daily basis and, by and large, they achieve just results. There are some good examples in the cases to which Dr Allars refers. She is mildly critical of the High Court's decision in *Australian Broadcasting Tribunal v Bond*[1] as taking a narrow view of the meaning of administrative "decision" in the Administrative Decisions (Judicial Review) Act 1977 (Cth). In that case the High Court was trying to balance a number of interests which were at stake in its decision. As Mason CJ stated, "To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process."[2]

Mason CJ was not referring to some hypothetical state of affairs. Resourceful litigants will play the rules to their best advantage irrespective of the impact on the processes of administration or on the wider interests of society. I remember some years ago, when I had responsibility for the extradition area in the Attorney-General's Department, we had a very protracted case involving the extradition of a fugitive to the United States. The case seemed to drag on forever with many applications for judicia

1 (1990) 170 CLR 321.
2 Ibid at 337.

review. The United States authorities were becoming quite frustrated. We then discovered that the American State which would prosecute in the event that the fugitive was extradited had a provision in its law which gave persons who were held in custody in a foreign country a reduction in their sentence of three years for every year they were in custody in the foreign country. The fugitive was obviously in no hurry to leave Australia!

I would like to touch on another area which Dr Allars discusses; this is the issue of investigative tribunals appearing in review courts to defend their decisions in an adversarial manner. I am pleased to see the principles in *R v Australian Tribunal; Ex parte Hardiman*[3] being discussed in a paper of this kind. As Southwell J observed in *Secretary, Department of Health and Community Services v Gurvich*,[4] no inflexible rule exists on the extent to which tribunals should appear as respondents on appeals or reviews of their own decisions.

The difficulties usually arise when there is no contradictor appearing in the reviewing court. Fortunately, in the great majority of cases there are two parties involved in the proceedings before the original tribunal. For example, in most administrative law cases, there is an applicant for review and the agency defending its decision. When the matter reaches the appeal court, one could normally expect those parties to argue both sides of the appeal before the court. In those circumstances the tribunal whose decision is being reviewed should take a neutral stance and, according to the *Hardiman* principle, simply submit to the jurisdiction of the court. However, where there is only one party (other than the original tribunal) there is a risk, in the absence of a contradictor, that both sides of the case will not be argued before the reviewing court. This puts the reviewing court at a disadvantage and the interests of justice might not be served if the court does not have the benefit of both sides of the argument.

There is often a lack of a contradictor in those tribunals which investigate and determine matters on their own motion. The Human Rights and Equal Opportunity Commission (HREOC) and coroners are two examples amongst the cases discussed by Dr Allars. In cases such as these there can be pressure on the original tribunal to appear in the review court to ensure that its decision is properly explained and defended. The cases discussed by Dr Allars note, however, that this can create greater problems, particularly in those circumstances where the original tribunal has to adjudicate further on the matter after the review proceedings have been completed. The applicant for review may fear that the original tribunal may be less than objective if it has vigorously defended the correctness of its decision before the review court.

In normal circumstances, I believe that the original tribunals should resist the pressure to defend their decisions on review and try instead to find more appropriate solutions. Where alternatives are not available, those tribunals should be scrupulous to ensure that their submissions are put in an objective, facilitative manner. To overcome at least some of the difficulties there is scope for modest reform. The concerns expressed about coroners defending their own decisions might be solved by giving the various Directors of Public Prosecutions a statutory function to assist courts in reviews of coroners' decisions. In the case of bodies such as the HREOC the situation is not so easily solved. One *ad hoc* solution, which has been utilised from time to time, is for the

3 (1980) 144 CLR 1 at 5.
4 [1995] 2 VR 69 at 73.

tribunal being reviewed (or the Attorney-General) to brief counsel to act as *amicus curiae* to assist the court. The *amicus* does not rely on instructions and is free to assist the court in such manner as he or she thinks fit. The role is analogous to that of a counsel assisting a royal commission. It should also be noted that in some statutes the Minister is given a right to intervene in certain matters where an agency or tribunal is a party. Section 163A(2) of the Trade Practices Act 1974 (Cth) is an example. This facility could also be used to overcome the difficulties mentioned above. Another possible solution at the federal level would be to make provision in the Judiciary Act 1903 (Cth) for courts to give notice to the Attorney-General where there is no contradictor and for the Attorney-General either to intervene (for example, where an issue of general application is involved) or to make arrangements for an *amicus* to appear.

Finally, I want to mention a general impression I gained from reading Dr Allars's paper. The view has been expressed that the administrative law reforms which commenced at the federal level 20 years ago did not fulfil all the hopes of the original architects of the reforms.[5] Having read Dr Allars's paper I am more optimistic. What emerges is the fact that the administrative law reforms have developed into a marvellous accountability mechanism. In one case after another, officials have had to justify the lawfulness of their decisions both on merits and judicial review. Administrative review makes these investigative agencies more accountable than many commentators suggest. This accountability alone justifies those reforms.

5 R Creyke and J McMillan (eds), *The Kerr Vision of Australian Administrative Law: at the Twenty-Five Year Mark* (due for publication in 1997, CIPL, ANU).