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

*Robin Creyke**

Introduction

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

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

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

The Findings

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

* *Robin Creyke is Senior Lecturer in Law, Australian National University.*

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

Background to the dispute

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

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

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

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

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

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

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

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

Proceedings for review

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

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

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

The NH&MRC and public consultation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Failure to consider relevant matters

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

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

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

Is the matter relevant?

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

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

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

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

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

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

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

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

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

Obligation to consider the matter

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

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

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

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

Awareness of the material

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

Failure to consider the matter

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

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

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

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

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

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

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

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

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

Lessons for public inquiries from the Tobacco Institute case

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

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

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

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

Consequences of invalidity

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

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

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

Litigation strategy

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

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

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

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

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

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

Conclusion.

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

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

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

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

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

Endnotes

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

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

54 *Id* at 12.
55 *Ibid.*
56 *Ibid.*
57 *Id* at 15.
58 *Ibid.* See also *Turner v Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 237, 241 per Toohey J; *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 per Gummow J; *Deloitte Touche Tohmatsu v Australian Securities Commission* (1996) 136 ALR 453, 468; *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 at 472 per Wilcox J. However, use of standard form paragraphs in a statement of reasons does not necessarily mean that proper, genuine and realistic consideration has not been given to a matter (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481, 486).
59 Finn J was quoting from *Tickner v Chapman* (1995) *sub nom Norville v Chapman* 133 ALR 226 at 238 per Black CJ. See *Tobacco Institute* case 44 ALD 1 at 12.
60 *Tobacco Institute* case 44 ALD 1 at 12.
61 *Id* at 14.
62 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 24 at 40-41.
63 *Chapman v Minister for Aboriginal and Torrens Strait Islander Affairs* (1995) 37 ALD 1 at 31, 33, 46-7.
64 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65; *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The surrogate decision-maker may have formally delegated authority if the statute so provides or may undertake the task as a *de facto* decision-maker or *alter ego* (*O'Reilly v Commissioners of State Bank of Victoria* (1983) 153 CLR 1, 11).
65 *Century Metals & Mining NL v Yeomans* (1989) 100 ALR 383.
66 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.
67 *Tobacco Institute* case 44 ALD 1 at 12.
68 A view presented by Sir Gustav Nossal at the hearing and referred to by Finn J in the *Tobacco Institute* case 44 ALD 1 at 15.
69 For practical reasons, the same freedom to restrict the criteria of relevance is not possessed by the citizen.
70 *Tobacco Institute* case at 14-15.
71 *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251.
72 *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 37 ALD 1 at 31, 33 cf at 46-7 per O'Loughlin J.
73 *Yarran v Blurton (No 2)* (1992) 112 ALD 603.
74 The principle in *Jones v Dunkel* (1959) 101 CLR 298. The principles has been accepted as being applicable to applications for judicial review (*Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (1996) 67 FCR 40).
75 *Administrative Decisions (Judicial Review) Act 1977* (Cth) paragraph 11(1)(c).
76 *Tobacco Institute* case 44 ALD 1 at 16
77 Section 4 of the Act defines a "regulatory recommendation" as "a recommendation of the Council that it intended to be given legal effect in a State by legislation of that State".
78 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322.