ACCESS TO INFORMATION: GUERILLA WARFARE UNDER THE TRADE PRACTICES ACT

BY
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In this article Mr Pagone addresses the question of the Trade Practices Commission's access to information which is necessary for proceedings under the Trade Practices Act 1974 (Cth). Should the Trade Practices Commission have access to relevant information and, if so, what are/should be the limits to such access? Mr Pagone sets about answering these questions with a case analysis of the Court's treatment of section 155 of the Trade Practices Act and its precursor, section 15B of the Australian Industries Preservation Act 1906 (Cth). The importance of ready information to the effective running of the Commission is stressed and the article is concluded with a short overview from the philosophical standpoint.

"For knowledge itself is power"
Francis Bacon 1561-1626

Since its inception there has been a spate of litigation surrounding the use by the Trade Practices Commission of its powers of investigation under section 155[1] of the Trade Practices Act 1974 (Cth) (the Act). Through that litigation we have seen attempts to emasculate the Commission and the Act by severely circumscribing the ability to investigate possible infringement. The extent to which investigatory powers are reduced will determine the effectiveness of legal supervision of market practices. Judicial pronouncements from that litigation show the judiciary seeking to balance the need to sustain the powers of the executive in market regulation with hallowed concepts of freedom and fairness; concepts which may not be applicable in this context.

Much of the objection to the grant and exercise of wide powers of investigation rests upon notions of the primacy of individual liberty and freedoms. Such notions are not wholly applicable in economic regulation where private liberty is sought for

the primarily social act of trade and where the legislature seeks to achieve such goals as social equality and fairness in trade (having as much to commend them in principle as does the ideal of liberty). Moreover, a fuller analysis of the context in which trade takes place may show that more scrutiny and accountability of trading activity is the best path to a more liberal society.

I. CONSTITUTIONAL LIMITATIONS

1. Invalid Exercise of the Judicial Power of the Commonwealth

The limitations now sought to be imposed upon section 155 of the Trade Practices Act 1974 (Cth) have their genesis in three High Court judgments handed down between 1908 and 1912 which dealt with similar provisions in the precursor legislation: section 15B of the Australian Industries Preservation Act 1906 (Cth).[2] The first determined onslaught upon powers of investigation granted to the executive under trade practices legislation came in the decision of *Huddart, Parker & Co. Pty Ltd* v. *Moorehead*.[3] In 1908 the Comptroller-General of Customs, being the government official empowered by the Act, stated in writing that he believed that offences had been committed against the Act and required Huddart, Parker & Co. Pty Ltd (the company) and W. T. Appleton (an executive officer of the company) to answer certain questions asked pursuant to section 15B. Both the company and Appleton challenged the validity of the purported exercise of the power to investigate under section 15B. The company successfully claimed that the Act was ultra vires the legislative power of the Commonwealth of section 51(xx) of the Constitution. That aspect of the decision need not concern us here save to note that the reasoning employed by the majority was disapproved in *Strickland* v. *Rocla Concrete Pipes Ltd*[4] and that the dissenting judgment of Isaacs J., has been subsequently approved.

Of more interest for present purposes is the challenge to section 15B launched by Appleton. He argued, unsuccessfully, that section 15B was invalid on a number of alternate grounds:

1. That it involved the use of judicial power which the Constitution required to be exercised by a Court established pursuant to section 71 and that the Comptroller-General was not such a Court;
2. That the use of section 15B amounted to a trial without a jury contrary to section 80 of the Constitution; and
3. That the Constitution provided for the establishment of an Inter-State Commission which alone could exercise powers such as those granted in section 15B.

The High Court unanimously rejected all three arguments. The second and third propositions were disposed of relatively simply. Section 101 of the Constitution dealing with the establishment of the Inter-State Commission was not a mandatory provision[5] and even if it were, the power to compel answers to questions was not confined solely to the Commission.[6] In respect of section 80 of the Constitution, which does preserve the right to a trial by jury in cases of indictable offences, it was held that compulsory examination of a suspected person, even if it might incriminate

the person interrogated, was not inconsistent with the right to trial by jury.[7]

In respect of the first argument Counsel for Appleton drew an analogy between the power of examination given to the Comptroller-General and that of examining magistrates or justices, claiming that the power given to the Comptroller-General under section 15B amounted to the grant of "judicial power" similar to that expected by them. To dispose of this issue it was necessary to consider what was meant by the expression "judicial power". Griffiths, C.J.[8] discussed the historical development of the examining magistrates concluding that the mere fact that a magistrate or justice performed preliminary investigations would not alter or transform the nature of the inquiry into a judicial function if it would not otherwise have that character.[9] He relied heavily upon the belief in a *triparte* division of the sovereign power into legislative, executive and judicial,[10] concluding that the essential feature of the judicial function of a sovereign is "to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property".[11] That aspect was clearly absent in the Comptroller-General's inquiry and thus the section was valid.

Like Griffiths C.J., Isaacs J. attempted to define "judicial power". He adopted the definition offered by Palles C.B. in *The Queen* v. *The Local Government Board for Ireland*[12] that the distinction between ministerial and judicial power is that the latter imposes liability or affects rights by a binding determination of a case before it, whereas in the exercise of ministerial power rights and liabilities are affected by the fact determined and if the mninisterial action is wrong it may be challenged.[13] In the case before him it was clear that the action of the Comptroller-General under section 15B did not affect rights or impose liabilities.[14]

O'Connor J. disposed of the argument by distinguishing between the use of section 15B and an exercise of judicial power on the basis of the differences "between the two proceedings".[15] However, he continued to make a point which has become vital in recent litigation:

> When the Comptroller makes his requirement under 15B there can be no proceeding pending in a Court. He is empowered to use the section with reference to an offence when once it has been brought within the cognizance of the Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in this Court by the Constitution. I take it therefore as clear that, at the stage when the Comptroller-General is authorised to apply the provisions of the section, the suspected or alleged offence is no more within the cognizance of a Court than if it were under preliminary consideration by the Police Department. At that stage it is merely a subject of departmental inquiry.[16]

This was undeniably obiter, if not outright irrelevant to the case before him. What O'Conner J. was anxious to do was to identify the difference between a preliminary investigation where the matter had not reached the Court and an exercise of a Court's powers to compel discovery and answers to interrogatories. The point was that the mere fact that a preliminary investigation could be carried on under threat of compulsion did not bring the process into the category of judicial function. Nevertheless, in the process he made significant obiter comment regarding the invalidity of an exercise of power of investigation if it would interfere with the judicial process. Upon what basis did O'Connor J. seek to rest his conclusion? What

does it mean to "interfere" with the judicial process? After all, all legislation can ultimately be characterised as an "interference". And if there is an interference, upon what basis is it true to say that the High Court has "undoubted" power to prevent it?

I suggest that answers to these questions are not self-evident for the Federal Court in the *Trade Practices Commission* v. *Pioneer Concrete (Vic) Pty Ltd* has relied upon the obiter dicta of O'Connor J. without, it seems, accepting what appears to be his justification for the conclusion. In the Full Court decision in *Pioneer Concrete*[18] one of the objections raised by the recipient of the section 155 notice was that the section was invalid as it gave judicial powers to a non-judicial body. The Court rejected the submission.[19] In respect of judicial interference Deane J. was prepared to go very far when he asserted:

> ...that not only are the Parliament and the Executive bereft of any constitutional power or authority which would authorise legislative or executive action which would preclude the due performance of judicial functions by a Federal Court, but that the Parliament and the Executive are under a positive constitutional duty to make available to a Federal Court exercising federal jurisdiction the means, facilities and assistance which, with due regard to what is reasonable in the relevant place at the relevant time, can properly be regarded as necessary for the due and proper performance of such judicial functions.[20]

Upon what does Deane J. extend the principles enunciated by O'Connor J.? It is one thing to say that the Constitution prevents the legislature from investing judicial power in non-judicial bodies, but why is it manifestly the case that the legislature cannot "interfere" with the judicial process? The conclusion may be correct and there may be much to be said in its favour, but it is strikingly odd that so little should be offered by way of explanation.

Is it not possible that O'Connor J. merely implied that once a matter had come within the cognizance of the Court, any further investigation would *then* assume the character of the judicial power since it would be used as part of the judicial process by the executive? Would it amount to an "interference" if the Federal Court were given power to act as an inquisitor? If not, then the only possible distinction to be drawn when the power is given to a body other than a Court is that by so doing a part of the Court's (that is judicial) power is vested in a non-judicial body.

Care should be taken when relying upon the obiter of O'Connor J. For no other judge in that case made the same comments. Barton J. did support the proposition in the subsequent case of *the Melbourne Steamship Co. Ltd* v. *Moorehead*[21] but it can be argued that *Hubbart, Parker* is authority for a much more modest principle, namely, that the legislature had not intended (as a matter of statutory construction) that any such interference take place.[22] Whatever their difference in interpretation, all members of the High Court agreed that an exercise of the power granted under section 15B did not, in the circumstances, amount to an exercise of the judicial power.[23]

To a large extent the similar issues to those in *Huddart, Parker*[24] arose for consideration subsequently in *the Melbourne Steamship Co. Ltd* v. *Moorehead*[25] which involved the same series of transactions. Insofar as they are relevant, the facts were that a number of companies in an industry were being prosecuted under the

Australian Industries Preservation Act 1906 (Cth) but the Melbourne Steamship Co. Ltd was not a party to those proceedings. Nevertheless the company appeared to be involved in a complex series of transactions with which the other proceedings dealt and accordingly the Comptroller-General issued a notice pursuant to section 15B seeking answers to questions and production of documents which might be useful in the proceedings already commenced.

The company raised two objections: (1) that section 15B was directed to individuals and not bodies corporate; and (2) that section 15B does not apply to questions asked for the purpose of obtaining information for use in proceedings *already commenced*.[26] The decision on the second point is of considerable interest and a source of potential debate. A majority held that the company acted lawfully in refusing to answer the questions (Isaacs J. dissenting), but it is possible to read the judgments of Griffiths C.J. and Isaacs J. as consistently enunciating the same principle to be applied although coming to different conclusions on the facts. On such a reading Barton J. would be seen as reaching the same conclusion as Griffiths C.J. on the facts but by the employment of different reasoning. It is crucial to bear in mind that it was found by the Court that the motive of the exercise of power pursuant to section 15B was to assist the Crown *not* against the company to which the questions had been directed (the Melbourne Steamship Co. Ltd), but in proceedings brought against others and to which the Melbourne Steamship Co. Ltd was not a party.

Both Griffiths C.J. and Isaacs J. looked to the object of the power given under section 15B and held that it was to make inquiry to ascertain whether the Comptroller-General's belief that an offence against the Act had been committed was well founded.[27] It was found by the Court that the purpose for which the power was being used was not to investigate possible contraventions of the Act by the Melbourne Steamship Co. Ltd, but to gather evidence for other proceedings in which the Company was not a party. Thus Griffiths C.J. can be seen to have decided the case on the basis of abuse of power: that in seeking evidence for other proceedings rather than for an investigation of possible contraventions of the particular company which had been requested to supply information and that where Parliament has granted power to an official for a particular purpose and that power is used for some other purpose then the official has exceeded or abused his power (albeit honestly).[28]

In contrast Isaacs J. relied upon the traditional distinction between motive and purpose, applying the principle that the Courts have no traffic with the former.[29] The purpose of section 15B was to investigate and that was the clear effect of the action taken by the Comptroller-General. Of course there were limits to the power but those limits were more narrowly construed by Isaacs J., namely, that the power would only be exhausted against a person if legal proceedings had been commenced against that person,[30] not because it would be an interference with judicial power,[31] but because if proceedings had been commenced against a person "the language of the power is, on the face of it, then inapplicable".[32]

Such an interpretation of these two judgments shows that any disagreement is really only about where they draw the line of ultra vires. Regrettably the picture is more complex since Griffiths C.J. made some comments which would seem to

accord with the view expressed by Barton J. and which would bring it in line with that enunciated by O'Connor J. in *Hubbart, Parker*.[33] Barton J. expressly adopted the view of O'Connor J. that section 15B should be read so as not to allow an "interference with judicial proceedings".[34] To emphasise the debate regarding the possible justifications of this proposition it is worth noting that according to Barton J. the reason judicial proceedings could not be interfered with was because:

> If sec. 15B were read as an interference with judicial proceedings, it would be an exercise by the legislature of a power vested by the Constitution in the judiciary.[35]

Barton J. thus made it perfectly clear that there is no separate heading of non-interference with the judiciary other than that based upon the concept of non-exercise of judicial power by non-judicial bodies. According to the view of Barton J. the determining point is that at which the Crown institutes "proceedings in respect of the subject matter of the questions" asked pursuant to section 15B.[36] At that point it has entered what is the judicial domain alone.[37] Clearly there is much assumed about the notion of "judicial power".

Isaacs J. rejected the suggestion that the judicial power was involved[38] but Griffiths C.J. was not as explicit and adopted language similar to that of Barton J. in the commencement of his judgment where he stated that section 15B could not be used for the purpose of "collecting evidence in a pending suit" for the power is "exhausted so far as regards the persons whom the Attorney-General alleges to have committed the offence" once a formal prosecution has been commenced "in respect of an alleged offence".[39] On this reasoning the *power* is exhausted from that time the matter "becomes subject to the judicial power".[40]

It is plausible to read Griffiths C.J. as adopting a position similar to that of Barton J. After all, the objection based upon the section being an exercise of the judicial power was argued in the case as is evidenced by the judgments of Isaacs and Barton J.J. The Federal Court in *Pioneer Concrete* however rejected that reading of Griffiths C.J. According to Deane J., Griffiths C.J. was not indicating that service of a section 15B notice would involve a purported exercise of part of the judicial power of the Commonwealth, rather:

> [T]he point that was being made was that, as a matter of construction, the power conferred by s. 15B was a power to be exercised on the occasion of a preliminary inquiry for the purpose of determining whether a prosecution should be instituted. Once such a prosecution had been instituted, the occasion for, and the purpose of, the exercise of the power had passed: the question or matter of suggested contravention had passed from the stage of preliminary inquiry and been absorbed in the subject of the judicial proceedings in much the same way as a right is absorbed by the judgment which vindicates it (*"transit in rem judicatam"*).[41]

The end result of the decision might be applauded and perhaps it is little wonder that the Federal Court should seek to distinguish a High Court decision of 1908 which might be felt no longer applicable to modern conditions of corporate life, but in the attempted reconciliation it appears evident that someone is confused. If Barton J.'s gloss (in *Melbourne Steamship*) on O'Connor J.'s principle (enunciated in *Huddart, Parker*) is correct, then the reasoning upon which an exercise of powers of investigation will be held invalid on the grounds of interfering with the judiciary rests upon the constitutional principles of separation of powers. But by rejecting

that construction the Federal Court seems to have created a new ground of invalidity: interference with a judiciary *per se* (not connected with a doctrine of judicial power being exercised exclusively by judicial bodies). Moreover, to reach that conclusion a tortured analysis of Griffith C.J.'s judgment is required. Would it not have been simpler to agree with the contention that to hold that section 15B (semble section 155) should not be used in circumstances where it will amount to an exercise of the judicial power but that no such act had occurred in the case before the Federal Court?

2. Interfering with the Judiciary

Whatever its conceptual underpinnings there is now much support for the proposition that the Commission's power of investigation cannot be used if it would interfere with the judicial process. To hold that the legislature cannot "interfere" with the judiciary needs some elaboration of the concept "interference". The cases give only a scanty indication of the extent of this principle.

A starting point is the decision of the Federal Court in the two *Pioneer Concrete* cases.[42] In December, 1978 a company, Row Mix Concrete Pty Ltd (Row Mix), commenced proceedings in the Federal Court against a number of companies including Pioneer Concrete. Row Mix seeking an injunction pursuant to section 80, alleged that the defendants had contravened section 45 of the *Trade Practices Act* 1974 (Cth). The Trade Practices Commission was not involved as a party but sought to make its own investigations.

There was nothing to suggest that the Row Mix proceedings were anything short of bona fide but Deane J. who noted that much time elapsed since initiating the proceedings, indicated that "none of the parties. . .[were] exhibiting any particular enthusiasm" to having the matters heard.[43] Understandably, Row Mix was concerned with its own commercial situation and would gain little in the pleasure of vindicating a public wrong if its commercial interest could otherwise have been secured. The Trade Practices Commission, on the other hand, had a totally different interest in making its own investigations: it was concerned to enforce its statutory obligations on behalf of the public. It was also at a disadvantage since, unlike Row Mix, it would not have ready access to knowledge, information and documents from any involvement in the industry.

Consider this picture: Row Mix claims that certain companies have breached the Act; private proceedings are brought which meander at a leisurely pace; there is no guarantee that proceedings will come before the Court; the Commission lacks information. Quite reasonably the Commission decided to make its own investigations and in doing so issued a section 155 notice against Pioneer Concrete Pty Ltd and others.

The case was first heard by Lockhart J. who held that the Commission was in contempt of court in serving the notice. In doing so His Honour relied upon his understanding of the majority judgment of the High Court's decision in *Melbourne Steamship*[44] holding that "once the 'matter' is within the cognizance of the Court, it becomes subject to judicial power, it becomes transit *in litem pendentem*".[45] Was "*the* matter" before the Court? Yes, according to Lockhard J., for the "matter" involved in the Row Mix proceedings were the same "in all *relevant* respects"[46]

(emphasis added). He rejected the argument that a *relevant* distinction was that section 155 is merely an investigatory power which the Commission sought to use *to investigate* the *possibility* of a contravention of the Act and was not being used in aid of litigation. Nor was it relevant that by so holding the Commission was precluded from executing its statutory duty of enforcing the Act.[47] Counsel's justification for the conclusion accepted by Lockhart J. was that as proceedings under Part IV of the Act were not criminal, the answers to the notice (acquired under statutory compulsion) could be used in the Row Mix proceedings notwithstanding the fact that in those proceedings the defendants would be entitled to refuse to give those answers if interrogated by Row Mix.[48] This argument was used to support the contention of "interference" (it would otherwise be little defence to the contention that Parliament had intended such consequences a conclusion which would require statutory amendment to be avoided).

The Commission successfully appealed to the Full Court of the Federal Court. It was held on the facts that there had been no "interference" with judicial proceedings, nevertheless their Honours made it clear that "[i]n a particular case it might be; it would depend on the circumstances".[49] Bowen C.J. gave some examples of possible "interference" amounting to contempt of court:

> Speaking generally, administrative legislation of a matter which is before a Court will not constitute a contempt, though it may do so if the results are published (*Johns & Waygood Ltd* v. *Utah Australia* [1963] V R 70 at 79-80) or if the investigation *is conducted in such a way as to interfere with the Court or the conduct of the proceedings.*[50] (emphasis added)

We may debate about the applicability of the case of *Johns & Waygood* to the first generality of Bowen C.J. But the lack of precedent and vagueness of the second generality should cause concern. His Honour does attempt a little more specificity later on:

> So long as the investigation is conducted in such a way that it does not interfere with the witnesses or parties before the Court, and is not publicised, there would appear to be no objection.[51]

It seems as if the Court is having difficulties with the very novelty of the principle it is enunciating. Can it be said with any certainty that the Courts are telling the executive any more than that it should be cautious? Arguably, the specificity adds little to the generality as it, in part, merely restates itself and its notion of "interference" with witnesses needs greater elaboration. Will it, for example, "interfere" with a witness to require that his evidence be disclosed to the Commission pursuant to a section 155 notice?

The same kinds of criticisms may be levelled at Deane J. He too accepted the broad injunction on executive interference with the judiciary in circumstances where the notice was *not* being used in aid of judicial proceedings.[52] But, the "readily" envisaged circumstances His Honour proffers as examples give little assistance: his instance of a notice being served upon a judge actually hearing a matter being required to produce documents is intuitively convincing but less critical in practice. We could concede the point without gaining much knowledge of the myriad of more likely circumstances which may arise.

Sheppard J. sought to concur with both Bowen C.J. and Deane J. but he expressly refrained from any conclusion on whether it would amount to interference if the

Commission "lent itself to the assistance of a private party who had instituted proceedings and the Commission proposed to use its powers under the section to assist him".[53] Thus the Commission's motive in issuing a notice under section 155 becomes relevant. Arguably, the motive would only be in issue in the proceedings for contempt and would not affect the validity of the exercise of the power for other motives or purposes. Why such a conclusion as His Honour posits should be reached, must, as a matter of policy, be queried. If the Commissioner can exercise its power to investigate, why deny important information to a private litigant? The result would be to insist that the Commission effectively duplicate proceedings by commencing another action with the evidence it has gained. Surely the limitation to a section 155 notice is that the Commission cannot use its powers as a supplement to rules of discovery once it has commenced litigation — and that based on a reading of the statute and not on constitutional grounds.

The Full Court rejected the justification advanced on behalf of Pioneer Concrete that "interference" would result by Row Mix being able to gain access to the information in its proceedings via a subpoena. The logical instability of the argument was clearly demonstrated by Bowen C.J.: how could a subpoena issued by the judge in the Row Mix proceedings be an interference in those very proceedings? If Row Mix could gain access to the information "it follows from the use of the processes of the Court itself, not the institution of an investigation by the Commission".[54]

3. In Aid of Proceedings

In *Pioneer Concrete* the Full Court relied upon the fact that the Commission was not a party to the Row Mix proceedings and had not instigated other proceedings. It distinguished the facts from situations where the Commission might seek to use its power under section 155 as a more powerful substitute to its right to answers to interrogatories and production of documents during litigation. In doing so the Court distinguished the earlier decision of Franki J. in *Brambles* v. *Trade Practices Commission*.[55]

Brambles involved another action against the Trade Practices Commission for contempt of court in serving a notice upon a company. In that case the Commission had commenced proceedings against Brambles Holdings Ltd and some other companies seeking to recover a penalty for alleged breaches of section 45 of the Trade Practices Act 1974 (Cth). Prior to the case being heard the Commission served a notice upon the defendants asking questions which were also relevant to the proceedings before the Federal Court. Franki J. applied the decision of the High Court in *Melbourne Steamship Co. Ltd* v. *Moorehead*[56] that the investigatory power was spent once prosecutions had been commenced and that the power could not be used for the purposes of obtaining information in a pending suit.[57] Indeed, even the dissenting judgment of Isaacs J. in *Melbourne Steamship* contained dicta in support of such a proposition.[58] Moreover, in applying the principles enunciated by O'Connor J. in *Huddart, Parker*,[59] Franki J. concluded that the purported use of the power granted in section 155 amounted to "a clear interference with the Court" by attempting "to achieve by threats an advantage in proceedings already before the Court which could not otherwise have been obtained".[60]

This result placed the Commission in an invidious position, for it had been decided by the High Court in 1910 and was common ground between the parties in the *Brambles* case that the Commission was *not* entitled to discovery in proceedings brought against a person to recover penalties.[61] In *Brambles*, Franki J. held that there were no significant differences between the operation of the two respective sections granting rights of investigation.[62] The combined effect of these two decisions is significant for the Commission's power to gain information.

Associated Northern Collieries was heard by Isaacs J. sitting alone upon a summons for directions. The Crown had brought an action against Association Northern Collieries and others alleging breaches of the Act and seeking to recover penalties imposed by sections 4 and 6 and for an injunction under section 10. Broadly speaking the summons for direction involved two ostensibly independent issues: (1) was the defendant entitled to discovery of the Crown; and (2) was the Crown entitled to discovery of the defendant? Section 15B was not relied upon (and in view of the comments of O'Connor in *Huddart, Parker* could not have been relied upon) since Court proceedings had commenced.

Whilst the issues may in law be strictly separate, the *effects* of their resolution are wholly intertwined. The Crown lost on both aspects of the case. First, Isaacs J. held that the Crown was bound to give particulars of the case which it presented and which it required the defendant to answer. Further, that the Crown is generally liable to give discovery.[63] As His Honour explained:

> I take the fundamental principle to be that the opposite party shall always be fairly appraised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms "surprise", but he is not entitled to be told the mode by which the case is to be proved against him.[64]

The implications of this fundamental principle will be apparent to all: you are entitled to know that the other side knows about you, thus, with care, you need reveal nothing accidentally.

Of course Isaacs J.'s comments were made with reference to litigation "on foot" and not with a preliminary investigation under section 15B or with the new section 155. One can, however, conceive of the following senario: the section is invoked used to acquire information but none is forthcoming, the Crown instigates proceedings to recover a penalty for failure to comply with the notice and the defendant seeks and is granted discovery of the Crown's case for wanting further information. By this route the defendant has again determined what it cannot afford to give away.[65] Furthermore, for Isaacs J., a prospective defendant need not have to rely upon such precarious measures, since in *Huddart, Parker* he had expressed the view that a search for information under section 15B involves:

> The requirement that the person of whom information is demanded shall himself be informed with reasonable certainty of the nature of the alleged offence, that is, of the offence which the Comptroller-General believes he has been committed.[66]

Not all the details need be supplied, nor need they be supplied with "great particularity" but enough to enable the person "to know what it is he has to tell or produce".[67] With some modification, this feature has been reaffirmed in recent cases on section 155.

In some respects this dicta of Isaacs J. might be seen a curious judicial gloss: on the one hand there is much good sense in telling the person what the Commission requires him to tell or produce, for how else will he know what to give; on the other hand such specificity might deprive the Commission of much useful information it would not otherwise have had. We will return to these issues when looking at the recent decisions on section 155.

4. Exposure to a Penalty

Isaacs J. also held in *Associated Northern Collieries* that the Crown was not entitled to discovery of a party where that discovery might expose the party to a penalty.[68] The full implications of this aspect of the decision deserve careful attention. A starting point is to note that exposure to a "penalty" is broader than exposure to a possible "criminal" charge and that the principle is not confined to proceedings initiated by the Crown.

How is the Court to determine whether discovery exposes a party to a penalty? Isaacs J. answered that question by reference to the obvious distinction between actions commenced with the avowed object of inflicting a penalty and actions which seek to prevent or redress a civil injury.[69] This distinction is not conclusive of the issue, for the case before Isaacs J. also involved an application for an injunction in which discovery was also denied on the basis that the issues were "not independent":

> They are indistinguishable and indivisible, and it would be impossible to make any discovery whatever without forfeiting the protection to which the defendants are entitled.[70]

Isaacs J. could not have meant that *but for* the action seeking a penalty discovery would have been granted. Indeed, many cases where the principle has been raised successfully have involved ordinary civil actions.[71]

The modern statement of the principle can be found in *Blunt* v. *Park Lane Hotel Ltd*[72] where Goddard L.J. stated the rule to be:

> That no-one is bound to answer any question if the answer thereto would, in the opnion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for.[73]

In that case the plaintiff sued the defendant in defamation. The defendant had made allegations of adultery involving the plaintiff's moral character and sought to rely upon the defence of truth. The plaintiff refused to answer interrogatories on the grounds of possible exposure to a penalty. The Court of Appeal held that the possibility of punishment in the ecclesiastical courts for adultery or unchastity was not "reasonably likely" nor was the risk of being refused the sacrament by her parish minister sufficiently likely to justify the exemption sought. In cases under the Trade Practices Act 1974 (Cth) the likelihood of an action to recover a penalty is unquestionably real and it is crucial to note the extent to which this principle may be relied upon.[74]

Following the decision of Isaacs J., the Australian Industries Preservation Act 1906 (Cth) was amended by the insertion of section 14B which provided that in proceedings for an offence under the Act a person could not be excused from

answering questions or making discovery on the grounds that it may tend "to incriminate him or make him liable to a penalty". Such a broad provision has not been inserted into the Trade Practices Act 1974 (Cth).[75] Instead, section 155(7) merely compels production of documents or answers to questions if pursuant to a section 155 notice the answers may tend to "incriminate" the person answering the question. This, of course, leaves it completely open for an objection to discovery being raised *during litigation* (which the old section 14B was designed to overcome). Moreover, it has been suggested that "s.155 does not abrogate the privilege to remain silent insofar as matters sought in the notice are relevant to the imposition of a penalty; in this context the word "incriminate" in s.155(7) is necessarily confined to matters of a criminal nature and thus it is only in this regard that the privilege is abrogated".[76]

The issue arose in *Melbourne Home of Ford (No. 1)* v. *Trade Practices Commission* where the Full Court of the Federal Court held that a notice given under section 155 may lawfully require information which might tend to expose the person questioned to a penalty.[77] That decision was on a case stated from Smithers J. who then proceeded to hear other arguments on invalidity.[78] The problem with the Full Court decision was that it did not refer to Isaacs J.'s decision in *Associated Northern Collieries*. A subsequent appeal from the decision of Smithers J. to a differently constituted Full Court, seeking to re-open the earlier Full Court decision,[79] was refused, the Full Court holding the issue to be *res judicata* and only available for reconsideration by appeal to the High Court.[80]

A more recent attempt to re-open the issue was made in an appeal to a further differently constituted Full Court of the Federal Court in *Pyneboard* v. *Trade Practices Commission*[81] where the Court followed *Melbourne Home of Ford (No. 1)* on the basis that the appellants had "failed to demonstrate either that the decision . . . was given per incuriam or that it is plainly and demonstrably mistaken".[82] In any case there may be room for argument that the privilege against exposing oneself to a penalty may be confined to "procedural steps in curial proceedings"[83] and certainly the decision in *Associated Northern Collieries* was restricted to questions of discovery in court proceedings. Whether the principle will be extended to answers given under section 155(1) remains to be seen.

In the meantime, the Trade Practices Commission, like the Comptroller-General, may be limited in its powers to obtain information once litigation has commenced by a person objecting on the basis that an answer is likely to expose that person to a penalty. If a person refuses to comply with a section 155 notice it may be difficult to prosecute a person for failing to comply with the notice as it may still not be possible for the Commission to obtain access to any documents or information to decide whether the notice has not adequately been complied with. It is suggested that a section similar in terms to those of section 14B should be inserted into the Trade Practices Act 1974 (Cth) so as to remove any doubt. We may readily agree with Messrs Huntington and Limbury that "any such amendment would raise fundamental questions as to the right to decline to incriminate oneself and as to whether such right should be abrogated",[84] but we ought not to shy away from facing those issues and, as shall be argued later, there is much to be said in favour of more power for the Commission.

II. ULTRA VIRES

Numerous objections have been raised in relation to the exercise of the Commission's powers under section 155 and to particular requirements in notices. Those objections have been expressed in manifold ways although it is submitted that most can conceptually be subsumed under the doctrine of ultra vires. Thus, the Full Court of the Federal Court has recently said that the primary question is one of *ultra vires*: namely whether the objection however based, can be sustained on the basis that the exercise of the power or a requirement could not have been made, or made in good faith, and for the purpose for which the power was granted.[85]

Indeed, the language of the section itself imposes a number of express limitations. The central provisions of the Act are contained in its first three sub-sections. It is section 155(1) which authorises the Commission to serve a notice upon a person who it believes may be capable of furnishing it with certain information, documents or evidence or to attend before the Commission to give evidence or produce documents. Two important limitations are placed upon the exercise of this power. First, that the Commission, Chairman or Deputy Chairman must have "reason to believe that" the person "is capable of furnishing information, producing documents or giving evidence". Secondly, the information, documents or evidence must *relate* to "a matter that constitutes, or may constitute, a contravention of" the Act or which may be relevant for the purposes of a decision pursuant to section 93(3) (which deals with notification of exclusive dealings).[86]

Sub-section 2 (the search and seizure provision) is to allow an "authorised officer ...to enter premises, and to inspect any documents in the possession or under the control of the person" and to make copies or take extracts of those documents. This provision is subject to seven limitations. First, that the Commission, Chairman or Deputy Chairman "has reason to believe that a person has engaged or is engaged in conduct that constitutes, or may constitute a contravention of" the Act. Secondly, that the purpose of the entry, search, seizure or copying must be "for the purposes of ascertaining" whether the person has engaged or is engaging in that conduct. Thirdly, that the method of ascertaining that fact is "by the examination of" the "documents in the possession or control" of *the* person. Fourthly, the officer must be authorised. Fifthly the authorisation must be from a member of the Commission. Sixthly the only things the authorised officer may do are: (a) enter premises; (b) inspect any documents in the possession or under the control of the person; and (c) make copies of or take extracts from the document. The officer may not hold an oral investigation. Seventhly, and most significantly, the provision may only be invoked against the person who is thought may have contravened the Act. The section does not authorise the inspection of documents held by anyone other than those under the control or in the possession of *the* person believed to have engaged or have been engaged in conduct contravening or possibly contravening the Act. Unlike the broad provisions of section 263 of the Income Tax Assessment Act 1936 (Cth), section 155(1)(b) of the Trade Practices Act 1974 (Cth) would not authorise access to places and documents of a third person like an accountant, solicitor or business associate.

1. Relatedness

A central concept of these provisions which has given rise to much litigation is that of "relatedness". Section 155 authorises a notice to be served in respect of information, documents or evidence which *relates* to a contravention, or possible contravention, of the Act or is "relevant" to the Commission's making a decision under sub-section 93(3). Potentially, this requirement could seriously restrict the Commission's power of investigation. If interpreted narrowly it could confine the Commission's demands to that information which it can show to be related. Taken at face value it would seem that judicial pronouncements have given these words a very wide interpretation, but it is submitted that the principle still acts as a great restraint upon the Commission and points to serious deficiencies in the Act.

The most common objection linked to this question of relatedness is based on an attempt to link the ordinary rules applicable on discovery to a notice under section 155. Typically, it is argued that section 155 requirements cannot be so vague or general as would amount to a "fishing expedition". The same argument was raised in the High Court in proceedings in respect of the Income Tax Assessment Act 1936 (Cth) in *F.C.T.* v. *A.N.Z. & Ors (Smorgan No. 3)*.[87] Section 264 of that Act authorises the Federal Commissioner of Taxation to demand the production of documents which *relate to* a person's income or assessment. In the *Smorgan* cases the validity of such a demand was challenged, *inter alia*, on the basis that the section did not authorise a "roving inquiry" or "fishing expedition". The argument was rejected with the Court holding that whilst the need for a relation limits the Commissioner's powers, he would not be limited in his inquiry to that information or those documents of which he has knowledge. He is entitled to make a "roving inquiry".[88] For the Trade Practices Commissioner the difficulty is that the relatedness is to be determined by the recipient of a demand who must decide whether the documents fit the description.[89] Admittedly, if the recipient is wrong he is liable to pay a penalty, but the burden of proving that the documents should have been produced will lie upon the prosecution.[90] Quite apart from any defence such as a reasonable and honest mistake which may be available to the recipient who does not produce related documents, the Commissioner is placed in a difficult position: he may not know that any related document or information has been withheld; moreover, in view of the judgment of Isaacs J. in *R.* v. *Associated Northern Collieries*,[91] he may be deprived of discovery upon action to recover a penalty. A dishonest or limited disclosure by a recipient of a notice or demand has a distinct advantage for that recipient. The same applies to section 155 of the Trade Practices Act 1974 (Cth). The Courts have appeared to uphold bureaucratic interference but in reality the Commission may have advanced very little. Given the legislative provisions, perhaps there was little else they could do.[92]

The relatedness issue arose in *Melbourne Home of Ford* v. *T.P.C. (No. 1)*[93] when the Federal Court had to consider whether a section 155 notice was sufficiently related to the relevant matter to be valid. Smithers J. held that section 155 did limit the information or documents which could validly be required by the Commission to those "which do in fact relate to" a matter which constitutes or may constitute a contravention of the Act.[94] Once that requirement is fulfilled the section allows the Commission to require all such information as the recipient may have and be able to

furnish.[95] It does not matter that the Commission does not know of its existence. Thus a very widely drafted notice would, on Smither's J. construction, be valid but perhaps less effective than a more tightly drawn one since the former leaves more room for the exercise of the recipient's discretion.[96] Whilst the Courts must not approach the question of relatedness overcritically or technically it is clear that lack of certainty or sufficient relatedness will result in a requirement or notice being held to be *ultra vires*.[97]

The judgment of Smithers J. has generally been approved by other Federal Court judges in subsequent cases including that of the Full Court in the appeal from his decision.[98] In that appeal the Full Court broadly endorsed the principle that the Commission's inquiry should be as broad as it chose to set, indicating that the Court's role was only to stop an investigation if the power had been exceeded in a particular case.[99] The Court indicated that a requirement for information or documents may be an excess of power if the requirement is "couched in such wide and general terms that a proper exercise of the investigatory power could not support the requirement in question".[100] As the Court explains:

> [t]his is but a particular application of the general principle that the exercise of a discretionary power must be reasonably capable of being regarded as related to the purpose for which the power is conferred (see *e.g., Allen Commercial Constructions Pty Ltd* v. *North Sydney Municipal Council* (1970) 123 C.L.R. 490 [1971] A.L.R. 201). If the requirement expressed in a particular notice is reasonably capable of being so regarded, that ground for alleging an excess of power fails.[101]

The concluding sentence of the passage quoted to graft upon section 155 a requirement that each particular notice must on its face appear "reasonably" capable of being related to an offence or alleged offence. The Court has said that they are disposed to read the Commissioner's power under section 155 quite broadly[102] and thus one should expect that the "reasonableness" requirement will only rarely be available to strike down an otherwise valid notice.

2. Reasonableness

Another ground for invalidity is based on the argument that any requirement in a notice must bear a reasonable relationship to the alleged offence. One should not confuse the reasonable relationship which must exist between the requirements in a notice with the reasonableness of there being a relation between a requirement and an offence or possible offence. It was with the latter reasonableness that the Full Court in *Melbourne Home of Ford* was concerned in the passage extracted above. It is clear from the authority cited in that passage that the Court was merely concerned with emphasising the basic point that a power, when granted, can only be lawfully exercised for the purpose for which it was conferred. In *Allen Commercial Constructions Pty Limited* v. *The Council of the Municipality of North Sydney*[103] the High Court was concerned with whether a particular planning condition imposed by the responsible authority upon a planning permit was *ultra vires* the enabling ordinance which gave the responsible authority power to grant applications subject to such conditions "as it may think proper to impose". In holding the particular condition valid Walsh J. (who delivered the leading judgment in the High Court) said that the ordinance should be understood:

> [N]ot as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made.[104]

Thus the High Court merely stated that any power or discretion given must be subordinated to the scope and purposes of the Act. So understood, the Full Court in *Melbourne Home of Ford* expressed that if there is a lack of reasonable relation between the requirement and an offence, or possible offence, then the Commission will have exceeded its powers and the notice required will be invalid. This leaves open the question of what in the future will be regarded as an insufficiently reasonable relation, and, beyond the generally expressed intention of giving the provisions a broad interpretation in favour of the Commission, there are few guidelines.

In *Panelboard Pty Ltd* v. *T.P.C.*[105] Fox J. was confronted with a situation similar to that in the *Melbourne Home of Ford* case. On the question of reasonableness, His Honour stated that "[i]n practice the most that a Court can do is to ask whether the particular requirement is reasonably capable of being regarded as 'related'" and where there is ambiguity or uncertainty the proper approach is "to ask whether on a fair construction there is any reasonable doubt".[106] Such tests are to be used in favour of the validity of a notice and "a question or requirement in a notice issued under section 155 is not invalid solely on the ground of uncertainty or of ambiguity, unless a point is reached where it cannot reasonably be given any meaning".[107]

The other aspect of "reasonableness" which has occupied the Court's time is the argument that the requirements must themselves be reasonable. The simple assertion that the notice or a requirement in the notice will be invalid if it is burdensome or oppressive has been rejected.[108] In *Panelboard*[109] it was argued that one requirement was so unreasonable; not that it was *per se* invalid on the grounds of unreasonableness, but that the unreasonableness provided strong evidence to suggest that the Chairman of the Trade Practices Commission had exceeded his powers. It was stated on affidavit that compliance with the requirement would require production of over 20,000 invoices, statements and delivery dockets located outside the place where the notice required production.[110] Fox J. rejected the submission on the basis that there appeared to be sufficient relatedness but continued with the qualification that there may be cases in which it might be possible "to say that a notice, regular on its face", may "in the circumstances be attacked because of the harshness of its impact (time, place, number of documents are three possible factors)".[111] In this case the recipient of the notice did not succeed because the requirement could not be described as sufficiently harsh since any harsh effect of complying with a requirement was caused by the size and organisation of the business operation rather than the requirement.[112] In *Pyneboard Pty Ltd* v. *T.P.C.* the Full Court upheld the decision of Fox J. holding that the test is whether the requirement is so harsh, oppressive or unreasonable as to lead to the conclusion that "the requirement could not have been imposed in good faith or could only have been imposed to achieve a collateral purpose or without regard to the burden which it would impose upon the recipient [of the notice]".[113]

In principle, the point may be reached where the requirement is so onerous as to be unduly burdensome and oppressive[114] and hence be *ultra vires*, but the point at which invalidity arises has "ever been elusive".[115] In *Clinch* v. *I.R.C.*[116] Ackner J. discussed an objection to comply with a notice to provide documents and information which, it had been submitted, would take five months full time work with paid assistants to complete. His Honour reasoned that even assuming the estimate to be correct the plaintiff could not rely upon his own failing to support a claim that the notice was burdensome or oppressive;[117] the plaintiff should have anticipated the possibility of being required to supply information when setting up office procedures. It would, however, be burdensome or oppressive to request answers which could not be supplied without having professional or accounting advice constantly on tap.[118]

Meanwhile, as realised by the Courts, genuine practical problems with interpretation of section 155 notices do arise. Fox J. in *Panelboard* pointed to the glaring deficiencies in the Act which exist due to the absence of legislative machinery by which the Court may make declarations interpreting ambiguous words in otherwise valid notices.[119] The only machinery present is section 163A(1) conferring jurisdiction upon the Court, *inter alia*, to make declarations in relation to the "operation or effect of any provision of the Act", or in relation to the validity of anything done under the Act. This does not extend to declarations of construction.[120] Legislation should be introduced to remedy this situation.

In the interim the recipient of a notice must do his best. If the question is so wide that an answer might include material not related to the matter investigated, then to that extent no answer need be given.[121] A reasonable construction of a notice will give much latitude to the Commission and the onus will lie upon the recipient to determine, initially, whether the question or requirement has exceeded the powers of section 155. The recipient may act expediently and simply ask the Commission for clarification of any doubt[122] or in other cases state his understanding of the question before giving an answer.[123] The meaning of notices is to be construed from the commercial circumstances in which the notices are given.[124]

3. Scope of Questions

A question may be so wide as to be uncertain. It has been held that a notice must convey with reasonable clarity exactly what information the recipient is required to disclose.[125] The primary question remains one of *ultra vires* so that a notice, or a requirement within a notice, will not be held invalid unless it is so uncertain in that it "cannot reasonably be given any meaning".[126]

The Federal Court held that one requirement in the notice in the *Pyneboard* case was so uncertain. The notice required that particulars be produced which "supported" any reason for price increases. It was held that there was sufficient uncertainty about whether the required documents were those which supported the existence of the reason or those which supported the correctness of the reason.[127]

The range of information which may be required is quite broad and the requirement of clarity and certainty will not be applied preciously or overcritically.[128] For example, it will be no objection that answers provide merely cicumstantial evidence.[129] Evidence of possible defences to any charge may equally

be required with evidence of an incriminating nature since the former goes to determine whether the Commission ought to prosecute and thus forms part of an "investigation".[130] The breadth the Courts appear to be prepared to allow the Commission can be seen in a statement of the Full Court in *Melbourne Home of* Ford v. *T.P.C.*:

> The investigative power may properly be exercised by inquiring into the existence of facts which do not themselves constitute a contravention or deny the possibility of a contravention. The power may properly be exercised to ascertain facts which may merely indicate a further line of inquiry, or which may tend to prove circumstances from which an inference can be drawn as to the existence of other facts which have a more immediate and approximate relationship to the matter under investigation.[131]

A requirement to produce information which may bear "directly or indirectly" on some matter will not be invalid for uncertainty though the burden cast upon the recipient by such a broad requirement will be greater.[132]

In *Riley McKay Pty Limited* v. *Bannerman* it was held that one question was partly invalid insofar as it might lead the Commission to particular individuals "who might be possible witnesses".[133] This was viewed as an inappropriate use of section 155(1).[134] Such a conclusion might be thought to conflict with the more general statements of the Full Court in *Melbourne Home of Ford* and it is submitted that to that extent the dicta in *Riley McKay* should not be followed. In some cases, the Courts have placed some limitations upon specific words which have been used in section 155 notices. "Meeting", for example, has been limited in the case of one notice to refer to those meetings marked by "some formality and purpose".[135] A question will not be invalid merely because it requires the exercise of judgment[136] but the section cannot be used to seek interpretations of a document other than interpretations of symbols, codes etc.,[137] or to require a recipient to form a judgment as to the matters which arose in proceedings such as those before the Prices Justification Tribunal.[138]

Similarly, a requirement may validly seek information regarding "discounts, allowances, rebates or credits" even though the alleged related matter or offence speaks only of "discounts and allowances".[139] A requirement may validly seek information regarding matters that relate to competitors as well as non-competitors[140] and regarding the purpose of meetings. In this context "purpose" will include all "substantial or significant purposes".[141] Where opinions are necessary, the relevant opinions will be those of the company's officer or officers who attended the meeting on the company's behalf,[142] and it will found no objection that the company must act in the "role of detective" by having to find the information.[143]

4. Reason to Believe

It is a condition precedent to the issuing of a section 155 notice that the Commission, the Chairman or the Deputy Chairman *"has reason to believe"* that a person is capable of furnishing information, producing documents or giving evidence relating to an investigation. The belief relates to the ability to provide information and not that an offence has been committed.[144] To challenge a section 155 notice would thus require the applicant to show that the Commission, Chairman

or Deputy Chairman "has no reason to believe that the person to whom the notice is given is capable of" providing the relevant information.[145] A formidable task.

Similarly, the power must not be exercised "dishonestly or in bad faith"[146] and thus if there are no reasonable grounds for belief then there has been an abuse or excess of power.[147] In 1942 the House of Lords held, in *Liversidge* v. *Anderson*,[148] that a defence regulation authorising the imprisonment of persons who the Secretary of State had reasonable cause to believe to be of hostile origin or association merely required that the secretary hold an honest belief and that his belief could not be impugned on the grounds of lack of reasonableness. It was held that the Secretary of State was alone in deciding whether "reasonable" cause existed. That case has subsequently been disapproved of in the United Kingdom[149] and there is some Australian High Court authority for the proposition that whether reasonable grounds exist is to be determined by objective analysis.[150] Even so, the task confronting a recipient is not insignificant.

A number of attempts to run these arguments have been made. In *W. A. Pines* v. *Bannerman*[151] the recipient of the section 155 notice sought a declaration of invalidity pursuant to section 163A of the Act and in the process sought discovery of the Chairman to gain evidence to assist in the argument that he lacked reason or "reasonable" reason to believe that information might be supplied. The right to discovery was in principle affirmed but in the circumstances denied. Brennan J. held that discovery should not be granted in such circumstances where it would amount to "mere fishing". In the case before him there was no more than a bold assertion that the Chairman lacked sufficient "reason to believe", there was neither an "anterior relationship between the parties" which entitled one to obtain information from the other, nor was sufficient "shown to ground a suspicion that the party applying for discovery had a good case" which might be aided by discovery.[152] Lockhart J. took a similar approach characterising the appellant's ploy as "seeking to use the weapons of discovery and interrogatories to find out if it has a case of which it presently knows nothing".[153]

More originality was employed to challenge the Commission's reasons in *Ricegrowers* v. *Bannerman*[154] although with no greater success. The Commission served a section 155 notice on the Ricegrowers Co-Operative Mills Ltd (Ricegrowers) in March, 1981. The Administrative Decisions (Judicial Review) Act 1977 (Cth) (the Judicial Review Act) provides for the review of administrative decisions by the Federal Court on a number of grounds[155] and also provides for a person entitled to apply for review to obtain reasons for an administrative decision by making a request in writing for a statement "setting out the findings on material questions of fact, referring to evidence or other material on which those findings were based and giving the reasons for the decision".[156] Ricegrowers made such an application but the Commission refused to supply its reasons on the grounds that the Judicial Review Act did not apply to it. It was held that the service of a notice issued under section 155 was exempted from the Operation of the Judicial Review Act by Clause f(iv) of Schedule 2 of the Act.[157]

In any case, where a notice or requirement in a notice is partly invalid then it is generally for the questioner to modify the question so as to bring it within the ambit of power.[158] This is only the case where "blue pencil deletion of what is invalid is not

practicable or where, if such deletion be practicable, it would result in what is substantially a different question".[159]

III. ADMISSIBILITY AND USE OF ANSWERS

Having obtained information in response to a section 155 notice, the Commission may still not be at liberty to use it in subsequent proceedings. Notices requiring companies to make depositions also have their attendant difficulties. In the first of the *Smorgan* cases[160] Stephen J. had held that section 264(1)(b) of the Income Tax Assessment Act 1936 (Cth) could not be used to require "the company to attend, whether by its public officer or in some other form".[161] No doubt a corporation may be bound by admissions obtained in the evidence of a duly authorised individual, "but the evidence will remain that of the individual witness".[162]

The same issues have arisen in relation to section 155. In *Riley McKay* v. *Bannerman*[163] Bowen C.J. applied the statements of Stephen J. in *Smorgan (No. 1)* holding that it was inappropriate to ask for the knowledge or belief of the company: a notice should seek the "knowledge or belief of the company's directors or employees or as the case may require".[164] However in this context section 84 of the Act may possibly be used to attribute intention, purpose or conduct to the body corporate. Section 84(1) provides that where it is necessary to attribute intention to a body corporate, it will be sufficient to show that a servant or agent who had engaged in the relevant conduct had that intention. The provision is limited to proceedings brought under Part IV of the Act which deals generally with enforcement and remedies for breaches under Part IV and V of the Act and may not extend to a failure to comply with section 155 which is located in Part XII of the Act.

Sub-section 84(2), on the other hand, deems that the conduct of a director, agent or servant of a body corporate shall be the conduct of the body corporate where that conduct is engaged in on behalf of a body corporate by that director, agent or servant or any other person if at the direction or with the consent or agreement of the director, agent or servant of the body corporate (whether express or implied). However, this deeming provision is restricted to acts performed on behalf of companies and does not extend to "admissions" which may be made in compliance with a section 155 notice.[165] In *T.P.C.* v. *Nicholas Enterprises Pty Ltd & Ors*[166] a notice was issued against a number of liquor dealers alleged to have been engaged in arrangements which would lessen competition contrary to section 45 of the Act. The judgment of Fisher J. warrants careful reading as it discusses the application of many aspects of evidentiary principles to information obtained pursuant to a section 155 notice. Some of the more important principles to be found in the judgment can be summarised as follows:

1. That if an employee of the corporation has sufficient standing to "speak on behalf of his company" the answers which may be received may be admissible as against that company.[167] Similarly, a statement of an employee may be inadmissible against his or her employer if that employee does not have authority to make that statement.[168]
2. Any admission will only be admissible against the party which has made it

and not against other parties which may otherwise have been involved in a common purpose with the party making an admission. This follows the evidentiary rule which provides that evidence will only be admissible against another party if it can be said to relate to something done in the furtherance of a common purpose, and the making of an admission cannot generally be seen as part of a common purpose.[169]

1. Protection of Confidences

Closely allied to the Commission's power to obtain information under section 155 is the extent to which corporations and natural persons are able to protect confidential information. The issue arose in *Allied Mills* v. *T.P.C.*[170] where the company, Allied Mills, sought to prevent the Commission from using certain documents which it had been given voluntarily by a former Victorian manager of the company. The Commission had investigated proceedings against Allied Mills and other companies alleging breaches of section 45 of the Act. When the former employee (Mr Matthews) gave documents to the Commission (which included a diary belonging to the company) the company demanded the return of the documents and sought an order restraining the Commission from using the documents. One of the arguments raised by the Commission was that it had power to require that the documents be produced under section 155 and therefore there was no point in returning them. Sheppard J., in the first hearing (a petition for leave to file and serve a cross-claim), rejected that argument following the decision in *Brambles Holdings Ltd* v. *T.P.C.*[171] that it would amount to a contempt of court to serve a section 155 notice once proceedings had commenced. Leave to file a cross-claim was granted to the company.

On the hearing of the cross-claim the company was not successful in having the documents returned. Counsel for Allied Mills argued that the only way in which the Commission might obtain information was by exercise of its powers under section 155 and that if it came by information in any other way the proper course "was to offer to return" it to the owner.[172] This argument was rejected after a careful analysis of the purpose of section 155 with Sheppard J. holding that the Commission was entitled to retain the document.[173] It was also argued that section 155 could only require persons who actually owned documents to produce them. It was pointed out that section 155 referred to persons "capable of furnishing...documents" and it was submitted that only the true owner could fit that description.[174] That too was rejected by Sheppard J. on an analysis of the purpose of the section. First, he said, that the company's argument could only be raised in relation to "documents" whereas the section also referred to "information". Thus to accept the argument would be to place documents in a different position to other information where "ownership" would not be applicable on any construction of the section.[175] Secondly, that the section itself, as well as section 156, draws a distinction between the person producing the document and the person entitled to possession of it. Clearly the person producing the document need not be the true owner.[176] Sheppard J. held that the company was not entitled to the return of the documents where an iniquity was disclosed and further that the Commission would have been entitled to keep them anyway.[177]

The case is particularly important in that it addresses the much broader issue of the application of the law of confidence. These issues are not restricted to the employee and employer relationship where the former may have gained some confidential information which the latter does not want to see disclosed. A "would-be" informant may wish to know whether he can safely supply information to the Commission or other party without being exposed to litigation for breach of a confidence. Moreover, if an employee has disclosed information he may be very keen to have his identity concealed to avoid dismissal.[178]

The modern principle that confidence will not be protected by the Courts in certain circumstances has been traced to the State trial of the Earl of Angelsea in 1743[179] in which it was said that the conversation with an attorney could be subject to an order of disclosure if the attorney was "employed in any unlawful or wicked act"; indeed that the attorney's duty "to the public obliges him to disclose it".[180] That dicta was followed in *Gartside* v. *Oatram*[181] in circumstances which have acute application to trade practices situations. The case involved an action by an employer to prevent disclosure by an employee of information obtained during the course of his employment. During the interlocutory stages of the case the employer, the plaintiff, declined to answer interrogatories which would support the defendant's argument that the plaintiff's business had been conducted fraudulently. Wood V.C. held that the plaintiff was obliged to answer the interrogatories and could not rely upon a confidential relationship to protect the fraud. Wood V.C. reasoned that there "is no confidence as to the disclosure of iniquity"[182] and said:

> You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.[183]

It may be worth noting that the argument was based upon the notion of a property right in keeping secrets, in this case associated with trading, with the Court holding that such a proprietary right could not be said to exist as regards inequities.[184]

Fraudulent intentions are doubtless "inequities" as are breaches of the Trade Practices Act as held by Sheppard J. in *Allied Mills*,[185] but much scope lies in between leaving room for dispute as to whether confidences shall be protected. The doctrine was re-examined with some modification in the case of *Initial Services* v. *Putterill*,[186] where, Mr Putterill, a former employee of Initial Services, had disclosed to the press certain documents revealing that Initial Services had been involved in price fixing agreements contrary to law. The company sued Putterill alleging breach of an implied term of a contract of employment to keep certain confidences. The case reached the Court of Appeal on the narrow issue whether the defendant's pleadings in defence were unfounded. The Court held that it was not possible to say that the defence was unarguable, but that in the course of giving reasons for the decision, their Honours considered the scope of the exceptions to the rule that confidences should be kept.

The two principal judgments were delivered by Lord Denning M.R. and Salmon L.J.; with Winn L.J. agreeing with the conclusions of both. Lord Denning M.R. was prepared to hold that the exception to the law's protection of confidences extended "to any misconduct of such a nature that it ought in the public interest be disclosed to others".[187] Whether "misconduct" is broader in scope than "iniquity"

or not, it is certainly broader than "unlawful" or "offending against some Act". Thus, it is arguable on the Lord Denning formulation, that an employee could not be sued by an employer for, or be prevented from, disclosing information to the Trade Practices Commission if what is being disclosed can properly be characterised as "misconduct" even though it may not amount to an offence against the Act. What will be required is a consideration of the public interest involved in the disclosure.

In his judgment, Lord Denning M.R., went well beyond an earlier Court of Appeal decision in *Weld-Blundell* v. *Stephens*.[188] In that case an accountant was being sued in negligence and breach of contract. He had been employed by the appellant in a confidential capacity to investigate certain matters and conduct of a third person. In the letter of appointment the appellant had defamed the third person who had in turn successfully sued when the letter had been accidentally discovered. The appellant's defence that confidence in an iniquity could not found a cause of action was to a large extent rejected by the Court of Appeal.[189] The case did not involve a criminal act or fraud but merely the disclosure of a libel. Banks L.J. sought to restrict the exception "to the proposed or contemplated commission of a crime or a civil wrong" a restriction which was expressly disapproved in the latter case by Lord Denning M.R.[190]. According to the Master of the Rolls the "exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always — and this is essential — that the disclosure is justified in the public interest".[191] Thus, although subject to a broad "public interest" discretion, Lord Denning M.R. would happily extend the exception to cover the nebulous concept of "misdeeds". This decision has subsequently been approved and followed by the House of Lords.[192]

Salmon L.J. took a more cautious approach than Lord Denning M.R. although the result would be the same. Like Lord Denning M.R., he concurred in the view that the defendant's case was not unarguable, but noted that the defence pointed to a breach of an Act and not merely a "misdeed". However his judgment indicates a readiness to go further when he expressed the view that a Court was unlikely to assist a person to carry out agreements which were contrary to the public interest even if an agreement to keep confidences had been expressly made.[193] This view is consistent with the majority decision in *Weld-Blundell* v. *Stephens* where it was held that the libel should not have been disclosed, but that the damages suffered by the appellant in a subsequent suit for defamation could not be recovered. It was held that having acted wrongly the appellant could not seek the protection of the contract to protect his own wrongdoing.[194] To allow the appellant to recover the amount suffered in the libel suit would amount to an indemnity for his own wrongdoing.[195] Hence even assuming that "iniquity" is not as broad as Lord Denning M.R. would allow, there is strong authority to deprive a complainant of any indemnity or special damages caused by the disclosure.

An employee "eager to spill the beans" might also be interested in another aspect of the decision in *Initial Services*. The information was not disclosed to the relevant government authority but to "the press". Again the ratio was that this fact did not make the defence "unarguable". More explicitly Lord Denning M.R. held that

disclosure of an iniquity must be a "proper person",[196] but that sometimes a proper person may include the press.[197]

2. Tracking Source of Information

However the Commission obtains its information, whether pursuant to a valid notice by some other means, a person (whether corporation or otherwise) whose confidences have been breached or secrets revealed may wish to discover the source of the information for perfectly valid reasons. The viability and effectiveness of the Commission's investigatory activities will largely depend on the extent to which it can guarantee confidentiality and conceal the identity of its informants. Informants may be unwilling to come forward voluntarily if their identity can easily be discovered; and unwilling informants will maintain their reluctance when giving information by saying as little as possible if they know that their identity will be revealed. Competing interests must be balanced and priorities set. Assuming the information disclosed was not true it may be that a cause of action exists against the informer, who may even be a trade rival with much to gain by "weighing down" a competitor with a Trade Practices Commission investigation or merely adverse publicity. Typically, the issues may arise where information has been volunteered either to the Commission or to the press but different considerations will arise in each of these situations.

With respect to information supplied to the Commission the first point to note is that there is no general provision ensuring that information supplied shall be kept secret. There are provisions limiting disclosure of documents and information supplied for authorisation,[198] on notifications of exclusive dealings[199] and regarding access to documents on the public register.[200] Section 157 provides for the disclosure of copies of "documents" furnished to the Commission or otherwise in its possession which are related to:

1. An application for authorisation;
2. A notice given by the Commission under section 91(4);
3. Proceedings commenced under sections 77, 80 or 81; or
4. An application under sections 80A or 87(1A); and

which tend to establish the case of the corporation or other person.

Section 157 is clearly applicable to all documents however the Commission may have come by them. But there are many limitations.[201] First, it only applies to "documents" and not all information. Secondly, there is no requirement to disclose the source of the documents. Thirdly, documents prepared by an officer of the Commission or personal adviser to the Commission are exempt. Fourthly, section 157(3) gives the Court a very broad discretion to refuse to require disclosure of a document if it "considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason".

Quite apart from any debate about whether section 157 can be relied upon to limit the discovery the Crown might otherwise have to make,[202] it remains true that section 157(3) does give the Court broad powers to limit discovery on that limited range of documents which section 157 alone makes discoverable. Moreover, this says nothing of the other grounds for resisting discovery, of such matters as the

identity of an informant.

It is now settled authority that a refusal to disclose the source of information to an interested party will not inevitably result in the Commission failing to act in accordance with the rules of natural justice.[203] In a case which seeks to rely upon a breach of natural justice the Commission could justify the non-disclosure of its source of information on the need for confidentiality and anonimity of persons who come forward to prevent unlawful actions: to disclose the source of information might lead to their being reluctant to come forward in the future and hence hindering the Commission's work. Doubtlessly, the Commission has a duty to act fairly but that might be discharged by giving a party "sufficient indications of the objection raised against him to enable him to answer them".[204] It is submitted that it will rarely be possible to obtain from the Commission the source of information and documents other than as provided in the Act.

3. Bill of Discovery

In *Norwich Pharmacal Co* v. *Customs and Excise Commissioners*[205] a bill of discovery seeking the names of persons importing chemicals which infringed the appellant's patent was granted. The rule was stated to be that discovery cannot be made against a person who is merely a bystander or who has possession of the documents.[206] The exception to that rule was more narrowly drawn:

> [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.[207]

There the Customs and Excise Commissioners had become involved in the very transaction of the wrongdoing — albeit innocently. The Commissioners had detailed records of the names of persons importing the infringing chemicals into the United Kingdom. To effect the wrongdoing, it had been necessary to give particulars to the Commissioners. Only in rare cases will it be possible to argue an analogous case with respect to the Trade Practices Commission other than where it is possible to allege that a person has been defamed (perhaps maliciously) by furnishing incorrect information. In *D.* v. *National Society for the Prevention of Cruelty of Children*[208] the House of Lords upheld the claim of privilege of the N.S.P.C.C. and refused an order for discovery of the name of an informant. In that case their Lordships held that a bare promise of confidentiality would not be sufficient to ensure protection unless "by reason of the character of the information or the relationship of the recipient of the information to the informant a more public interest is served by protecting the information or the identity of the informant from disclosure in a court of law".[209]

The Courts have shown a greater willingness to protect the names of informers than to protect the disclosure of information or documents themselves, especially where the body seeking information has statutory power to compel the information to be supplied. In *Alfred Crompton* v. *Customs and Excise Commissioners (No. 2)*[210] the House of Lords rejected the Commissioner's claim of confidentiality in the information itself, holding that on the balance of competing interests, the case in favour of confidentiality was not as strong as in the case of informers because the

Commissioners had statutory power to require that information be supplied.[211] Obviously the same can be said of the Trade Practices Commission: there is good reason to preserve the anonimity of a voluntary informer, for otherwise, the Commission might not become aware that certain people could provide information; less protection need be given to the actual information, since the Commission has power to require that it be furnished.

Different considerations arise with respect to obtaining information from the press.[212] As a matter of construction there is little doubt that the Commission can use its powers under section 155 to require reporters to furnish information. But if a person or corporation wants to discover the identity of information supplied to the media it immediately raises the complex issues, both legal and social, discussed in *British Steel Corporation* v. *Granada Television Ltd.*[213] That much publicised decision involved an action seeking the identity of the person who had disclosed to Granada Television Ltd certain damaging material concerning the operations of British Steel Corporation in the handling of a strike. Since the *Granada Television* case it would seem that it is possible for an injured party to discover of a newspaper or other meddia reporter the identity of the informant. Their lordships stressed the need to weigh competing public interests and in that case preferred the public interest in disclosing the identity of a person against whom an injured party had a cause of action.[214] Of their lordships forming the majority, only Viscount Dilhorne restricted the basis upon which he would order disclosure on the fact of a wrongdoing (a breach of confidence) in which the journalist has become involved.[215] Their lordships did however differentiate the situation before them from those cases involving libelous action where the so-called "newspaper rule" generally precludes disclosure of the source of information of the libel.

IV. THE CASE FOR INQUISITION

In all this discussion and in all the decisions, as is often the case, many of the most important issues are often not articulated and the most ingrained and basic assumptions not analysed or explored. It is therefore pertinent to draw attention to the underlying assumptions which may inform the judiciary in actions which touch on the broad questions of access to information. As can be seen, the Courts have generally taken a broad interpretation of section 155 and have not been seen as being unduly restrictive in their interpretation of the section. Legalism apart, there is much to be said in favour of such a broad view and the policy which should inform the judiciary in its deliberations should not pass without mention.

One of the important upshots of the recent spate of litigation on section 155 is that we see the judiciary coming to terms with the modern world but still relying upon many worn out concepts developed in other times. No doubt unconsciously, judicial opinion and counsel's argument are informed by mutually preconceived assumptions which are rarely reviewed and tested for their validity in the modern complex world. Those assumptions need to be debated so that the hollow rhetoric which echoes in such standbys as "liberty", "freedom" and "privacy" can be filled with a modern dose of social and political reality.

1. A Brief Perspective on Liberty

Our current notions of liberty owe much to the philosophers and theorists of previous generations. The "Millian" concept of liberty is an integral part of our western democratic state — and rightly so. What is often forgotten, however, is that the thinkers and philosophers of yesteryear were addressing their remarks to particular problems of their own time.

Hobbe's *Leviathan* as much as Montesquieu's *Spirit of the Laws*, John Locke's *True End of Civil Government* and Rousseau's *Social Contract* represent an attempt to place limits upon the arbitrary exercise of power by the sovereign. Each of the social theorists concerned with a theory of the State realised that a crucial aspect of any State was the use of force.[216] The capricious use of force was seen as an evil to all social theorists and all attempted to place some limitations upon its power. Underlying this concern were the particular political realignments of the day; the attack on despotism was also an attempt to justify political authority in the hands of different classes. Even the famous doctrine of separation of powers, which today has lost much of its original meaning, was no more than an attempt to weaken the legitimacy of the despotic rule of the monarch in favour of the intermediary powers of clergy and nobility which dominated Montesquieu's social order.[217] Theorists such as Montesquieu took as their source of attack the "absolute monarchy" of their day[218] and favoured a splitting and combination of political power to avoid despotic rule.[219]

It must be apparent to even the most cloistered scholar that today's world is different to that described in previous centuries. To be sure threats to individual freedoms[220] still exist and those threats may take on a far more subtle mantle as was argued by Hayek when he objected to economic controls on the basis that individual action is reduced and replaced by an impersonal set of moral and philosophical priorities which the people cannot choose to reject.[221] However, the lines of arbitrary and despotic action have been greatly reduced. Philosophers and political scientists may argue that there has been a shift in government such that the traditional lines of accountability to Parliament no longer serve as *effective* control over political action[222] but it will still be a gigantic leap to proclaim the loss of popular liberty and individual freedoms.

2. Liberty, Public Policy and the Courts

It would be equally naive to argue against the notion that modern life has seen a vast intrusion of the State into public life.[223] The point is simply that it is insufficient to see this intrusion *a priori* as a death knell to our individual freedoms and liberties. Moreover, there is a substantial argument which can be mounted from precisely the contrary notion; arguments which often seem to be implicitly rejected by judicial pronouncements.

We may begin with two simple points of common agreement: (1) modern life is very complex; and (2) that society cannot exist with uncontrolled individual freedom.[224] The difficult issue will be to determine the appropriate extent of individual freedom. John Stuart Mill attempted to define such extents for his time and some of his comments may be of use for us today. He wrote that:

> [i]n the conduct of human beings towards one another it is necessary that general rules should for the most part be observed, in order that people may know what they have to expect: but in each person's own concerns his individual spontaneity is entitled to free exercise.[225]

Thus Mill conceived two clearly distinct domains: the public domain and the purely private one. But how do we distinguish between the two? Mill's answer was the concept of purely self-affecting action:

> Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the problems of liberty, and placed in that of morality or law.[226]

Mill's first maxim that the individual is accountable to society for all his actions except those which "concern the interests of no person but himself" is the essence of the doctrine of individual liberty.[227] This is not to be confused with the social act sometimes referred to as freedom to trade. Less there be any doubt about Mill's view, it should be noted that he stated quite clearly that:

> ...trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interests of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society...As the principle of individual liberty is not involved in the doctrine of free trade, so neither is it in most of the questions which arise respecting the limits of that doctrine;...[228]

To Mill's example there could be added each of the several provisions of the Trade Practices Act 1974 (Cth) which deal with matters quintessentially social in the trading field.[229]

Whatever difficulties exist in drawing the dividing line between personal liberties and social acts,[230] once the act is shown to have social consequences the force of any argument advocating greater liberty is thereby reduced. Moreover, modern society being what it is, the growth of intrusions into the seemingly private domain is typically matched by a growing need of that intrusion precisely in order to preserve the great bulk of social liberties and freedoms which we have remaining.

If it had ever been possible to identify in trade and commerce a purely private domain which could not justifiably be intruded upon by the machinery of state, it is now even less likely. It has been repeatedly demonstrated that with the decline of *lassez faire* capitalism the modern industrial state makes the division of private and public in economic matters impossible and illusory.[231] Both organised industry and powerful unions have "become giant and powerful social forces"[232] whose decisions regarding products, quality, wages, employment and economic development affects us immediately and ultimately.[233] Their power to mould our preferences and desires is now a commonplace of conventional wisdom. With the discrediting of — or at least doubts cast over — the ideal of consumer sovereignty as an effective check upon activities of the modern industrial state[234] our Courts must be shaken out of their complacency and forced to question seriously whether their notions of economic liberty are not in fundamental conflict with more basic democratic values of public accountability. Writing, well over a decade ago, Professor W. Friedmann noted that the "unquestioning identification of economic liberty and material progress, with political and social democracy...is more than ripe for an examination".[235] Indeed Professor J. K. Galbraith writing at about the same time as

Friedmann revealed the "irony" that [a] doctrine that celebrates individuality provides the cloak for organisation".[236] In market power terms, it "is not the individual's right to buy that is being protected. Rather, it is the seller's right to manage the individual".[237] More recently the point was made by R. Cranston who reminds us of the often forgotten fact that "[t]here are different dimensions to liberty. Control of one dimension does not necessarily lead to control over another. Conversely, the pursuit of liberty by one group in society (for example, producers, or the wealthy) will ultimately conflict with the liberty of others (consumers or the poor). At that point, government intervention *is* needed to resolve the conflict".[238]

In a society which claims to cherish the traditions of individual freedoms, democracy and popular sovereignty the imminent threats to those cherished ideals must seem obvious. And yet we still find the judiciary making the fundamentally erroneous equation between an individual's private liberty in purely personal actions and private liberty in his economic affairs. The most celebrated case where these liberties were misequated is that of *I.R.C.* v. *Rossminster*[239] a decision of the House of Lords on the lawfulness of a search conducted by officers of the Inland Revenue Commission of "private" business papers of a number of persons suspected of being involved in tax avoidance schemes. Whilst the decision reached us ultimately correct, the explicit assumptions which informed some of their lordships' decisions must be open to serious question. For example, Lord Scarman said:

> Important as is the public interest in the detection and punishment of tax frauds, it is not to be compared with the public interest in the right of men and women to be secure in the privacy of their homes, their offices and their papers.[240]

Informed with this notion of the issues Lord Scarman "regretted" the decision that he had to make on the statute before him;[241] to be sure, statements made by his lordship would find few dissenters; he simply misequates two freedoms. Any argument extolling freedom of trade (or in the *Rossminster* case, freedom to arrange one's affairs to minimize the incidence of taxation) must rest upon economic and political considerations and has no adequate connection with the ideals of individual liberty.

The debate is not whether the Court should be guided by the economic consequences which their decisions will cause,[242] but more simply that the philosophy which often underlies the decision needs to be more rigorously questioned. In *Rossminster* it was not necessary to require the judiciary to consider policy issues such as the redistribution of income or wealth, or to decide upon an economic analysis of the facts. The thrust of the present criticism is more modest: merely that their philosophical perspective — in that case more fully articulated than in most — requires more rigorous analysis, for their ideal of individual freedom may not be served by a misapplication of the principle in economic affairs. So too it is in all aspects of economic regulation and hence the Trade Practices cases which have been discussed.

3. A Delicate Balance

We need not dwell overly long on whether power may be abused. The point is readily conceded. So, as with all standard analysis on difficult matters we may at once identify our quest as the need to find the delicate balance between the proper

exercise of executive power and the prevention of its abuse. We may also leap to embrace the near tautology of which lawyers are so fond, that power is abused when it is not used for the purpose for which it was given.

Section 155 of the Trade Practices Act on its face gives the Commission very broad powers of investigation. It has rightly been described as the "lynch pin" of the Commission's enforcement role: "[w]ithout it the Commission is sterile".[243] To the extent that the Act represents an attempt to ensure public accountability of important social activity by corporations and by individuals engaged in interstate trade and commerce, the fate of section 155 will determine the future of public control over matters which affect society in its public domain; not only will the Commission be paralysed in enforcing the provisions of the Act, but the public through its governmental agencies and political processes will be hampered in moulding the sort of economy (and, arguably, society) it desires.

Without effective machinery to supervise, investigate and to keep track of developments in the economic domain, the public will be helpless to enforce such ideals as competition, small business and consumer protection in the design and production stages. It will be even more helpless against anti-competitive agreements which create barriers of entry into the market, create higher prices for goods and services, limit goods and services readily available to it, decrease job opportunities and so on. None of these can be prevented without governmental supervision. For those entranced by the love of personal freedom let us be quite clear that we are talking about strikingly public consequences of artificially private decisions.

In deciding cases under section 155 of the Trade Practices Act 1974 (Cth) our Courts must be careful to ensure that they do not treat the Commission as a mere individual engaged in litigation with another party. It is the Commission that has been vested with powers to supervise a sphere of public activity for the benefit of the whole community. The powers of many corporations are formidable and it is important that the public watchdog of those corporations and individuals engaged in trading be not at a disadvantage.

And what if the power is abused? The answer is not in denying our watchdog the power, but in providing effective remedies by which an abuse may be challenged. If the Commission lacks reasonable grounds of belief that an offence has been committed, then *after* an investigation an injured party should be entitled to commence an action and be afforded full discovery to determine the Commission's belief. Similarly if the Commission is actuated by improper purposes. The answer lies in seeking to find solutions to possible abuses and not in sweeping the whole issue "under some judicial carpet" and avoiding confrontation of the problem. Ultimately this was the position reached by the House of Lords in *Rossminster*[244] and it is submitted that this view is precisely what will make that decision of lasting value for the community.

It is perhaps apposite to conclude this paper by quoting from the dissenting judgment of Isaacs J. in *Huddart, Parker & Co.* v. *Moorehead* where His Honour graphically described the powerlessness of an individual when confronted with the power of a corporation:

> Not only have they many advantages expressly and directly flowing from the language of the law, but their inherent nature, and proceeding from their very magnitude, their wealth, the influence that mere numbers inevitably bring, they

possess a power which few individuals can hope for. This power may be exerted for the public good, but it may not, and where it is not, the danger is proportionate to the power... Add to the power of numbers, the facilities of extension, the comparative personal immunity of individuals who compose the corporation, and the other special features of these artificial beings, and there presents itself a sufficient reason for handing over to a strong national authority for uniform and effective treatment, should it consider the occasion requires it, the comparatively vast and far-reaching transactions of foreign and trading or financial corporations.[246]

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FOOTNOTES

1 For present purposes the central provisions of s.155 provide:

"s.155(1) Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, or is relevant to the making of a decision by the Commission under subsection 93(3), a member of the Commission may, by notice in writing served on that person, require that person —

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such document; or

(c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of this Act, a member of the Commission may, for the purpose of ascertaining by the examination of documents in the possession or control of the person whether the person has engaged or is engaging in that conduct, authorise, by writing signed by the member a member of the staff assisting the Commission (in this section referred to as an "authorised officer") to enter premises, and to inspect any documents in the possession or under the control of the persons and make copies of, or take extracts from, those documents.

(3) The Commission may require the evidence referred to in paragraph (1)(c) to be given on oath or affirmation and for that purpose any member of the Commission may adminster on oath or affirmation."

2 The material parts of s.15B provided:

"s.15B(1) If the Comptroller-General believes that an offence has been committed against this Part of this Act, or if a complaint has been made in writing to the Comptroller-General that an offence has been committed against this Part of this Act and the Comptroller-General believes that the offence has been committed, he may by writing under his hand require any person whom he believes to be capable of giving any information in relation to the alleged offence to answer questions and to produce documents to him or to some person named by him in relation to the alleged offence.

(2) No person shall refuse or fail to answer questions or produce documents when required to do so in pursuance of this section.

(3) The Comptroller-General or any person to whom any documents are produced in pursuance of this section may take copies of or extracts from those documents.

(4) No person shall be excused from answering any questions or producing any documents when required to do so under this section on the ground that the answer to the question or the production of the document might tend to criminate him; but his answer shall not be admissible in evidence against him in any civil or criminal proceeding other than a proceeding for an offence against this Part of this Act."

3 (1908) 8 C.L.R. 330. Hereinafter referred to as *Huddart, Parker* but often referred to in other cases as the case of *Appleton*.
4 (1971) 124 C.L.R. 468.
5 Note 3 *supra, per* Griffiths C.J., 358; Barton J., 367; O'Connor J., 376; Isaacs J., 386-7; and Higgins J., 418.
6 *Id., per* Griffiths C.J. 360; Barton J., 366; O'Connor J., 376; Isaacs J., 387; and Higgins J., 418.
7 *Id., per* Griffiths C.J., 358; Barton J. agreed with Griffiths C.J., 366; *per* O'Connor J., 375; Isaacs J., 386; and Higgins J., 418.
8 With whom Barton J. substantially concurred *id.*, 366.
9 *Id.*, 357 and 358.
10 See also notes of argument in *id.*, 336 when this Montesquieuan view is first reported.
11 *Id.*, 357.
12 (1902) 2 I.R. 349, 373.
13 (1908) 8 C.L.R. 330, 383-4.
14 *Id.*, 384.
15 *Id.*, 379.
16 *Id.*, 379-80.
17 (1981) 36 A.L.R. 151.
18 *Ibid.*
19 "The exercise of judicial power of the Commonwealth and an interference with judicial proceedings are not necessarily one and the same thing.": *per* Bowen C.J. (1981) 36 A.L.R. 151, 154; and see rejection per Sheppard J., 168.
20 *Id.*, 165.
21 (1912) 15 C.L.R. 333.
22 A proposition which seems to have been accepted by the Federal Court in *T.P.C.* v. *Pioneer Concrete (Vic) Pty Ltd* note 17 *supra.*
23 Higgins J. agreed in the conclusion of the other justices and added little to the discussion on the meaning of the judicial power.
24 Note 3 *supra.*
25 (1912) 15 C.L.R. 333.
26 *Id.*, 340.
27 *Id., per* Griffiths C.J. at 341 and *per* Isaacs J. at 347.
28 *Id.*, 344.
29 *Id.*, 351.
30 *Id.*, 347.
31 *Id.*, 349.
32 *Id.*, 350.
33 Note 3 *supra.*
34 Note 25 *supra*, 336.
35 *Ibid.*
36 *Ibid.*
37 *Ibid.*
38 *Id.*
39 *Id.*, 341.
40 *Ibid.*
41 Note 17 *supra*, 164.
42 (1981) 32 A.L.R. 650 (decision of Lockhart J.); (1981) 36 A.L.R. 151 (decision of the Full Court of the Federal Court).
43 Note 17 *supra*, 161.
44 Note 25 *supra.*
45 (1981) 32 A.L.R. 650, 656.
46 *Ibid.*
47 *Id.*, 655.
48 *Id.*, 653.
49 Note 17 *supra*, 157.
50 *Ibid.*
51 *Ibid.*

52 *Id.*, 167.
53 *Id.*, 169.
54 *Id.*, 158.
55 (1980) 32 A.L.R. 328.
56 Note 25 *supra.*
57 Note 55 *supra*, 333.
58 Note 25 *supra*, 347.
59 Note 3 *supra.*
60 Note 55 *supra*, 338-9; see also 341-2.
61 That had been decided in *R.* v. *Associated Northern Collieries* (1910) 11 C.L.R. 738 when dealing with proceedings brought under the Australian Industries Preservation Act 1906 (Cth).
62 Note 55 *supra*, 335.
63 Note 61 *supra*, 740.
64 *Id.*, 740-741.
65 If the circumstances are important enough it will easily be recalled that the penalty for failing to comply with a notice issued under s.155 of the Trade Practices Act 1974 (Cth) is generally less severe than for a breach or one of the other provisions of the Act. So a person or company may risk prosecution by failing to comply with a notice rather than a more substantial breach of the Act.
66 Note 3 *supra*, 384.
67 *Id.*, 385.
68 Note 61 *supra*, 742.
69 *Ibid.*
70 *Id.*, 748.
71 *E.g., Rank Film Distributors Ltd* v. *Video Information Centre* [1980] 3 W.L.R. 487 (C.A.); [1981] 2 W.L.R. 668 (H.L.).
72 [1942] 2 K.B. 253.
73 *Id.*, 257.
74 But note obiter of Kaye J. in *Attorney-General (Victoria)* v. *Riach* [1978] V.R. 301, 306-307 where he limits the scope of "penalty" to criminal offence and forfeiture of land.
75 M. J. R. Huntington and A. L. Limbury "Some Observations on Recent Developments in Trade Practices" (1981) 55 *A.L.J.* 472, 488.
76 *Id.*, 494.
77 (1979) 36 F.L.R. 450, 468-9.
78 (1979) 27 A.L.R. 275.
79 (1980) 31 A.L.R. 519, 527-8.
80 *Id.*, 528.
81 (1982) 39 A.L.R. 565. Also followed in *Dunlop Olympic Ltd* v. *T.P.C.* (1982) A.T.P.R. 40-278, 43, 500.
82 *Id.*, 567.
83 *Ibid.*
84 Huntingdon and Limbury, note 75 *supra*, 494.
85 *Pyneboard Pty Ltd* v. *T.P.C.* (1982) 39 A.L.R. 565, 569, 578. See also *Riley McKay Pty Ltd* v. *Bannerman* (1977) 15 A.L.R. 561, 565, 566 *per* Bowen C.J.
86 Sub-section (3) links back to sub-section (1) which empowers the Commission to request any oral or written evidence presented before it to be given on oath and for that purpose any member of the Commission is empowered to administer an oath or affirmation.
87 (1979) 143 C.L.R. 499.
88 *Id., per* Gibbs A.C.J., 524; Mason J. 536 (Jacobs concurred); and Murphy J., 545.
89 *Id.*, 537.
90 *Id.*, 523.
91 (1910) 11 C.L.R. 738.
92 Perhaps what is required is a provision authorising full discovery on an action for a penalty. Thus if the Commission believed that information had been withheld it could institute proceedings in the knowledge that the Court would compel all documents to be disclosed for it to decide whether it should have been produced. A defence such as honest and reasonable mistake could be retained with the burden of proof falling upon the party raising it as a defence.
93 (1980) 27 A.L.R. 275.
94 *Id.*, 294.
95 *Id.*, 295.
96 *Ibid.*
97 *Pyneboard Pty Ltd* v. *T.P.C.* (1982) 39 A.L.R. 565, 571.
98 *Melbourne Home of Ford* v. *T.P.C.* (1980) 31 A.L.R. 519.

99 *Id.*, 530.
100 *Melbourne Home of Ford Pty Ltd* v. *T.P.C.* (1980) 31 A.L.R. 519, 531.
101 *Ibid.*
102 *Id.*, 529-30.
103 (1970) 123 C.L.R. 490.
104 *Id.*, 499.
105 (1981) A.T.P.R. 40-224.
106 *Id.*, 43-035.
107 *Ibid.*
108 *Riley McKay Pty Limited* v. *Bannerman* (1977) 15 A.L.R. 561, 567.
109 Note 105 *supra.*
110 *Id.*, 43-037.
111 *Id.*, 43-038.
112 *Ibid.*
113 *Pyneboard* v. *T.P.C.* (1982) 39 A.L.R. 565, 572-3.
114 *Panelboard Pty Ltd* v. *T.P.C.* note 105 *supra*, 43-038; *Clinch* v. *I.R.C.* [1974] 1 Q.B. 76, 92; *Melbourne Home of Ford* v. *T.P.C.* note 100 *supra.*
115 *Panelboard Pty Ltd* v. *T.P.C.* note 105 *supra*, 43, 034.
116 Note 114 *supra.*
117 *Id.*, 93.
118 *Id.*, 94.
119 Note 105 *supra*, 43-035.
120 *Ibid.*
121 *Dunlop Olympic Pty Ltd* v. *T.P.C.* (1981) A.T.P.R. 40-238, 43-169.
122 *Panelboard Pty Ltd* v. *T.P.C.* note 105 *supra*, 43-035.
123 *Id.*, 43-036.
124 *Melbourne Home of Ford* v. *T.P.C.* note 100 *supra.*
125 *Riley McKay Pty Limited* v. *Bannerman* note 108 *supra; Pyneboard* v. *Trade Practices Commission* note 113 *supra*, 570.
126 *Pyneboard Pty Ltd* v. *T.P.C.* note 113 *supra*, 568.
127 *Id.*, 577.
128 *Id.*, 570-1.
129 *Melbourne Home of Ford* v. *T.P.C.* (1979) 27 A.L.R. 275, 297.
130 *W. A. Pines Pty Ltd* v. *Bannerman* (1980) 30 A.L.R. 559, 566, 573.
131 Note 100 *supra*, 510, 530.
132 *Pyneboard* v. *T.P.C.* note 113 *supra*, 576.
133 Note 108 *supra*, 568.
134 *Ibid.*
135 *Melbourne Home of Ford* v. *T.P.C.* note 129 *supra*, 301.
136 *Panelboard Pty Ltd* v. *T.P.C.* note 105 *supra*, 43-040.
137 *Riley McKay Pty Limited* v. *Bannerman* note 108 *supra*, 566.
138 *Melbourne Home of Ford* v. *T.P.C.* note 129 *supra.*
139 *Pyneboard* v. *T.P.C.* note 113 *supra*, 573-574.
140 *Ibid.; Dunlop Olympic Pty Ltd* v. *T.P.C.* note 121 *supra*, 43-171.
141 *Panelboard Pty Ltd* v. *T.P.C.* note 105 *supra*, 43-039.
142 *Ibid.*
143 *Dunlop Olympic Pty Ltd* v. *T.P.C.* note 121 *supra.*
144 *W. A. Pines* v. *Bannerman* note 130 *supra*, 566, 569; *Melbourne Home of Ford* v. *T.P.C.* note 129 *supra*, 293.
145 *W. A. Pines* v. *Bannerman Id.*, 567; *Cf. Padfield* v. *Minister for Agriculture, Fisheries and Food* [1968] A.C. 997, where the House of Lords held that in all the circumstances it was possible to infer that the Minister did not have good reasons even though he might not have supplied his reasons or even be required to provide any.
146 *W. A. Pines Pty Ltd* v. *Bannerman* note 130 *supra*, 571.
147 *Id.*, 572.
148 [1942] A.C. 206.
149 *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66; and more recently *I.R.C.* v. *Rossminster* [1981] 1 All E.R. 80. See also *Secretary of State for Education and Science* v. *Tameside* [1977] A.C. 1014.
150 See *e.g., Bradley* v. *Commonwealth* (1972) 128 C.L.R. 557, *per* Barwick C.J.
151 (1980) 30 A.L.R. 559.
152 *Id.*, 567.
153 *Id.*, 575.

154 *Ricegrowers Co-Operative Mills Ltd* v. *T.P.C.* (1981) 35 A.L.R. 553 (at first instance); (1981) 38 A.L.R. 535 (Full Court).
155 Ss. 5 and 6.
156 S.13.
157 *Per* McGregor J. (at first instance) (1981) 35 A.L.R. 555, 565-566; per Full Court, (1981) 38 A.L.R. 535, 541 (per Bowen C.J. and Franki J.), and 547 (per Northrop J.). Thus it was unnecessary to decide whether concluding that the Chairman had reason to hold the requisite belief under s.155 constituted a "decision" within the terms of the Judicial Review Act: (1981) 38 A.L.R. 535, 539; but *cf.* Northrop at 544. See also G. Vandeleur "Trade Practices — Extent of Powers of Trade Practices Commission to require information — Trade Practices Act 1974 (Cth), s.155" (1981 55 *A.L.J.* 818.
158 *Melbourne Steamship Co. Ltd* v. *Moorehead* (1912) 15 C.L.R. 333, per Griffiths C.J. at 344.
159 *Pyneboard Pty Ltd* v. *T.P.C.* (1982) 39 A.L.R. 565, 572.
160 [1976] A.T.C., 4-364; (1976) 13 A.L.R. 481.
161 [1976] A.T.C. 4-364, 4-369.
162 *Id.*, 4-367.
163 (1977) 15 A.L.R. 561.
164 *Id.*, 567.
165 *T.P.C.* v. *Nicholas Enterprises Pty Ltd* (1979) 26 A.L.R. 609, 633.
166 *Ibid.*
167 *Id.*, 633.
168 *Id.*, 637.
169 *Id.*, 633.
170 *Allied Mills Industries Pty Ltd* v. *T.P.C.* (1981) 33 A.L.R. 127; (1981) 34 A.L.R. 105. Both cases were heard by Sheppard J.
171 (1980) 32 A.L.R. 328.
172 (1981) 34 A.L.R. 105, 124.
173 *Id.*, 125, 145-146.
174 *Id.*, 125.
175 *Id.*, 125-6.
176 *Id.*, 126.
177 *Id.*, 145-6.
178 To say nothing of questions such as whether s.155 abrogates the privilege of clients known as legal professional privilege q.v.: G. T. Pagone "Legal Professional Privilege and The Commissioner of Taxation Right to Information" (1981) 16 *Taxation in Australia* 340. Many of the issues raised in that article are applicable to s.155 of the Trade Practices Act 1974 (Cth).
179 *Annesley* v. *Angelsea* 17 State Tr. 1139.
180 *Id.*, 1229.
181 (1856) 26 L.J. Ch. 113.
182 *Id.*, 144.
183 *Id.*, 114.
184 *Id.*, 116.
185 (1981) 34 A.L.R. 105, 141.
186 [1968] 1 Q.B. 396.
187 *Id.*, 405.
188 [1919] 1 K.B. 520.
189 There is much discussion in the judgments about the extent of damages which might be awarded, with the majority holding that only nominal damages should be awarded: [1919] 1 K.B. 520, 531; 535; *cf.* Scrutton L.J. at 549.
190 [1968] 1 Q.B. 396, 405.
191 *Id.*, 405.
192 *British Steel Corporation* v. *Granada Television Ltd* [1980] 3 W.L.R. 774.
193 Note 186 *supra*, 410.
194 Note 188 *supra, per* Banks L.J. 530.
195 *Id., per* Warrington L.J. 535.
196 Note 186 *supra*, 405.
197 *Id.*, 406. See also dicta in House of Lords decision in *British Steel Corporation* v. *Granada Television Ltd* note 192 *supra*, where their Lordships, within the parameters of the decision, would give greater scope to confidentiality of information given to journalists.
198 S.89(5)-(5E).
199 S.95(2)-(8).
200 S.165(3).
201 See also M. J. R. Hüntington and A. L. Limbury note 75 *supra*, 489.

202 *Ibid.*
203 *R.* v. *Gaming Board Ex parte Benaim and Khaida* [1970] 2 Q.B. 417.
204 *Id.*, 431.
205 [1974] A.C. 133.
206 *Id., per* Lord Reid 173; Lord Morris of Borth-Y-Gest 180; Viscount Dilhorne 188; Lord Cross of Chelsea 197; and Lord Kilbrandon 203.
207 *Id.*, 175.
208 [1978] A.C. 171.
209 *Id.*, 218 *per* Lord Diplock.
210 [1974] A.C. 405.
211 *Id., per* Lord Cross of Chelsea, 434.
212 "Press" is used to include all aspects of the reporting media.
213 [1980] 3 W.L.R. 774.
214 *Id., per* Lord Wilberforce, 824-5.
215 *Id.*, 836.
216 A. Passerin D'Entreves, *Notion of the State* (1967).
217 See L. Althusser, *Politics and History* (1977), 67. Liberation of the masses and popular democracy had little to do with the concept. *Id.*, 64.
218 *Id.*, 82. See also John Locke, *True End of Civil Government*, Ch. XI.
219 Note 216 *supra.*
220 M. Friedman, *Capitalism and Freedom* (1962).
221 F. H. Hayek, *The Road to Serfdom* (1979), chapters 6 and 7.
222 C. B. Macpherson, "Do we need a Theory of the State?" in *Archives Europeennes De Sociologie* Vol. XVII(2) 1976; G. A. Kelly, "Who needs a Theory of Citizenship?" in *Daedalus* "The State" No. 4, 1979.
223 See H. Lubash, *The Development of the Modern State* (1969); G. Poggi, *The Development of the Modern State* (1978); and Z. Cowen, *The Private Man: The Boyer Lectures 1969* (1974) 49.
224 *E.g.*, J. Locke note 218 *supra*, 71 and chapter 8; J. S. Mill "On Liberty" in *Utilitarianism, On Liberty, and Considerations on Representative Government* (1972), 132.
225 Mill, *id.*, 133.
226 *Id.*, 138.
227 *Id.*, 149.
228 *Id.*, 150-151.
229 *E.g.*, monopolisation, exclusive dealing, boycotting, unfair advertising, etc.
230 A difficulty clearly recognised by Mill himself, note 224 *supra*, 168.
231 W. Friedmann, *Law in a Changing Society* (2nd ed. 1972), 366; J. K. Galbraith, *The New Industrial State* (2nd ed. 1972), 298; see also more recently Edward S. Herman, *Corporate Control, Corporate Power* (1981), chapter 7.
232 W. Friedmann, *id.*, 320.
233 *Id.*, 327-335.
234 J. K. Galbraith, note 231 *supra*, especially Ch. 19.
235 W. Friedmann, note 231 *supra*, 297.
236 J. K. Galbraith, note 231 *supra*, 221.
237 *Ibid.*
238 R. Cranston "Consumer Protection and Economic Theory" in A. J. Duggan and L. W. Darvall (eds.) *Consumer Protection Law and Theory* (1980), 255. It is also worthwhile bearing in mind the other point he immediately makes, that liberty is not an absolute value in our democratic society; it must be balanced with the fulfilment of such other ideals as equality and fraternity.
239 [1980] 1 All E.R. 80.
240 *Id.*, 101.
241 *Ibid.*
242 Y. Grbich, "Is Economics any use to Tax Lawyers? Towards a More Substantial Jurisprudence to Replace Legalism" (1980) 12 *M.U.L.R.* 340.
243 M. J. R. Huntington and A. L. Limbury, note 75 *supra*, 484.
244 *I.R.C.* v. *Rossminster* [1980] 1 All E.R. 80; "At some stage, which cannot be particularised. .the immunity which exists at this stage of initial investigation will lapse. Then the Revenue will have to make good and specify the existence and cause of their belief...and the issue will be tried in the normal manner", *per* Lord Wilberforce 85; see also *per* Viscount Dilhorne 89-90, *per* Lord Diplock 93-94 ("The public interest in immunity from disclosure of the officer's belief that a document that he seized may be required as evidence in a future prosecution for an offence involving a fraud is thus, in general, temporary in nature, except as regards identity of informants...and possibly new and unusual methods of investigation used by the Inland Revenue" 93) and *per* Lord Scarman 105.

245 (1909) 8 C.L.R. 330.
246 *Id.*, 406-7.