GIVING THE "GREEN-LIGHT" TO THE COMMERCIAL TRIBUNAL OF NEW SOUTH WALES

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I. INTRODUCTION

The main purpose of this article is to urge legislative amendments to the appellate review provisions of the *Commercial Tribunal Act* 1984 (NSW) (the Act).[1] The aim of these amendments is to actualise the formal monopoly enjoyed by the Commercial Tribunal of New South Wales (the Tribunal) over the determination of *factual* issues raised in the context of proceedings before the Tribunal. As such, the following argument is relevant to other tribunals in a similar predicament and to the evolving relationship between courts and tribunals generally.[2]

At present, s 20(5) of the Act purports to limit appeals from the Tribunal to the Supreme Court, to those "against the decision of the Chairman or Deputy

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1 Specifically, s 20(5).

2 For example, similar to s 20(5) of the Act, s 118(1) of the *Anti-Discrimination Act* 1977 (NSW), provides that a party aggrieved by a decision of the Equal Opportunity Tribunal may appeal to the Supreme Court on a question of law, and subsection (3) provides that the Court shall hear and determine the question of law arising on the appeal and may make such order as to it seems fit.

Chairman" of the Tribunal which, by definition, is confined to consideration of questions "with respect to a *matter of law*" (emphasis added). With apparent clarity, Parliament has reserved questions of fact for ultimate decision by the Tribunal, as opposed to the ordinary or so-called superior courts. However, as it will be shown,[3] the courts have manipulated the distinction between law and fact so as to intrude upon the jurisdiction of the Tribunal.

In essence, the problem can be stated as one of clashing jurisdictions. The proposed amendments merely attempt to redefine and buttress the jurisdictional boundary between the courts and the Tribunal in a manner more consistent with the intentions of Parliament and a general and principled stand against the usurpation of the function of administrative tribunals by the judiciary.[4]

II. THE POLITICAL-LEGAL BACKGROUND

The modern administrative state is indeed "awash" in the "expertise" of specialist agencies like the Tribunal.[5] The recent proliferation of administrative tribunals operating beside the courts has been a response to a perceived need for informal, inexpensive, non-technical (though specialised) and speedy justice.[6] The rise of administrative tribunals is partly attributable to the expansion of the welfare state.[7] When the state provides benefits for and imposes controls on citizens, both "machinery for ascertaining who has a good claim" and "a procedure which ensures that the citizen's freedom is not interfered with in an arbitrary manner" must exist.[8] Such responsibility has to a large extent been placed in the hands of administrative tribunals, in preference to the existing courts, for reasons of perceived superiority on the part of the tribunals with respect to speed, cost and their capacity to pursue policy objectives.

The growing emphasis on the resolution of disputes by extra-judicial tribunals has threatened the central position of courts in the determination of private rights. In economics jargon, the barriers to entry into the market for the dispensation of law and justice have been lowered, thereby subjecting the courts to an unprecedented level of competition. To an observable extent, an atmosphere of

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3 See the discussion below, p 12.

4 I refer here to "court-substitute" tribunals or ones that perform (irrespective of their task and the degree to which it is performed) some *adjudicative* function. For a further discussion of the distinction between court-substitute and policy-oriented tribunals see J Farmer, *Tribunals and Government*, Weidenfeld and Nicolson (1974); and B Abel-Smith and R Stevens, *In Search of Justice: Society and the Legal System*, Allen Lane (1968). Examples of court-substitute tribunals include the Federal and Victorian Administrative Appeals Tribunals, the various state Equal Opportunity Tribunals, the Australian Broadcasting Tribunal, the Australian Securities Commission, the NSW Independent Commission Against Corruption (ICAC), the NSW Police Tribunal, the NSW Medical Tribunal, the NSW Consumer Claims Tribunal, the Victorian Small Claims Tribunal (and the Credit Tribunal which is a division thereof) and, of course, the Tribunal.

5 A Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) *Duke Law Journal* 511 at 511.

6 M Allars, *Introduction to Australian Administrative Law*, Butterworths (1990) pp 18-9.

7 H Street, *Justice in the Welfare State*, Stevens & Sons (1968) p 2.

8 *Ibid.*

mutual mistrust and suspicion has pervaded this competition. Justice O'Bryan[9] attests to this poisoned atmosphere when, (self-avowedly) on the strength of nothing more than a mere "suspicion", he openly doubts the impartiality of a specialist tribunal[10] in exercising jurisdiction over a statute "which clearly favours one group, consumers, at the expense of another".[11]

Perhaps indicative of this atmosphere is the current controversy surrounding the New South Wales Independent Comission Against Corruption (ICAC). This controversy largely arose from the Court of Appeal decision in *Greiner v Independent Commission Against Corruption,*[12] which rendered ICAC's findings of corrupt conduct against the former Premier, Mr Greiner and the former Minister for the Environment, Mr Moore, a nullity.[13] The decision highlighted the absence of any statutory right of appeal against ICAC's findings of fact and begged the question whether such a right should exist.[14] Following this case and particularly in view of the criticisms against the *Independent Commission Against Corruption Act* 1988 (*ICAC Act*) which were contained in the judgments, the New South Wales Parliamentary Joint Committee on ICAC compiled a report reviewing the ICAC Act.[15] The Committee received a number of submissions which called for the establishment of an appeal mechanism by which ICAC's findings of fact could be reviewed.[16] Unable to decide either way, the Committee referred this and other questions, to the New South Wales Law Reform Commission.[17]

Another significant source of tension between courts and tribunals is the issue of funding. The accretion of tribunals in New South Wales has increased the supervisory workload of the Supreme Court amidst perceptions of a pro-tribunal political bias in the distribution of resources. In a recent public airing of grievances, Gleeson CJ criticised the fact that the Supreme Court remains saddled with a "capped" budget whilst ICAC's funding varies according to the demands placed on it.[18] The Chief Justice explained this disparity in terms of a political imperative. His extraordinary public comments may betray a recognition on the part of the wider judiciary, of the gravity of the threat constituted by tribunals, to the legitimacy and continued viability of traditional courts.[19]

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9 *Custom Credit Corporation Ltd v Lupi* (1991) ASC [56,024] at [56,545].

10 Namely an oblique reference to the Victorian Credit Tribunal.

11 Namely the *Credit Act* 1984 (Vic).

12 (1992) 28 NSWLR 125.

13 Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (The Report), June 1992 at 76, 79.

14 Note 12 *supra*, per Gleeson CJ at 130, Mahoney JA at 153-4, and Priestly JA at 182.

15 Committee on the ICAC, *Report on Review of the ICAC Act*, Parliament of New South Wales, May 1993.

16 Submissions to this effect were made by Mr Hilton Jones (19 February 1993), The NSW Bar Association (6 November 1992), and the Law Society of NSW (12 October 1992): The Report, note 13 *supra* at 72.

17 The Law Reform Commission has not yet begun to consider this matter. Generally, the Commission acts only in response to direct referrals from the Attorney-General. It appears that the Committee's decision to refer the relevant question to the Commission is being reconsidered since no such referral has been issued by the Attorney-General.

18 L Simpson, "Judgment Day - The Supreme Court Fights Back", *Sydney Morning Herald*, 5 March 1994, Spectrum, p 1.

19 Extraordinary for their publicity.

A recent suggestion made by the Attorney-General of New South Wales to bring all of the State's major administrative tribunals (presumably including the Tribunal) under the control of a new division of the District Court should be seen in the context of this ongoing rivalry.[20] The radical reorganisation is being proposed under the well-worn banner of efficiency. More specifically, the Attorney-General is apparently concerned to expedite tribunal hearings. However, further annexation of tribunals to the notoriously overburdened court system will not necessarily improve the speed with which they function. [21] Still in gestation, this proposal may emerge as yet another attempt to curb the autonomy of tribunals by escalating their subordination to the authority of the judiciary.

The tension between the judiciary and administrative tribunals has contributed to the division of theorists into roughly two camps:

(a) those who assert and emphasise the ultimate supremacy of the 'ordinary law' as applied in the 'ordinary courts' of the land and to which all, "whatever be his [or her] rank or condition" are subject; [22] and

(b) those who decry this emphasis in favour of relative judicial passivism in relation to the control of administrative discretion.

The former group has been labelled "red light" and the latter "green light".[23] Red-light theorists tend to assume that administrative discretion is arbitrary, inherently evil and in need of pervasive judicial discipline. By contrast, green-light theorists place their confidence in discipline through political processes, in order to maximise the freedom of administrative agencies to implement government policy. The green-light viewpoint necessarily questions the validity of the classical conception of the 'Rule of Law',[24] and thus doubts the legitimacy of the position of the ordinary courts at the apex of an "authoritarian pyramid structure".[25]

The 'Rule of Law' as such is no longer confined only to law which is created or applied by courts of general jurisdiction. Its definition extends to include the law-making activities of all tribunals and government departments. Thus, the green-light perception of the nature of law and its administration is more democratic and pluralistic than that of traditional red-light theory. It sees:

> ...legislatures as the apex with courts and other adjudicating tribunals functioning in parallel with each other, exercising the authority that the legislature has delegated to them, and acting in relationships of superiority to each other only when the legislature has so determined".[26]

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20 L Morris, "Tribunals for Overhaul", *Sydney Morning Herald*, 28 February 1994, p 4.

21 For an exposition of the current resource-based problems which plague the court system in New South Wales see: M Gleeson, "The Administration of Justice in NSW - Resources, Delay and Case Management" (1993) 31(11) *The Law Society Journal* 31 at 31-2. Indeed, one of the reasons identified by the Chief Justice for the demand for increased access to the courts is the creation of new tribunals whose operations are supervised by the judiciary.

22 AV Dicey in HW Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall Law Journal* 1 at 6.

23 C Harlow and R Rawlings, *Law and Administration*, Weidenfeld and Nicolson (1984) Chs 1 and 2.

24 See AV Dicey, *An Introduction to the Study of the Law of the Constitution*, Macmillan (10th ed, 1965).

25 TG Ison, "The Sovereignty of the Judiciary" (1986) 10 *Adelaide Law Review* 1 at 10.

26 *Ibid* at 13.

As a result of statutory reform during the 1970s and 1980s, the Australian legal landscape in the 1990s has begun to take on a distinctly green hue.[27] The creation of new dispute-resolving and rights-determining institutions has resulted in a shift towards the green-light approach. The creation of the Tribunal can be seen as part of this shift. As will be argued in the context of the distinction between fact and law, significant sections of the judiciary have reacted against this shift by adopting a thinly veiled policy of intervention. It is submitted below, that this reaction is both retrograde and regrettable.

III. THE NEED FOR JUDICIAL RESTRAINT

What follows is not intended as a definitive argument for judicial restraint in the review of tribunal decisions.[28] Rather, the modest purpose here is to present some of the arguments in support of judicial restraint, to illustrate why judicial review of tribunal determinations of fact is itself objectionable.

Assertions of the need for judicial review of tribunal decisions have persisted throughout the rise of tribunals as a significant feature of the modern legal scene. For example, one of the complaints made to the Franks Committee on Tribunals and Enquiries[29] in the United Kingdom was that:

> ...[t]here is no appeal against the tribunal's decision. Tremendous power, which can ruin a person's life, has been put into the hands of three men. Yet there is no higher court in which their decisions can be tested.[30]

Apprehension with regard to the capacity of administrative tribunals to affect the lives and reputations of individuals is a common theme in this context. Relevantly, a submission was made to the ICAC Committee, that judicial review of ICAC's findings of fact should be contingent on ICAC's power to make findings of corrupt conduct against named individuals. It was argued that if ICAC's findings, adverse to individuals, were limited to primary facts, an appeal mechanism to review the findings would be unnecessary.[31]

Further, the assumption of qualitative superiority of the ordinary courts often underlies calls for the extension of judicial review. For instance, after casting the relative quality of courts and tribunals in terms of the difference between Rolls Royces and Mini Minors, Street asserts:

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27 The foundational reforms comprise the *Administrative Appeals Tribunal Act* 1975 (Cth), the *Ombudsman Act* 1976 (Cth), the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), and the *Freedom of Information Act* 1982 (Cth).

28 For a start on this, the reader is referred to: D Pearce, "Judicial Review of Tribunal Decisions - The Need for Restraint" (1981) 12 *Federal Law Review* 167.

29 Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries*, 1957.

30 Comments made by the Justice for Landladies Association to the Franks Committee in HWR Wade, *Administrative Law*, Clarendon Press (3rd ed, 1971) p 264.

31 See submissions of The Hon Adrian Roden QC, The Hon Athol Moffitt QC, CMG, The Hon Justice Clarke in: Committee on the ICAC, note 15 *supra* at 73-5.

> ...[t]he more cheap family saloons and the fewer Rolls-Royces there are, the greater is the need for good servicing and repair facilities.[32]

Such fears and preconceptions fuel perceptions of the power of judicial review as the 'last bulwark' of the citizen against the arbitrary oppression of the bureaucratic state. Such ideology has been used to justify the blatant and, indeed, illegal intrusion of the courts upon the ordinary activities of tribunals. In remarking on Professor Dennis Pearce's call for judicial restraint in this context,[33] Justice Fox stated that:

> Occasionally, of course the courts may be thought to go a little beyond what is strictly legitimate - finding jurisdictional error when it is debatable whether the error went to jurisdiction; *finding an error of law when perhaps it is more fact than law*. These sort of things may happen, but I would think that if they do it is because of what the court perceives to be the interests of justice (emphasis added).[34]

However, Fox J's apologetic tone suggests the influence of certain prejudices, the rejection of which lies at the heart of green-light theory.

First, it can be argued that in the context of reviewing the decisions of a specialist tribunal, the court's perception of 'the interests of justice' may not be enough to justify an otherwise illegitimate jurisdictional transgression. This is partly because the court's traditional preoccupation with the vindication of private property rights tends to undermine the efforts of tribunals in developing long-term policy which often involves the furtherance of more dissipated public interests.[35] It is critical to recognise that the type of 'justice' derived from the sporadic protection of individual and corporate proprietary interests may be outweighed by the 'justice' inherent in the realisation of an intelligent, coherent and effective public policy formed with a view to the public interest.[36] There is a danger that overzealous judicial review of tribunal decisions may procure the former type of justice at the expense of the latter (in cases where the latter is to be preferred).

The green-light position is further strengthened when it is considered that, where (as in this case) the legislature has explicitly confined appellate adjudication to matters of law, it follows that the only relevant perception of 'the interests of justice' *as affected by questions of fact*, is none other than the Tribunal's. Therefore, the court's penetration of the Tribunal's formal monopoly over factual matters can never be justified on the basis of an alleged superior ability to dispense

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32 H Street, note 7 *supra*, p 64, 3. For another example of the use of this automotive metaphor and the view of equivalence between the existing court system and the Rolls Royce see: GJ Samuels, "The Vehicles of Justice: Rolls Royce or Kingswood? " (1991) 14(2) *University of New South Wales Law Journal* 205 at 208.

33 D Pearce, note 28 *supra*.

34 RW Fox, "Commentaries" (1981) 12 *Federal Law Review* 182 at 182-83.

35 Ison puts a forceful case as to the bias of the judicial process towards the protection of private property rights and the preferment of concentrated corporate interests over more dissipated public interests: TG Ison, note 25 *supra*. See also H Street, note 7 *supra*, pp 5-6.

36 Baldwin and Hawkins highlight as one of the dangers of facilitating judicial review on substantive (including, presumably, factual) issues the fact that "[f]airness to particular individuals may, as a result, prevail over general considerations of public interest": R Baldwin and K Hawkins, "Discretionary Justice: Davis Reconsidered" in *Public Law*, Stevens & Sons Limited (1984) 570 at 598.

individualised justice when the question of that justice wholly depends upon factual issues over which the Tribunal is legally supposed to have exclusive jurisdiction.

The emphasis on judicial review as a means of safeguarding the individual from the abuses of the state may also be seen as fundamentally misguided. Ison asserts that the central problem in public administration is not the excess or abuse of power, but rather that of inertia and under-achievement through the under-use of power, or "the failure to engage in the conscientious pursuit of public policy objectives".[37] He contends that judicial review exacerbates this problem by providing "those against whom public power ought to be exercised" with another opportunity for obstruction. To use the words of Morton Horwitz, judicial review in the guise of the red-light notion of the 'Rule of Law', "undoubtedly restrains power, but it also prevents power's benevolent exercise".[38] As such, judicial review ranks among the forces that hinder tribunals from controlling the exercise of private, corporate power, or in Ison's terms, power against which the 'public power' of tribunals ought to be exercised. An appreciation of the realities of power distribution indicates that the significant threat to individual and collective liberty comes not from the public sector, but from the economic and political power wielded by the corporate sector. Therefore, judicial review not only does little to protect the citizen against the predominant threat to human rights and civil liberties posed by private corporations, but it is also harmful to the extent that it retards the capacity of public bodies to render such protection.

This argument can be applied to the Tribunal's capacity to control the power of corporate moneylenders. Judicial interference with the Tribunal's findings of fact both undermines the confidence of the Tribunal in its own decision-making capabilities, so as to foster conservatism and timidity in the Tribunal's pursuit of policy objectives[39] and diminishes the Tribunal's capacity to restrain the power of corporate credit providers over individual borrowers.

A related issue concerns the inequality of access to appellate courts. Currently, there is little criticism of the system of multiple avenues of appeal from tribunal decisions. The abiding trust in a direct relationship between the chances of arriving at the 'correct' legal answer and the number of layers of appeal was demonstrated when Fox J stated: "[i]f a judge were to go too far [in interfering with a tribunal's decision], his [or her] decision could be corrected on appeal".[40]

However, appellate review must be recognised as a luxury which is open only to those who can afford to sustain protracted and costly disputes. This category of litigants is more likely to consist of the relatively resource-rich corporations against whom, as was argued above, public power ought to be exercised. The availability of appellate review is of little benefit to litigants whose affairs are disadvantaged by the need to speedily resolve their disputes. The mere threat of delay which

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37 TG Ison, note 25 *supra* at 2.

38 M Horwitz, "Book Review" (1977) 86 *Yale Law Journal* 561 at 566; J Jowell, "The Rule of Law Today" in J Jowell and D Oliver (eds), *The Changing Constitution*, Clarendon Press (1985) p 18.

39 Recognising the now uncontroversial fact that adjudication invariably involves policy making.

40 RW Fox, note 34 *supra* at 184.

invariably attends an appeal may be sufficient to convince a litigant of lesser means to settle for less than his or her full legal entitlements. Appellate review is thus open to tactical manipulation thereby disadvantaging the interests of those citizens who, according to the red-light rhetoric, it is designed to serve.

The functions of tribunals differ from those of the judicial hierarchy. Primarily, tribunals resolve factual disputes between the parties involved. Courts resolve factual disputes, but also expound the law, with binding effect. There is nothing to suggest that courts are intrinsically better equipped to resolve factual disputes than tribunals. Indeed, to the extent that experience breeds expertise, the obvious likelihood is that tribunals which deal constantly with similar or related fact situations arising from a specialised field of human affairs are better equipped than courts of general jurisdiction to resolve disputes involving similar fact situations. The courts should defer to such expertise, in substance as well as form. To make tribunals an adjunct to the court system would substantially defeat their purpose. If parties before tribunals "find themselves caught up in the snakes and ladders of court appeals",[41] the speed of resolution, cost effectiveness and special expertise, which together constitute the legitimating foundation of tribunals, will simply evaporate. If this occurs "the independent tribunal system will collapse".[42]

For these and other reasons it is hoped that the Australian judiciary will undergo the same attitudinal transformation as its Canadian counterpart. Justice Blair in the Ontario Court of Appeal effectively captured this shift:

> The judicial attitude to tribunals has changed. Restraint has replaced intervention as judicial policy. Courts now recognise the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature. Judges also recognize that tribunals bring to bear in their decisions knowledge and expertise in their particular fields beyond the usual experience of the courts.[43]

IV. THE TRIBUNAL

The Tribunal was created primarily to improve speed and efficiency and provide expertise and informality in the resolution of disputes involving consumer credit in New South Wales.[44] In this respect, its functions and powers include the grant, refusal and variation of applications for credit providers' and finance brokers' licences;[45] the determination of reasonable legal fees in relation to credit sale or loan contracts;[46] the variation of the terms of regulated credit sale, loan and continuing credit contracts where a debtor is unable to discharge his or her

41 D Pearce , note 28 *supra* at 173.

42 *Ibid.*

43 *Re Ontario Public Service Employees and Forer* (1985) 23 DLR 97 at 112, in HN Janisch, "Consistency, Rulemaking and Consolidated-Bathurst" (1991) 16(1) *Queen's Law Journal* 95 at 106.

44 "Commercial Tribunal Opens for Business" (1985) 23(3) *Law Society Journal* 229.

45 *Credit (Administration) Act* 1984 (NSW), ss 12 and 13.

46 *Credit Act* 1984 (NSW), s 47.

obligations on account of hardship;[47] the reduction of a credit providers' loss incurred by reason of a contravention of the *Credit Act* 1984 (NSW) or the *Credit (Administration) Act* 1984 (NSW);[48] and the re-opening of transactions that give rise to unjust contracts or mortgages.[49]

The Tribunal's jurisdiction also extends beyond matters involving credit. The Tribunal has significant 'appellate' jurisdiction conferred by ss 85-89 of the *Building Services Corporation Act* 1989 (NSW); ss 22-24 of the *Travel Agents Act* 1986 (NSW); s 20F of the *Motor Dealers Act* 1974 (NSW); and s 59 of the *Trade Measurement Act* 1989 (NSW).[50] However, for present purposes, the focus is on the Tribunal's involvement in consumer credit matters.

Section 19(9) of the Act provides that, except in hearings with respect to applications for a credit provider's or finance broker's licence,[51] the Tribunal:

> (a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit; and
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> (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

This provision, when read in conjunction with some of the Tribunal's powers under the *Credit Act* 1984 (NSW), gives the Tribunal significant freedoms in the conduct and resolution of credit-related proceedings, freedoms which are alien to the relatively rigidly rule-bound courts. Indeed the Tribunal in *Walter Pugh Pty Ltd v Commissioner for Consumer Affairs*[52] stated that:

> ...[b]y a combination of s 85 of the *[Credit] Act* and s 19(9)(b) of the *Commercial Tribunal Act*, the legislature has conferred upon the Tribunal a largely unfettered discretion to do what is just and equitable in the circumstances of the particular case.

The decision of the legislature to confer upon the Tribunal such freedoms that were not bestowed upon the courts may be another factor contributing to jurisdictional jealousy.

Of course, s 19(9) of the Act does not free the Tribunal from its duty to act according to law and legal principles, and this is evident from the decision in *Walter Pugh* itself. If this was the effect of s 19(9), then the right of appeal to the Supreme Court on a question of law would be superfluous. This reasoning was applied by Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins & Ors*,[53] in relation to s108(1)(b) of the *Anti-Discrimination Act* 1977 (NSW), which is similar to s 19(9)(b) of the Act. This argument does not question the Tribunal's duty to act legally as such. Rather, it demonstrates that an expansive judicial

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47 *Credit Act* 1984 (NSW), s 74(4).

48 *Credit Act* 1984 (NSW), s 85(2).

49 *Credit Act* 1984 (NSW), s 146(1).

50 See also the *Registration of Interests in Goods Act* 1986 (NSW), s 15; *Fair Trading Act* 1987 (NSW), ss 78 and 78 and the *Motor Dealers Act* 1974 (NSW), ss 20L and 20M.

51 *Credit (Administration) Act* 1984 (NSW), ss 12(6) in conjunction with s 19(9) of the Act.

52 (1987) ASC [55-611] at [57,646].

53 (1992) 28 NSWLR 26 at 29.

determination of the extent of this duty has unjustifiably abridged the Tribunal's statutorily conferred discretion.

The inquisitorial character of the Tribunal was reinforced by Enderby J in *Custom Credit Corporation Ltd v The Commercial Tribunal of New South Wales*,[54] when he refused to declare that, among other things, the Tribunal was bound to conduct proceedings in the manner of "adversarial litigation". Clearly, a conjunctive reading of ss 19(9) and 20(5)[55] of the Act indicates that the Tribunal's jurisdiction over the fact-finding process was meant to be both extensive and exclusive. Thus, at least in a formal sense, the Tribunal is supposed to be the ultimate arbiter of fact.

The creation of the Tribunal was based largely upon recommendations contained in the Molomby Report in 1972.[56] In contradistinction to the Act, the Report recommended that there should be *no appeal* whatsoever from a decision of the Tribunal, whether on matters of fact or law, in applications other than those relating to licences. However, it also recommended that there should be a power to state a case on a question of law upon the request of a party. Further, the Report's recommendations were entirely consistent with the courts' inherent capacity for judicial review. However, this is not to suggest that the Report did not envisage a role for the superior courts; only that it was originally recommended that courts' be denied this current statutory authority to review on matters of law. The courts' subsequent jurisdictional expansionism[57] is all the more alarming having regard to these intentions.

V. THE DISTINCTION BETWEEN FACT AND LAW

In *Canham v Australian Guarantee Corporation Ltd*,[58] Carruthers J asserted that the phrase "a question with respect to a matter of law"[59] meant nothing less than "a pure question of law". What then, in law, is the difference between a matter of law and a matter of fact?

The following inquiry into the relevant case law will adopt the analytical framework of Emery and Smythe[60] whereby the decision-making process is divided into three stages:

(i) fact-finding;

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54 (1990) ASC [56-007].

55 See above, p 1.

56 Law Council of Australia, *Report on Fair Consumer Credit Laws to the Honorable GO Reid, QC, ML, Attorney-General for the State of Victoria* (T Molomby, Chairman), 1971-72. See also *Custom Credit Corporation*, note 54 *supra*, per Enderby J at [59,136] as regards the level of influence of the Molomby Report.

57 I refer here to the fact that the courts have effectively enabled themselves to review the Tribunal's findings of fact - a proposition argued below.

58 (1990) ASC [55-984] at [58,927].

59 Per s 20(5) of the Act.

60 CT Emery and B Smythe, "Error of Law in Administrative Law" (1984) 100 *The Law Quarterly Review* 614.

(ii) rule-stating; and
(iii) rule application.

As previously stated, this paper is concerned with the first stage. The question then arises as to when may an error of law may be made in the course of deciding a question of fact. The answer seems to be:

(i) when a misdirection as to the law occurs; and
(ii) when there is a complete *absence* of primary evidence for the conclusion of fact reached.[61]

This was the approach taken by Glass JA, with whom Samuels JA agreed, in *Azzopardi v Tasman UEB Industries Ltd*[62] and by the entire Court of Appeal in *Mahoney v Industrial Registrar of New South Wales.*[63] All that is required, in law, for a finding of fact to remain "a matter of fact" is that there be *some* evidence from which, in the court's opinion, the Tribunal could infer that finding.

According to Hope JA in *Mahoney*,[64] "[a] dominant rule is that a decision of fact which is wrong, or even unreasonable or perverse does not on that account involve an error of law". This rule has been derived from a substantial line of Australian authority. The cases *Clark v Flanagan*,[65] *McPhee v S Bennett Ltd*,[66] *Poricanin v Australian Consolidated Industries Ltd*,[67] *Qantas Airways Ltd v Gubbins & Ors*[68] and *Haines v Leves*[69] each contain statements to the effect that tribunals of fact need not, as a matter of law, believe certain evidence despite the fact that the evidence might be "all one way". Being matters of fact, the weight and degree of evidence are matters properly within the province of the Tribunal and beyond the reach of the court.[70]

However, the validity of this judicially devised distinction between fact and law is doubted. Whether supported by evidence or not, a finding of fact is, by definition, a factual issue. In considering the relationship between evidence and fact, an appellate court is inexorably drawn into an assessment of the validity of the finding in question based on the recorded evidence. There is no alternative open to a judge, deciding whether there is evidence to support a factual conclusion of a tribunal, but to examine the evidence and arrive independently at his or her own conclusions of fact. This is precisely what Campbell J does in *Bogan's* case.[71] In reality, this mimicks the fact-finding process. Indeed the "error of law" ground employed by the courts to review the decisions of tribunals "has been seen as encompassing the fact finding process itself", with the courts detecting an error

61 M Allars, note 6 *supra*, p 219.
62 (1985) 4 NSWLR 139.
63 (1986) 8 NSWLR 1.
64 *Ibid* at 2.
65 (1934) 52 CLR 416 at 427-28.
66 (1934) 52 WN (NSW) 8 at 9.
67 [1979] 2 NSWLR 419 at 426.
68 (1992) 28 NSWLR 26 at 33.
69 (1987) 8 NSWLR 442 at 469-70.
70 As recognised by Campbell J in *Australian Societies Group Financial Services (NSW) v Bogan* (1989) ASC [55-938] at [58,564].
71 See section VI B *infra*.

of law where a finding of fact cannot be supported by the evidence.[72] The stated distinction between "fact" and "law" can therefore be regarded as a figment of the legal imagination, for there is nothing "pure" about Carruthers J's "question of law".[73] Moreover, this interpretation of "errors of law" constitutes a device by which a court may, at its own discretion, interfere with a decision of the Tribunal with which it happens to disagree. In this way, the courts may sanction their own acts of trespass onto the Tribunal's legislatively defined area of expertise.

Furthermore, this approach tends toward the assumption that the probity of a given conclusion of fact necessarily depends upon, or at least is enhanced by, some degree of formally admitted and recorded evidence. The more recent pronouncements of the Court of Appeal in *Qantas Airways Ltd v Gubbins* are not inconsistent with this proposition. With respect to a provision identical to s 19(9)(a) of the Act, Gleeson CJ and Handley JA stated:

> ...[w]hile this discretion is not unfettered it is a wide one and the [Equal Opportunity] tribunal will not err in law merely because it acts on evidence which would not be admissible in a court or because there is no legally admissible evidence to support any of its findings.[74]

Thus, whilst evidence need not be legally admissible, evidence must exist. It is submitted that by evidence, the courts mean formally (though not necessarily legally) admitted and recorded evidence which is either oral or documentary.

However, a question arises when a complete absence of such evidence does not affect the validity of the Tribunal's finding of fact. If the probity of facts upon which a decision is based, is the ultimate and true object of the evidentiary requirement, then the requirement 'misses the forest for the trees'. It is simply irrational to allow, on the one hand, an appellate court to intervene in the fact-finding process where no formal evidence exists to support a disputed though obviously valid fact and on the other, prevent the same from intervening where only scant evidence exists to support a genuinely controversial finding. A strict application of the evidentiary requirement fails to recognise that some facts are self-evident and do not require articulation and evidentiary support for their veracity.[75] It deprives tribunals from being able to take (something in the nature of) judicial notice of certain facts. The requirement can be understood in the context of the adversarial system's traditional predilection for oral testimony or documentary evidence. It sits uncomfortably with modern tribunals that are empowered to ignore the rules of evidence and to inform themselves on any matter *in such manner as they think fit.*[76]

Nevertheless, the approach of the majority in *Azzopardi* has been labelled green-light in contrast to the interventionist approach taken by Kirby P, in the minority.[77]

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72 D Pearce, note 28 *supra* at 171, citing *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; and *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126.

73 In *Canham v Australian Guarantee Corporation Ltd*, note 58 *supra* at [58,927] (see above, p 6).

74 Note 68 *supra* at 32.

75 An example of such a fact is provided by *Bogan's* case which is examined below.

76 As in s 19(9)(a) of the Act.

77 M Allars, note 6 *supra*, pp 219-20.

His "proper test" is to find an error of law where the reasons of the tribunal demonstrate manifest error or illogicality in the reasoning process or indicate a perversity, suggesting an error at one of the three stages of the decision-making process. Obviously, this view is so broad as to provide opportunity for review of the Tribunal's assessment of the weight of the evidence. In effect, Kirby P suggests that an error of fact (even on the majority's distinction), if serious enough, will be regarded as an error of law in order to bring an appeal within the jurisdiction of the court. His view poses an even greater threat to the principle that the Tribunal should exercise ultimate jurisdiction over matters of fact.[78]

VI. JUDICIAL INTERFERENCE IN RE-OPENING UNJUST CONTRACTS

An illustration of the objectionable nature of judicial interference in the Tribunal's findings of fact will more effectively convey the need for the proposed amendments. The following two cases serve as an illustration.

A. *Morlend Finance Corporation (Vic) Pty Ltd v Westendorp*[79]

This was an appeal to the Supreme Court of Victoria under s 85J of the *Credit (Administration) Act* 1984 (Vic), from a decision of the Credit Tribunal of Victoria. Section 85J provides for appeal to the Supreme Court against a determination of the Credit Tribunal "as if the determination were a determination of the County Court." Given the normal facility of review on appeal both on fact and law,[80] the Supreme Court of Victoria, unlike its counterpart in New South Wales, can hear appeals from the Victorian equivalent to the Tribunal on pure questions of fact. Therefore, *Morlend* simply illustrates the dangers of pursuing the path taken by Victoria and urged by Kirby P in giving courts the power to review the Tribunal's assessment of the weight of the evidence.

Briefly, the facts were that the respondents (R_1) obtained finance from the appellant in order to avert the collapse of their business, by paying out their old truck and purchasing a second-hand truck. The transaction was structured as a loan of $13 000 and a lease agreement for the truck. A deed of guarantee was entered into with R_1's parents (R_2), whose house was mortgaged as security. The Credit Tribunal set aside the loan contract, the lease and the guarantee on the grounds that, inter alia, undue influence and unfair tactics were exerted on the respondents by an intermediary (I_1) acting for the appellant, in that I_1 led R_1 and R_2 to falsely believe that in the event of default by R_1, R_2 would be insured for their loss.[81]

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78 It should be noted that since *Azzopardi*, Kirby P has observed the majority opinion in that case as the binding rule: *Haines v Leves*, note 69 *supra* at 470.

79 (1993) ASC [56-200].

80 See *Azzopardi*, note 62 *supra* at 318-19, per Kirby P.

81 *Westendorp v Morlend Finance Corporation (Vic) Pty Ltd* (1990) ASC [56-005].

On appeal, the full court of the Supreme Court of Victoria set aside the tribunal's decision, one of the grounds being that the evidence did not sustain a finding that the alleged representation by I_1 actually occured. From a transcript of the evidence and counsels' argument alone, Fullagar J concluded that the testimony in favour of the respondents was "highly improbable, inexact, indefinite and indirect".[82] He expressed doubt as to the veracity of Mr Westendorp Jnr's testimony that I_1 had assured him that there would be a policy of insurance in place to protect his parents' house. He also dismissed Mrs Westendorp Jnr's evidence as "inadmissible and tendentious".

With respect, it is submitted that Fullagar J was not well placed to make these determinations.[83] The best test of the honesty of a witness and the accuracy of his or her perception, memory and narration is found in direct oral testimony. The adversarial legal system's resort to cross-examination is built on this principle.[84] The credibility of crucial witnesses in *Morlend* was ultimately judged by those who lacked any opportunity of observing the basic indicia of credibility, that is the appearance, demeanour and impression of the witness.

In this part of his decision, Fullagar J flatly refuses to acknowledge the fact-finding capabilities of tribunals. This interventionist stance may be contrasted with the approach of the High Court in *Uranerz (Aust) Pty Ltd v Hale*.[85] In restoring a finding of the Northern Territory Workmen's Compensation Tribunal, Gibbs J (with whom the other members of the Court agreed) said:

> ...[i]f a rehearing is conducted solely on written material...the appellate court should generally defer to the conclusion on a question of credibility formed by the tribunal from whom the appeal is brought and whose members saw and heard the witnesses.[86]

As Professor Pearce recognises,[87] if courts could readily overturn findings based on the veracity of witnesses which they have neither seen nor heard, thus providing a vivid example of judicial usurpation of the fact-finding process, the place of tribunals in the settlement of disputes would be critically undermined. There is little doubt then that providing for a full appeal from the Tribunal's findings of fact would have the potential to debilitate the Tribunal in its functioning.

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82 *Ibid* at [58,125].

83 This is to say nothing of the strength of the other grounds on which the court's ultimate decision was based.

84 D Byrne and JD Heydon, *Cross on Evidence*, Butterworths (4th ed, 1991) p 803.

85 (1980) 30 ALR 193.

86 *Ibid* at 198. Similarly, during the appearance before the Parliamentary Committee on ICAC on 9 November, 1992, Mr Ian Temby QC said in response to the question whether there should be a full right of appeal from the ICAC investigations: "If an appeal was conducted on the papers the court could not form views about the credibility of witnesses and the reasons for preferring some evidence over other evidence": Committee on ICAC, note 15 *supra* at 79.

87 D Pearce, note 28 *supra* at 176.

B. *Australian Societies Group Financial Services (NSW) Ltd v Bogan*[88]

This was an appeal to the Supreme Court of New South Wales from the Tribunal's decision[89] to re-open and vary a contract between the respondent and St George Building Society under s 146 of the *Credit Act* 1984 (NSW). Whether or not the contract was "unjust" within the meaning of that section turned on the Tribunal's finding that the respondent's disclosed salary of $2000 per month net, was prima facie very high for an assistant storeman so as to put the appellant on notice, and require it to ensure that the respondent was able to repay the instalments. In accordance with the prevailing distinction between law and fact, Campbell J ordered the Tribunal to re-hear the application on the basis that its finding as to the respondent's "very high prima facie salary" was unsupported by the evidence.[90]

It is entirely plausible that the Tribunal thought the finding so obvious as to obviate the need for recourse to formal evidence. In so doing, it is argued that the Tribunal attempted nothing more than to excercise its statutory right to "inform itself on any matter *in such a manner as it [thought] fit*" (emphasis added).[91]

In conventional legal terms, it can be argued that the Tribunal was permitted to take *judicial notice* of the fact in question. The general rule is that judicial notice may be taken of a fact that is of such notoriety that to call for evidence would be a waste of time.[92] According to Isaacs J, the only guiding principle is that the fact in question must be "so generally known that every ordinary person may be reasonably presumed to be aware of it".[93] Why then should a court be able (as it is) to take judicial notice of, for example the decreasing value of money in circumstances where common experience requires,[94] whilst the Tribunal is unable to take notice of the fact that a salary level which common experience suggests is commensurate with that of a high school principal is prima facie very high for one who is essentially an unskilled, manual labourer? Such a discrepancy would defy logic and common sense.

The rule that an error of law occurs where a finding of fact is unsupported by any evidence presupposes the need for such support. Therefore, where the validity of a conclusion of fact is unaffected by an absence of formal evidence, the entire foundation of the rule collapses. *Bogan* is a case in point.

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88 (1989) ASC [55-938].

89 *Bogan v Australian Societies Group Financial Services (NSW) Ltd* (1989) ASC [55-701].

90 *Ibid* at [58 563].

91 Section 19(9)(a) of the Act.

92 D Byrne and JD Heydon, note 84 *supra*, p 106.

93 *Holland v Jones* (1917) 23 CLR 149 at 153.

94 *Re Richardson* [1920] SALR 24.

VII. RECOMMENDATIONS

The Act should be amended by inserting after s 20(10) words to the following effect:

> (10A) For the purposes of this section, a reference to a matter of law in the context of the Tribunal's findings of fact is limited to either:
> (a) a misdirection of law; or
> (b) a complete absence of both legally admissible and inadmissible evidence for the finding of fact in question, where that finding requires some such evidence for its justification.

This amendment would compel the courts to recognise that a complete absence of evidence to support a conclusion of fact, does not always diminish the integrity of that conclusion.

Consistent with this aim, s 20(10) could be amended by deleting or qualifying the reference to "a matter as to the admission or rejection of evidence".[95] There are proceedings prescribed for the purposes of s 19(9) of the Act in which the Tribunal is obliged to apply the rules of evidence.[96] Section 20(10) of the Act may, on its proper construction, confer a right of appeal in respect of the admission or rejection of evidence only in circumstances where the rules of evidence apply. Otherwise, s 19(9)(a) which relieves the Tribunal from observing the rules of evidence in non-prescribed proceedings would be rendered null. There is nevertheless the possibility that the provision would not be construed subject to that qualification and, arguably, it would be preferable that the qualification be made express.

Another amendment is based on s 109H of the *Corporations Law*.[97] The following, or words to its effect, should be inserted after s 20(10A):

> (11) In determining whether a decision of the Chairman or Deputy Chairman is or is not with respect to a matter of law, a determination that would promote the purpose or object underlying this Act (especially having regard to s 19(9)) is to be preferred to a construction that would not promote that purpose or object.

This amendment is intended to make the courts recognise and give effect to the wide discretion which Parliament has afforded the Tribunal in respect of the conduct of proceedings and the fact-finding process.

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95 Section 20(10) states: "For the purposes of this section, a reference to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal and a matter as to the admission or rejection of evidence."

96 See the *Credit (Administration) Act* 1984 (NSW), ss 12(6), 23(15) and 25(6).

97 Formerly, s 5A of the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act* 1980 (NSW). See L Masel, "Regulatory Commissions and the Courts" in "Administrative Law - Restrospect and Prospect" (1989) 58 *Canberra Bulletin of Public Administration* 170.

VIII. DISSENSION

Credit providers are likely to object to these recommendations, as the proposed amendments are likely to exacerbate current perceptions of pro-consumer bias on the part of the Tribunal.[98] In contrast to the rationale behind the recommendations, credit providers would support pervasive judicial intervention in order to check what they perceive to be the systemic arbitrariness of the Tribunal. The following is a threefold response to this criticism.

First, it is submitted that the credit providers' self-characterisation as unfortunate victims of an antagonistic administration of partial legislation could be more accurately interpreted as a predictable reaction to the loss of a much abused superior bargaining strength enjoyed by lenders before the arrival of the Tribunal.

Secondly, even if these perceptions of bias were justified, much of it would occur at the rule-stating or rule application stages of the Tribunal's decisions, not at the fact-finding level. For example, credit providers have condemned as biased the Victorian tribunal's finding that if a lender contravened a provision of the Act, the resulting contract was ipso facto unjust and liable to be re-opened.[99] This was a statement of rule which the Victorian Supreme Court subsequently overturned.[100] The recommendations leave intact the New South Wales Supreme Court's current ability to do the same.

Thirdly, it must be kept in mind that the recommendations are not a radical departure from the current situation. They are in fact nothing more than a rationalisation of existing law. Notwithstanding a minority view on the current Court of Appeal[101] and apparent judicial myopia in relation to s 19(9) of the Act, the Tribunal's essential character remains unchanged. This article merely aims to give substance to what the Tribunal already possesses in form. It is simply an appeal to Paliament to take into its own hands what is apt to transmogrify in the hands of the judiciary. It does not go so far as to propose to alter the judiciary's present expansive scope for appellate review of the Tribunal's decisions as regards the interpretation and application of law.[102] It is not the point of this paper to dispute the inherent value of judicial review. The proposed reforms merely seek to preserve the exclusivity of the Tribunal's fact-finding function.

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98 See Corrs Chambers Westgarth, "Credit Bill 1991 - Scocam Draft Uniform Bill" (1992) 7(6) *Australian Banking Law Bulletin* 41.

99 *Rose v Esanda Finance Corporation Ltd* (1988) ASC [55-630] at [57,800].

100 *Custom Credit Corporation Ltd v Lupi* (1991) ASC [56-024], and *Custom Credit Corporation Ltd v Gray* [1992] 1 VR 540.

101 *Azzopardi*, note 62 *supra* at 41, per Kirby P.

102 See *British Launderers' Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 462 at 467, per Lord Denning MR; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365 per Deane J.

IX. CONCLUSION

By definition, reform presupposes an existing wrong. Here, the presupposed wrong lies not in the law per se, but in a perverse application of the law.

The central proposition advanced in this article is that the Tribunal is a *specialist* body, rendering appeals on questions of fact to courts of general jurisdiction inefficient and even harmful. Consistent with traditional notions of the 'Rule of Law' with its almost paranoiac fear of administrative discretion, the courts have subverted the intention of Parliament by manipulating the distinction between fact and law so as to facilitate effective review of the Tribunal's findings of fact. Implementation of the recommendations would, to some extent, adjust the line between fact and law to counter this subversion. In accordance with green-light principles this would enhance the Tribunal's clout and maintain its relevance in the regulation of the provision of credit in New South Wales. Alluding to the earlier mentioned automotive metaphor, it is time for us to fully acknowledge the utility and accessibility of the Mini Minor and the Kingswood, and allow them to further recede from the shadow of the Rolls Royce.