FEDERAL COURT OF AUSTRALIA

ADMINISTRATIVE LAW - judicial review - failure by Industry Research and Development Board to register applicant for tax concession for financial years 1986-1993 - where prior to processing of applications for concession government announced retrospective legislation would be passed preventing registration of applications not registered by 6 December 1995 - *obiter* observations as to whether *nunc pro tunc* orders appropriate and scope of injunctive power under s 16(1)(d) *Administrative Decisions (Judicial Review) Act* 1977

Administrative Decisions (Judicial Review) Act 1977 s 16(1)(d)
Industry Research and Development Amendment Act 1996 (Cth) s 2(2), (3) and (4)
Industry Research and Development Act 1986 (Cth) s 39J

Emanuele v *Australian Securities Commission* (1997) 71 ALJR 717 - cited
Guss v *Veen-Huizen [No 2]* (1976) 136 CLR 47 - cited
Clyne v *Deputy Commissioner of Taxation* (1984) 154 CLR 589 - followed
Minister for Immigration and Ethnic Affairs v *Conyngham* (1986) 11 FCR 528 - considered
Bond Corporation Holdings Ltd v *Australian Broadcasting Tribunal* (1988) 84 ALR 669 - cited
Boral Windows v *Industry Research and Development Board* (6 May 1998, unreported) - considered

TJM PRODUCTS PTY LTD V THE INDUSTRY RESEARCH AND DEVELOPMENT BOARD
NO QG 71 of 1996

SPENDER J
BRISBANE
26 MAY 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QG 71 of 1996**

BETWEEN: **T J M PRODUCTS PTY LTD ACN 009 887 325**
Applicant

AND: **THE INDUSTRY RESEARCH AND DEVELOPMENT BOARD**
Respondent

JUDGE: **SPENDER J**

DATE OF ORDER: **26 MAY 1998**

WHERE MADE: **BRISBANE**

THE COURT ORDERS THAT:

1. The principal proceedings be dismissed.
2. The respondent pay the applicant's costs on a party and party basis up until 8 November 1996, and the applicant pay the respondent's costs on a party and party basis subsequent to 8 November 1996.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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Applicant

AND: **THE INDUSTRY RESEARCH AND DEVELOPMENT BOARD**
Respondent

JUDGE: **SPENDER J**
DATE: **26 MAY 1998**
PLACE: **BRISBANE**

REASONS FOR JUDGMENT

This is a notice of motion dated 14 March 1997 brought by The Industry Research and Development Board ('the Board'), seeking orders under O 20 r 2 of the *Federal Court Rules* for summary disposal of an application by T J M Products Pty Ltd ('TJM Products') for an order of review under the *Administrative Decisions (Judicial Review) Act* 1977 ('the ADJR Act'). That application concerns the registration under s 39J of the *Industry Research and Development Act* 1986 (Cth) ('the IRD Act') of TJM Products in nine separate tax years, in respect of the 150% tax concession for research and development available pursuant to s 73B of the *Income Tax Assessment Act* 1936 (the 'ITA Act'). TJM Products made application on about 26 October 1995 in respect of the years 1985-86 to 1993-94 inclusive, which applications were received by the Board apparently about 30 October 1995.

The application for an order of review was filed on 14 May 1996 pursuant to ss 5, 6 and 7 of the ADJR Act. The application sought review of a decision by the Board not to register the applicant pursuant to s 39J of the IRD Act in respect of the various applications; further, or alternatively, the application sought review of the decision of the Board not to make a decision to register the applicant in respect of the applications until a decision is taken by the government about applications for registration in respect of the years of income prior to 1993-94. It also sought review of the conduct engaged in by the Board for the purpose of making each of those claimed decisions, and sought review of the refusal or failure of the

Board to make a decision, namely, to register TJM Products in respect of the said applications.

The application asserted the following grounds:

"1. There has been an unreasonable delay by the Respondent in making a decision under section 39J of the Act to register the Applicant in respect of the said applications.

2. Further or alternatively, there has been or will be unreasonable delay by the Respondent in making a decision under section 39J of the Act to register the Applicant in respect of the said applications until a decision is taken by the Government about applications for registration in respect of the years of income prior to 1993/1994.

3. The decision not to register, the decision not to make a decision, the conduct engaged in by the Respondent and the refusal or failure to make a decision were improper exercises of the power conferred on the Respondent by the Act, and in particular sections 39J and 38K thereof, in that:-

(a) the Respondent took irrelevant considerations into account in exercising, or refusing, or failing to exercise, the powers so conferred including:-

(i) that the said applications could not be processed until a decision was taken by the Government about applications for registration in respect of the years of income prior to 1993/1994,

(ii) the statement made by Mr Keating on 6 December 1995 in respect of the proposals of government for revised registration procedures in respect of applications under section 39J of the Act,

(iii) that, according to conventions, the said proposals for revised registration procedures were being administered by the Respondent and were operative,

(iv) that all companies seeking to claim income tax concessions for research and development activities undertaken prior to the income year of 1993/1994 needed to be registered as of midnight 5 December 1995;

(b) the Respondent failed to take relevant considerations into account in exercising, or refusing or failing to exercise, the powers so conferred including:-

(I) that the Respondent was bound by the provisions of the Act as they existed at the relevant time,

(ii) that the Applicant had complied with the provisions of section 39J(1) of the Act,

(iii) that the only grounds on which the Respondent could refuse to register the Applicant in respect of the said applications are set out in section 39K of the Act,

(iv) that the Respondent had no power to decide not to make a decision, or otherwise refuse to make a decision, to register the Applicant in respect of the said applications;

(c) the Respondent exercised the powers so conferred for a purpose other than a purpose for which such powers were conferred;

(d) the Respondent exercised personal discretionary powers at the direction or behest of, or otherwise in adherence to, Government policy,

(e) the Respondent exercised such powers in accordance with a rule or policy without regard to the merits of the particular case;

(f) the Respondent's exercise of such powers was so unreasonable that no reasonable person could have so exercised such powers in that way.

4. The decision not to register, the decision not to make a decision, the conduct engaged in by the Respondent and the refusal or failure to make a decision involved errors of law (whether or not on the face of the record of the decision) including:-

(a) the misconstruction by the Respondent of the Act and the powers conferred on it thereunder.

5. The decision not to register, the decision not to make a decision, the conduct engaged in by the Respondent and the refusal or failure to make a decision were not authorised by the Act in pursuance of which they were purported to be made.

6. The decision not to register, the decision not to make a decision, the conduct engaged in by the Respondent and the refusal or failure to make a decision were otherwise contrary to law."

TJM Products sought the following orders in the application filed 14 May 1996:

"1. an order setting aside or quashing the said decisions of the Respondent;

2. an order setting aside or quashing the conduct of the Respondent not to make a decision;

3. a declaration that the Applicant is and was as at 26 October 1995, entitled to be registered under section 39J of the Act in respect of the said applications;

4. a declaration that, for the purpose of the Act and the Income Tax Assessment Act (1036) [sic] (Cth), the Applicant shall be taken to have

been registered under section 393 of the Act in respect of the said applications as at 26 October 1995.

5. *an order directing the Respondent to register the Applicant under section 39J of the Act in respect of the said applications;*
6. *alternatively, an order directing the Respondent to deal with the said applications according to law;*
7. *costs."*

On 6 December 1995 the then government announced changes of policy for research and development activities prior to the 1993-94 financial year. This ministerial announcement led to the enactment more than a year later on 19 December 1996 of the *Industry Research and Development Amendment Act* 1996 (Act No 82 of 1996) ('the IRD Amendment Act'). That Act purports, in Items 13 and 14 of Schedule 1, to affect the function of the Board in registering applications, subsequent to 2.30 pm Australian Eastern Standard Time on 6 December 1995.

Meanwhile, on 25 January 1996, before that legislation came into effect, the Board registered TJM Products in respect of the income year 1993-94.

Between January 1996 and April 1996 there was correspondence between TJM Products and the respondent concerning the fate of the applications for registration for the years prior to 1993-94. In a letter of 25 January 1996 an officer of AusIndustry wrote concerning the other applications by TJM Products, which letter said in part:

> *"If an application prior to the 1993/94 year was sent in at the same time as this registered application, it cannot be registered until a decision is taken by the Government about retrospective applications."*

In response to this letter an officer of TJM Products wrote to AusIndustry by letter of 23 February, which letter said in part:

> *"Thank you for your registering our 1993/94 claim, however your indecision regarding our prior year claims leaves us bewildered and distressed that such an attitude could prevail. Our applications were lodged with your office prior to any change in the process being mentioned. If your office had processed our application in a timely manner <u>we would have perhaps had all claims registered before Mr Keating's press announcements</u>.*
>
> *It is not conscionable that a delay in your process can effect (sic) our applications when the IR&D Act was and is still in effect under which our*

applications were submitted."

(my emphasis)

On 18 March 1996 TJM Products again wrote, the letter saying in part:

> *"We formally request that your department process our prior year claims for research and development activities.*
>
> *The relevant legislation in place at the time of lodging our R&D claims on or about the 26th October 1996 is still current. We fail to see any legal reason why our claims should not be processed immediately. We also understand that claims received by your office after our claims were lodged have been since processed by your department and we seek clarification of this matter.*
>
> *We believe that you have a minute from the then Minister Mr Cook to halt processing claims but we do not believe this overrides legislation currently in place. We also understand that both yourself and your department believe the claims should be processed."*

On 2 April 1996 AusIndustry wrote:

> *"As you are aware, the then Prime Minister, Mr Keating, announced in the* Innovate Australia *statement on 6 December 1995 the proposals of government for revised registration procedures. Currently the new Government is considering the issues afresh and will announce its policy in due course.*
>
> *In the meantime, according to conventions, as we understand them, the new registration requirements which were announced as of 6 December 1995 are being administered* ***such that they will not prejudice the outcomes of emerging government policy****. Thus all companies seeking to claim the tax concession for R&D activities undertaken prior to the 1993/94 financial year needed to be registered as of midnight on 5 December 1995."*
>
> (emphasis added)

On 3 April 1996 TJM Products wrote to the Federal Treasurer, Mr Costello, which letter said in part:

> *"As a snapshot of our case we outline the following:*
>
> *-We lodged our R&D claim on 26th October 1995.*
> *-The Department of Industry had our claims in process on the 5th November 1995*
> *- We were advised in January 1996 that our pre 1993 claims were held due to Paul Keating's press statement of 6th December 1995 reviewing retrospectivity.*
>
> *You would realise that we have no control over the administrative process*

> *or efficiency thereof in regard to the Department of Industries claim procedure. Moreover, we cannot see how a press statement can supersede the law of the land.*
>
> *Our understanding is that Treasury has interpreted the press statement to prelude (sic) any claims not registered by 5th December 1995."*

As earlier indicated, the application for an order of review in paragraphs 3 and 4 of the prayer for relief sought orders pursuant to s 16(1)(c) of the *Administrative Decisions (Judicial Review) Act* 1977, declaring that:

> *"...the applicant is and was as at 26th October 1995, entitled to be registered under s 39J of the Act in respect of the said applications."*

and further declaring that, for the purpose of the Act and the *Income Tax Assessment Act* 1936 the applicant shall be taken to have been registered under s 39J of the Act in respect of the said applications as at 26 October 1995.

At the hearing on the motion for summary dismissal the applicant successfully obtained leave to amend the application by amending the fifth prayer for relief, seeking an order directing the respondent *"to register the applicant under s 39J of the Act in respect of the said applications as if the applicant had been duly registered in respect of the said applications on 26 October 1995"*. (amendment underlined)

The Board's function in registering eligible companies appears in Part III of the 1986 IRD Act. Prior to the passing of the 1996 IRD Amendment Act, s 39J of the 1986 IRD Act provided as follows:

> *"39J(1) Where:*
>
> *(a) an eligible company applies to the Board for registration in respect of a year of income;*
> *(b) the company provides to the Board such information in relation to its research and development activities, or proposed research and development activities, as the Board reasonably requires; and*
> *(c) there are no grounds under section 39K on which the Board is entitled to refuse to register the company in respect of that year of income;*
>
> *the Board shall register the company in relation to that year of income."*

The point of registration is to be found in s 73B of the ITA Act. Subject to the provisions of that section, deductions are available to eligible companies incurring either contracted

expenditure on research and development, or expenditure not being contracted expenditure, in an amount equal to the expenditure multiplied by 1.5 in the year of income. A company is an eligible company if, being a body corporate, it is incorporated under the law of the Commonwealth or of a state or territory. TJM Products is an eligible company.

One of the conditions required to be met before an eligible company could satisfy the requirements for deduction is 73B(10) which relevantly provided:

> *"A deduction is not allowable under this section to an eligible company for a year of income in respect of expenditure in relation to research and development activities unless:*
>
> *(a) the company is registered in relation to the year of income and in relation to those activities, under section 39J of the* Industry Research and Development Act *1986."*

Thus, registration is a prerequisite of eligibility for a deduction under s 73B of the *Income Tax Assessment Act* 1936.

TJM Products filed its application for an order of review in the Federal Court on 14 May 1996. On 7 November 1996, the Board registered TJM Products under s 39J for the financial years 1985/86 to 1992/93 inclusive. The letter advising of these registrations said in part:

> *"Please note that the registration of TJM Products Pty Ltd for the 1992/93 and prior years of income may be rendered nugatory by the passage of the Industry Research and Development Amendment Bill 1996 which is currently in the Senate."*

The short point of the application for summary dismissal of the application is that the complaint of failure on the part of the Board to decide the applications has been overtaken by events, in that, on 7 November 1996 the applications the subject of the application for an order of review had been approved. As a consequence, there is no purpose to be served in maintaining the application further. In my opinion this contention is correct and there is no reasonable prospect of obtaining any of the relief, and in particular, the relief sought in prayers 3, 4 and 5 of the amended application and therefore the principal proceedings should be dismissed. No basis has been shown suggesting that there is some reviewable error in the failure by the Board to decide the respective applications on or before 2.30 pm on 6 December 1995.

It seems to me that s 73B contemplates that the entitlement to a deduction comes about on registration by the Board and not at any earlier time. It seems to me that there is no power in the Board to register a company *nunc pro tunc*, and *a fortiori* there is no power in the Court to direct the Board to treat the registrations which it in fact effected on 25 January 1996 and on 17 November 1996 respectively, as if they had been effected at some date prior to 6 December 1995.

Toohey J in *Emanuele* v *Australian Securities Commission* (1997) 71 ALJR 717 described the origin of *nunc pro tunc* orders. Toohey J said:

> *"Mozley and Whiteley's Law Dictionary offers this definition of* nunc pro tunc:
>
> 'Now instead of then; meaning that a judgment is entered, or document enrolled, so as to have the same legal force and effect as if it had been entered or enrolled on an earlier day.' "

His Honour referred to the observation of Lord Eldon in *Donne* v *Lewis* (1805) 11 Ves Jun 601; 32 ER 1221 at 1222:

> *"The Court will enter a Decree* nunc pro tunc, *if satisfied from its own official documents, that it is only doing now what it would have done then."*

On the question of power to make orders *nunc pro tunc*, in *Guss* v *Veen-Huizen [No 2]* (1976) 136 CLR 47 , where the appellant sought amendment to the register of practitioners so as to include his name as and from an earlier date, Mason and Murphy JJ said, at 66:

> *"In his affidavit in support of his objection the appellant asked that the Register of Practitioners, in which his name has recently been entered following the discovery that it had not been entered in 1962, be amended so as to include his name from 2nd March 1962 or such other date prior to 5th August 1976 as the Court may hold appropriate. This application was not supported by oral argument. Nor could it be supported. Section 55B(3) plainly contemplates that the entitlement to practise arises upon entry in the Register and not before."*

That there is no power in the Court enabling it to direct the Board to register the applicant under s 39J of the Act in respect of the applications by the applicant as if the applicant had been duly registered in respect of those applications on 26 October 1995, as sought in prayer 5 of the amended application, is supported, in my view, by the observations of Gibbs CJ, Murphy, Brennan and Dawson JJ, in *Clyne* v *Deputy Commissioner of Taxation* (1984) 154

CLR 589 at 597. That case concerned the power in a Court to backdate a sequestration order. Their Honours noted at 597:

> *"...the court has, in our opinion, no power to backdate a sequestration order to make it take effect either before, or contemporaneously with, the commencement of the bankruptcy resulting from the acceptance of the debtor's petition. In a number of cases in which a bankruptcy petition was wrongly dismissed and the debtor was thereafter adjudicated bankrupt on his own petition, the appellate court, in allowing an appeal, has directed that the receiving order made against the debtor should be amended as if dated on the day on which the petition was wrongly dismissed, and should be deemed to be made on the creditor's petition:* In re Haynes; Ex parte Kibble (1890) 7 Morr 50; In re Johns; Ex parte Spears (1893) 10 Morr 190; In re Teale; Ex parte Blackburn [1912] 2 KB 367. *The practice established by those cases can be justified by the power that an appellate court has in allowing an appeal to make the order which should have been made in the first instance. However, the Act itself provides when a debtor becomes a bankrupt - either upon the making of a sequestration order (s 43(2)) or upon the acceptance by the registrar of the debtor's petition: s 55(3)(b). Apart from the power of an appellate court to put right what was wrongly done in the first instance, no court has power to cause a debtor to become a bankrupt on a date earlier than that for which the Act provides. Neither the general power conferred by s 30(1)(b) of the Act to make such orders as the court considers necessary for the purpose of carrying out or giving effect to the Act, nor the power given to the Federal Court by its rules to antedate its orders (O 35, r 3) extends to permit the court to make an order which would bring about a result different from that prescribed by the express provisions of the Act and so serious in its possible consequences."*

This is not to say that there are not serious questions concerning the effect of what has in fact occurred; in my opinion, there is a very serious question concerning the nature of the legislative changes to s 39J introduced by the IRD Amendment Act . However, in the view I take of the matter, the Board's power to approve registration is prospective and there is no power to direct that registration operate from a time prior to the date when the application for registration is accepted.

For practical purposes, unless the acceptance by the Board of the application for registration occurred prior to 2.30 pm on 6 December 1995, no sensible distinction flows from the fact that registration was not granted in respect of the earlier years earlier than 7 November 1996.

In respect of an application made on 26 October 1995 and received by the Board on 30 October 1995, there is no material which reasonably permit of the argument that there was some dereliction or legal error in the Board in not having those registrations effected by 6

December 1995. The fact that the processing of the applications for the prior years were put *"on hold"* because of the Board's deferral to the policy changes announced by the then government on 6 December 1995 evidences an error of law on the part of the Board, does not have any practical significance unless that deferral had the consequence that a registration would have been effected before 6 December 1995, and no basis has been suggested on which such an outcome would have occurred.

In my opinion, the injunctive power under s 16(1)(d) of the *Administrative Decisions (Judicial Review) Act* sufficiently extends to ordering a decision-maker to decide a matter in a particular way, but it does not extend to empowering the court to order that that particular decision operate retrospectively from a nominated date. Section 16(1)(d) of the ADJR Act provides:

> *"16. (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:*
>
> *...*
>
> *(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties."*

The terms of that subsection do not extend, in my view, to permitting the Court to direct a decision-maker to regard something which has not been done as having been done.

In *Minister for Immigration and Ethnic Affairs* v *Conyngham* (1986) 11 FCR 528 at 536, Sheppard J, with whom Beaumont and Burchett JJ agreed, said that *"s 16(1)(d) plainly confers power on the court, in an appropriate case, to order a decision-maker, whether a Minister of the Crown or other public official, to decide a matter in a particular way".* His Honour said at 537:

> *"...the language of s 16, including that of sub-section (1)(d), should not be the subject of a narrow or restrictive construction. On the contrary, it should receive the liberal construction normally given to remedial legislation."*

Sheppard J said at 541:

> *"Where, as here, what has transpired has amounted to a constructive failure to deal with the real application which has been made, it will sometimes be appropriate, (for example, in cases of substantial urgency from the point of view of the aggrieved party) to require the decision-maker to make a decision forthwith or within a limited time."*

That particular passage speaks of a power requiring a decision-maker to make a decision within a short time, but it lends no support at all for the proposition that the Court has power to require a decision-maker to adopt the position that a decision had been made in the past which had not in fact been made in the past.

To like effect is the observation by Gummow J in Bond Corporation Holdings Ltd v Australian Broadcasting Tribunal (1988) 84 ALR 669 at 683:

> *"In an appropriate case where a decision is set aside, an order under this provision [s 16(1)(d)] may be made compelling a decision of a particular kind."*

It seems to me that the real complaint by TJM Products in the circumstances is that a possible consequence that the registrations in fact granted by the Industry Research and Development Board on 25 January 1996 and 7 November 1996 respectively are *"vitiated"* as a consequence of the enactment of s 39J of the IRD Amendment Act.

It will be recalled that a press release was made on 6 December 1995 announcing the government's intention to limit the ability of companies to register for concessions in respect of past expenditure. It is apparent from the correspondence earlier set out that the Board dallied, in reliance on the policy indicated in that press release, which was that companies would not be permitted to register more than six months after the end of the financial year in which the research and development expenditure was incurred.

The 1996 IRD Amendment Act passed through parliament and was assented to on 19 December 1996. Section 2(3) provided, inter alia, that Item 13 of Schedule 1 to that Act was to be taken to have commenced at 2.30 pm Australian Eastern Standard Time on 6 December 1995. Subject to the exceptions claimed in s 2(2), (3) and (4) the 1996 IRD Amendment Act commenced on the day it received Royal assent. Item 13 provided for the insertion after 39J(1) of the 1986 IRD Act the following new sub-section:

> *"(1A) Subject to sections 39JA, 39JB, 39JC and 39JE, the Board cannot register a company under this section, in relation to the company's research and development activities, in respect of a year of income:*
>
> *(a) if the year is the 1992-93 year of income or an earlier year of income - after 2.30 pm Australian Eastern Standard Time on 6 December 1995; or*
>
> *(b) if the year is the 1993-94 or 1994-95 year of income - unless the application for registration is made before 7 June 1996, or*

> *(c) if the year is the 1995-96 year of income or a later year of income - unless the application for registration is made after the end of the year of income but within 6 months after the end of that year."*

Hill J has recently held in *Boral Windows* v *Industry Research and Development Board* (6 May 1998, unreported) that the registration by the Board under s 39J of *Gas Corp* as communicated by letter dated 25 November 1996 was vitiated by the *Industry Research and Development Amendment Act* 1996. His Honour mildly noted at p 8 of his judgment:

> *"Retrospective legislation is somewhat distasteful. Retrospective legislation which takes away accrued rights is even more so. A construction not retrospective and a construction that does not operate in respect to vested rights will always be preferred if open. But ultimately this Court must give effect to the language which Parliament has used and the legislative purpose to which that language points. Not only does s 8 of the* Acts Interpretation Act *1901 allow the possibility of a contrary intention but it also must be read subject to s 15AA of the same Act which directs the Court, looking at the question of construction as a whole, to adopt that construction which will further the parliamentary purpose.*
>
> *It follows in my view that, while Gas Corp factually was registered on 25 November 1996, as and from the 1996 IRD Act being given the Royal Assent on 19 December 1996 but operating retrospectively from 6 December 1995, that act of registration was beyond power and in breach of s 39J(1)(a) with the consequence that, at the time of commencing the present application, Gas Corp was not and, for legal purposes, never had been registered by the Board."*

The question of whether, consistent with the judgment of Hill J in *Boral Windows* v *Industry Research and Development Board*, the registrations in fact of 25 January 1996 and 7 November 1996, are by virtue of the Royal Assent to the 1996 IRD Amendment Act on 19 December 1996, to be taken as not having occurred, are not matters that arise in the present application.

The judgment of Hill J is a hard decision, and there is the need to consider the possible application of *Georgiadis* v *Australian and Overseas Telecommunications Corporation* (1993-94) 179 CLR 297. If the effect of the 1996 IRD Amendment Act is to strip TJM Products of its status of registration and, with it, an entitlement to deductions under s 73B of the *Income Tax Assessment Act* 1936, it may be that the amendment is invalid as affecting an acquisition of property on other than just terms. Of course, it has to be recognised that the entitlements presently in question are statutory in origin, and not based on the general law.

These considerations illustrate the real risk to the rule of law when the Executive gives obedience to ministerial decree rather than legislation; where a ministerial press release is treated as equivalent to legislation passed by the Parliament of the people of Australia; and where the position is further complicated by an attempt to give binding authority to a ministerial statement of policy by retrospective legislation.

In this context, it is well to remember the strong words of Sir Anthony Mason speaking extra-judicially in "The State of the Australian Judicature" at the 26th Australian Legal Convention in Sydney on 18 August 1989. His Honour, reported in Vol 53 No 10 of the *Law Institute Journal*, said at 977:

> *"The rise in the power of the Executive has contributed to a decline in respect for the law just as it has contributed to a decline in respect for the authority of Parliament. Nowadays the community is expected to act on a ministerial statement forecasting legislative amendments which will be given a retrospective operation as if the statement had the force of law. Retrospective legislation, formerly frowned upon, seems now to be accepted. Thus people are expected to comply, not with the law as it stands, but with what the Executive says that the law will be declared to be at some future time. Sometimes the prophecy of what the law will be is incomplete or proves to be inaccurate - the law, when enacted, turns out to be different, with consequential inconvenience and, in some instances, injustice. That apart, these procedures encourage people to act on the footing that the existing law is irrelevant."*

The registrations in fact effected by the Board on 25 January 1996 and 7 November 1996 are not matters that fall for adjudication in these proceedings and must await another day. For the reasons earlier expressed, I am satisfied that the application for an order of review filed 14 May 1996 and further amended on 17 April 1997 should be dismissed.

In relation to the question of costs, on 10 January 1997 the Australian Government Solicitor wrote to the solicitors for TJM products, which letter said in part:

> *"I now request that you discontinue this proceedings immediately upon the commitment of my client to pay your client's party and party costs up to 8 November 1996.*
>
> *The basis upon which this request is made is that there is no longer any issue between the parties. The respondents, being the Industry Research and Development Board, has now, by registering your client in relation to the years of income for which it sought registration, discharged all the*

> *functions and responsibilities that the Act imposes upon it. In effect, your client sought registration, and has now been registered. There is no issue of a justiciable nature between the parties.*
>
> *I advise that if you are not inclined to discontinue the proceedings, I have instructions to apply to the Court to have them struck out pursuant to Order 20 rule 2, or alternatively Order 29, rule 2 of the Federal Court Rules."*

In a letter of 28 February 1997, the solicitors for the Board said:

> *"There is no general commitment to pay your client's costs up to 8 November 1996. The comment in my letter dated 10 January 1997 was in the context of what my client was prepared to offer should your client discontinue the proceedings. As your client does not intend to do so, the question of costs is at large."*

In the light of the approach reflected in the letter of 10 January (which seems to recognise that there was delay by the Board in not effecting registration until 7 November 1996, because of the Board's deference to ministerial decree rather than to its statutory function), it seems to me that a fair order as to costs is that the respondent should pay the costs of the applicant on a party and party basis up until 8 November 1996, and the applicant should pay the respondent's costs on a party and party basis subsequent to 8 November 1996.

I certify that this and the preceding fourteen (14) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 26 May 1998

Counsel for the Applicant:	Mr M Bland
Solicitor for the Applicant:	Smith & Stanton
Counsel for the Respondent:	Mr A Robertson SC
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	17 April 1997

Date of Judgment: 26 May 1998