INTERPRETATION - AN AUSTRALIAN-AMERICAN COMPARISON

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The United States Supreme Court's decision in *Chevron USA Inc v Natural Resources Defense Counsel, Inc*[1] (Chevron) has been hailed as one of the most significant decisions in American administrative law.[2] It has been seen to represent a dramatic improvement on prior attempts to grapple with the proper scope of judicial review of agency interpretations of statutory provisions.[3] Under Chevron (which gave its name to the doctrine of judicial deference), the circumstances in which courts must defer to agency interpretations of statutes were dramatically expanded. The idea that deference on questions of law is sometimes required was not new. However, prior to Chevron, courts were said to have such a duty only when Congress expressly delegated authority to an agency 'to define a statutory term or prescribe a method of executing a statutory provision'.[4] Outside this narrow context, deference was not mandatory but was an exercise of judicial discretion depending upon multiple factors that courts evaluated in light of the circumstances of each case. The Chevron test was seen to establish a straightforward approach to a traditionally complicated issue in administrative law.[5] Put simply, the court first decides whether the statute resolves the specific issue or is silent or ambiguous with respect to the issue. Should the court determine that the statute is silent or ambiguous, it then affirms the agency's interpretation of the statute if that interpretation is 'reasonable'.

To appreciate the impact of Chevron, it is first necessary to look briefly at the pre-1984 situation of judicial review of agency interpretation of statutes. The Chevron doctrine of judicial deference and how it has affected United States administrative law, its strengths and its failings will then be examined. The issues in Chevron, the decision itself and how it promulgated the notion of judicial deference will be looked at in detail. The paper will also analyse how the Chevron decision has been applied and the reaction it has received – both good and bad – over the years. The paper will also contrast the United States experience with that of Australia. It will be seen that the situation in Australia for judicial review of agency interpretation of statutes is quite different, for the concept of judicial deference in the American sense has never really taken hold in Australia. Rather, in Australia the situation is almost the opposite. The paper concludes that while there are some positive and useful guidelines in the doctrine of judicial deference, the doctrine is not suitable for universal application.

The pre-1984 situation

Prior to 1984, the United States Supreme Court appeared to maintain two inconsistent lines of cases when reviewing agency interpretations of statutes which they administered. One approach is illustrated in *National Labor Relations Board v Hearst Publications*.[6] In Hearst, the issue was whether newsboys were 'employees' within the meaning of the *National Labor*

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Relations Act[7] (NLRA). The newspapers had refused to bargain collectively with the newsboys who then turned to the National Labor Relations Board (NLRB) for protection. The NLRB ruled that the newsboys were employees within the definition in the National Labor Relations Act. A Court of Appeals examined the question and said that the newsboys did not fit within the statutory term employees. The Supreme Court, however, reversed the appellate court's decision and affirmed the agency's decision. In reaching its decision, the Court noted that the term employee is broad, has no precise meaning and was not specifically defined by Congress. The Court concluded that Congress intended that the term take 'colour from its surroundings', that is, the meaning of the term should depend on its relationship to the statute in which it appears and the broad purposes of that statute.[8] This became known as the 'deferential rational basis test'[9] and was applied in a number of cases until 1983.

The second line of cases is exemplified in *Packard Motor Car Company v NLRB*,[10] (Packard). While the facts of the case were similar to those in Hearst, in that the NLRB had to define the term employee, the Court did not agree with the NLRB's legal approach to this case. Packard is often considered to be at odds with Hearst, for in Hearst the Court deferred to the NLRB's construction of the term while in Packard, the Court construed the term independently of any consideration of the Board's term.

For forty years the Supreme Court allowed these two inconsistent lines of cases to exist without making any attempt to reconcile or distinguish the two. When an issue concerning the construction of an agency-administered statute was raised, the Court applied one line of cases and ignored the opposite, alternating between the two lines without supplying any doctrinal guidelines to explain why one test rather than the other should be applied.[11]

The Chevron decision

Chevron has, as indicated above, been hailed as a landmark decision. Certainly, it has had a profound impact on United States administrative law for it 'forged the analytic framework for assessing the validity of an administrative agency's construction of the statute that it is charged with administering'.[12] It appeared at the time of its issuance to represent a dramatic resolution of longstanding tensions inherent in judicial review of administrative law, in favour of broader deference to agency interpretations of statutory terms. With Chevron, the Supreme Court established a new two-step approach to judicial review of agency interpretations of provisions contained in statutes delegating regulatory power to an agency. Step one of the notion of judicial deference arises from the following part of the judgment:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[13]

Step one of the process is straightforward for it involves the court determining whether Congress has addressed the precise question at issue. The inquiry into legislative intent should focus first on the plain language of the statute. If the answer is not found in the statute itself, the court should look to the legislative history of the provision. If the language of the statute indicates that Congress has resolved the policy issue that corresponds to the interpretative issue before the court, the court's duty is to enforce the congressional policy decision against the agency.

The second step in the Chevron test is probably more controversial and the source of some of the problems which have arisen upon application.

> If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to

> the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[14]

Taken literally, this is an instruction to reviewing courts not to attempt to interpret ambiguous language in statutes which delegate power to agencies. According to Davis and Pierce,[15] if the statute is ambiguous, Congress has not resolved the policy issue presented, and the agency is therefore the appropriate institution to resolve the policy issue in accordance with the philosophy of the incumbent administration. The reviewing court retains a limited role in the policy making process to ensure that the agency's interpretation of the policy is reasonable.

The Supreme Court rebuked the Circuit Court for the expansive role it assumed in reviewing EPA's policy decision. In the Court's words, the Circuit Court 'misconceived the nature of its role' for 'federal judges – who have no constituency – have a duty to respect policy choices made by those who do'.[16] The Court emphasised that judges are neither experts in the field nor members of 'either political branch of government'.[17] When Congress has not made a policy decision itself, but has delegated that decision to an agency, that agency can 'properly rely upon the incumbent administration's views of wise policy to inform its judgments'. In the Court's words:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[18]

The Court concluded with the unequivocal statement that:

> The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.[19]

The facts in Chevron

The single issue in Chevron was the proper interpretation of the word 'source' as the term is used in the 1977 amendments to the Clean Air Act[20] (the Act). The Act requires the Environmental Protection Agency (EPA) to impose emission standards on each 'stationary source' – ie a source of air pollution producing more than 100 tons of pollutants annually.[21] Consequently, the interpretation of 'stationary source' is critical for regulating emissions. In 1981, the EPA changed its interpretation of 'source' to refer to the entire plant rather than individual smokestacks within a plant. Under this much broader definition, known as the 'bubble' concept, the EPA treated each polluter as a single source rather than regulating each individual smokestack. Thus, a company could shift emissions among smokestacks to meet EPA guidelines and the EPA has limited control over individual smokestack pollution.

The Natural Resources Defense Council (NRDC) challenged the EPA's definition and argued that the statute's legislative history and policies supported the more narrow smokestack definition. The D.C. Circuit however, found that the language and legislative history of the statute did not indicate conclusively how 'source' was to be defined and invalidated the agency's ruling. The Supreme Court reversed the D.C. Circuit Court's decision and affirmed the EPA's new interpretation of 'source' using the following reasoning. The language of the statute and its legislative history indicated that Congress never addressed the issue of whether 'source' was to be interpreted to mean each part of a plant or an entire plant. The EPA's new interpretation furthered one of the two principal goals of the 1977 amendment – permitting industrial growth. There was no evidence available concerning the impact of the new interpretation on Congress's other major goals improving air quality. Hence, EPA's choice of interpretation reflected a pure policy decision in an area in which Congress delegated EPA power to make such policy decisions.[22]

Reaction to Chevron and its application

Initially reaction to Chevron was favourable. It was described as 'the leading case on the subject' of statutory construction; a 'case which all appellate judges these days bear firmly in mind in reading statutes'.[23] Two years later, Chevron's message was reiterated and strengthened in *Young v Community Nutrition Institute*.[24] In the first three years after its issuance, Chevron was cited in approximately 400 cases.[25] Cynthia Farina said that 'Chevron's justification for choosing deference was spare but powerfully direct' coming as it did after decades of repeated scholarly and judicial debate about the proper allocation of interpretative authority.[26] In Farina's view, Chevron invoked the principles of separation of powers and legitimacy by recognising that the choice of interpretative model is part of the large problem of reconciling agencies and regulatory power with the constitutional scheme. The opinion explained that courts must defer in order to respect the legislature's decision to entrust regulator responsibility to agencies and to ensure that the policy choices inherent in interpreting regulatory statutes are made by persons answerable to the political branches rather than by unelected judges.[27]

Chevron was applauded by Judge Kenneth W. Starr of the United States Court of Appeals for the District of Columbia as a 'good' decision for its jurisprudential provisions and also for its practical effects.[28] The jurisprudence of Chevron appealed to Starr for he felt it was inappropriate for Federal Courts to take a supervisory approach when reviewing agency decisions. He saw Chevron as vindicating the traditional function of judicial review. For him, Chevron confirmed the judiciary's role of declaring what the law is, but prevented the judiciary from going beyond the legitimate role and straying into the forbidden area of overseeing administrative agencies. In his eyes, Chevron affirmed the fundamental allocation of responsibility by forbidding the courts to engage in supervisory oversight of agencies when Congress had not spoken to an issue.[29]

On practical grounds, Starr saw Chevron as allowing agencies to use their expertise in interpreting the range of complex statutes which characterise the modern administrative state. This was so because where an agency has drafted a statute and shepherded it through Congress, the agency's understanding of the statute's language, its legislative history and its goals would be thorough and complete. Allied with this, is the technical expertise to be found in the agency. This is particularly so when a regulatory scheme is complex or statutory terms are broad and imprecise. Some statutes contain terms that are intentionally imprecise. Starr felt that Chevron quite properly recognised that such terms constitute an implicit but nevertheless valid delegation of authority to the agency.[30] In Starr's view, other practical advantages emanating from Chevron would be an improvement in agency proceedings by encouraging agencies to take more responsibility for interpreting the statutes they implement and an improvement in statutory draftsmanship.[31]

Interpretation difficulties

The language of Chevron has since posed difficulties for some scholars. Step one divides the statutory language into two categories 'clear' and 'ambiguous'. Justice Scalia's question of 'How clear is clear?'[32] indicates that ambiguity is a matter of degree. A further complication in this question is that what is ambiguous for one interpretative school is plain meaning to another. Justice Breyer sees problems in the interpretation of Chevron because of the language used.[33] Take for instance, the following extract from the decision:

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[34]

To him, the language used may be read as embodying a complex approach for it speaks of 'implicit' delegation of interpretative power and the word 'permissible' is general enough to embody a range of relevant factors. Yet he also feels the language may also be read as embodying a straightforward approach (as many other commentators also see it). The reviewing court has to simply decide whether the statute is 'silent or ambiguous with respect to the specific issue' and, if so, accept the agency's interpretation if it is 'reasonable'.[35]

While a straightforward interpretation may be seen to be attractive in the short term, Breyer did not see it as having a lasting presence. This is because there are many different types of circumstances, different statutes, different kinds of application, different substantive regulatory or administrative problems to allow judicial attitudes about questions of law to be reduced to any single simple verbal formula. The questions of statutory interpretation which may arise are too many and too complex to rely upon a single simple rule to provide an answer.[36]

Another reason why the straightforward interpretation of Chevron could be undesirable is that it may sometimes add unnecessary lapses of delay, complexity and procedure to a case. This could occur if a court believed that the statute was silent on the particular question, because if following Chevron, the court should then investigate if the agency had a reasonable interpretation of the words. However, if the court then found that the agency had no reasonable interpretation of the words and the agency had not considered the question in sufficient depth, the court would then remand the case to the District Court to give the agency a chance to develop a 'reasonable' interpretation of the statute. [37]

Some of the criticisms and attempts to limit Chevron result from a misunderstanding of the nature of the statutory interpretation issues that agencies and courts frequently must resolve. Pierce points out that, historically, interpretation of terms used in a regulatory statute has been characterised as an issue of law and that some commentators have distinguished between the proper scope of judicial review of issues of law and judicial review of issues of policy.[38] However, many issues of statutory interpretation require an agency to resolve policy issues rather than legal issues. Thus, the first step in the Chevron test requires a court to determine whether the interpretation of the statutory provision in question is an issue of law or an issue of policy. If the court determines that it is reviewing an agency's resolution of a policy issue, the court then moves to the second part of the test and affirms the agency's interpretation of the statutory provision if the agency's interpretation is 'reasonable'.[39]

In Chevron, the Supreme Court recognised that there are many different reasons why Congress declines to resolve policy issues.[40] Congress may have neglected to consider the issue; Congress may have believed that the agency was in a better position to resolve the issue; or for purely political reasons Congress may not have wanted to or been able to achieve the consensus necessary to resolve the issue.

However, some writers have pointed out that Congress resolves very few issues when it enacts a statute empowering an agency to regulate. In these instances, the vast majority of policy issues, including many of the most important issues, are left for resolution by the agency. Congress declines to resolve many policy issues by using statutory language that is incapable of meaningful definition and application. This is accomplished through the use of several different drafting techniques such as the use of empty standards and contradictory standards and lists of unranked decisional goals.[41]

This does present a problem for courts, for when they are faced with the task of interpreting imprecise, ambiguous or conflicting statutory language, they are sometimes required to resolve policy issues which Congress raised but failed to resolve. Similarly, an agency frequently makes policy when it interprets ambiguous or imprecise terms in the statute which grants the agency its legal powers. Pierce provides an illustration of this from Chevron. In

defining 'stationary source' to mean the whole plant rather than just an individual piece of equipment, the EPA did not 'interpret' the statutory language by determining that Congress intended 'stationary source' to mean a plant. Congress used the imprecise term 'stationary source' without defining the term at all. The EPA decided, as a matter of policy, that it would interpret 'stationary source' to mean a plant because in the agency's view such an interpretation would further Congress' conflicting goals.[42] Another factor which could influence an agency's policy would be the views of the current political administration.[43]

The question then arises as to which institution - the court or the agency – is more appropriate to resolve the policy controversy. The fact that agencies are more accountable to the electorate than courts is given as one reason why agencies are the more appropriate institution to resolve policy controversies. The reviewing court's attitude should be the same to an agency's policy decision whether the decision was made by interpreting an ambiguous statutory provision or by any other means of agency policy making. In keeping with Chevron's two steps, the court should affirm the agency's decision, which would include the agency's statutory interpretation, if the policy decision is reasonable. However, if the agency's policy is arbitrary and capricious, the court should reverse the policy decision. In the process of deciding if an agency's policy decision is 'reasonable' the court should review the decision making process by which the agency determined that its choice of policy was consistent with the statutory goals and the contextual facts of the issue in question.[44]

While Chevron has been cited many times and applied by both the Supreme and appellate courts,[45] the Justices of the courts do not seem to share a common understanding of the meaning of Chevron. The fact that there are multiple opinions in many cases discussing Chevron suggests that the Justices are divided on the proper approach to be taken by a court when reviewing an agency's interpretation of ambiguous statutory language. There have been instances when the Supreme Court has stated the Chevron test and applied the test to reach a unanimous opinion – e.g. *United States v Riverside Bayview Homes, Inc.*[46]; *Chemical Manufacturers Association v Natural Resources Defense Council*[47]. However, in other instances, the Justices have divided concerning the meaning to be given to ambiguous language in an agency administered statute. In *INS v Cardoza- Fonesca*[48] the Justices reached different results through the application of Chevron. However, the dicta of *INS v Cardoza-Fonesca* reveals confusion among the majority in its understanding of Chevron. The confusion over the meaning of Chevron continued with *K Mart Corp v Cartier Corp*[49], a case which has no majority opinion, but two lengthy four-Justice pluralities and a brief opinion which formed the deciding vote. One of the pluralities stated that a court should use 'traditional tools of statutory construction' when reviewing an agency's construction of its statute. The plurality undertook a lengthy analysis of these 'traditional tools' – the structure of the statute, inferences of intent derived from statements of statutory goals, various canons of interpretation, and statements from legislative history. It did affirm the agency's construction of the statute, although according to Davies and Pierce, the opinion 'seems to be based more on the Justices' views of wise policy than on deference to the agency's views'.[50] The second plurality claimed to apply the 'strong' version of the Chevron test and reversed the agency interpretation. *K Mart Corp* is all the more intriguing and puzzling because several of the Justices who urged strong deference in *Cardoza- Fonesca* joined the second plurality opinion urging rejection of the agency's construction in *K-Mart Corp*.

Cracks in the Gloss

Thus, while the facts of the Chevron test appear clear, its application has not been smooth. The Supreme Court's decision in Chevron has been criticised on many grounds by scholars and judges. One ground for criticism has been that it violates the statutory command of §706 of the *Administrative Procedure Act 1946*[51] 'the reviewing court shall decide all questions of law' and is counter to the famous pronouncement in Marbury v Madison:[52] 'It is emphatically the province and duty of the judicial department to say what the law is'. However, Davis and

Pierce[53] counteract this criticism saying it is based on an inaccurate characterisation of the issues and a misreading of Marbury. They hold that once an agency or a court concludes that Chevron step one does not apply because Congress did not resolve the issue in dispute, the dispute becomes one of policy rather than of law. Further, they argue that the Marbury Court, like the Chevron Court, recognized that issues of policy are to be resolved by the politically accountable branches.[54]

Sunstein is adamant in his criticism of Chevron:

> ...the decision threatens, first, to confuse rather than clarify the law governing judicial deference to statutory interpretation by administrative agencies. Second and more fundamentally, I think the case threatens to undermine rather than promote separation of powers principles that have been with us for a long time.[55]

Sunstein details a number of problems he sees with Chevron and the notion of judicial deference. He sees that the judgment may be read two ways. The first is a 'strong' or literal meaning that the language of the case governs the reading and this reading proclaims a rule of judicial deference to administrative interpretation of statutes. The second way of reading the judgment is a 'weak' or more interpretative way which allows more in the way of judicial independence in reviewing statutes. He states categorically that:

> What Chevron threatens to do, with either a strong reading or a weak reading, is to undermine some separation of powers principles that have been around for a long time. ... It is filled with possibilities for errors. The courts make occasional mistakes. Nonetheless, that principle is built into the constitutional structure and is basically sound. Courts rather than agencies should be the interpreters of law. Courts have institutional advantages. That principle is, to some degree at least, threatened by the Chevron decision.[56]

Sunstein has maintained that the meaning of Chevron is not clear and thus makes application difficult. He sees conflict between the two steps. If Chevron recognizes that no deference is due when Congress has directly addressed the question at issue, courts will often approach issues of law independently. If however, Chevron requires deference whenever there is ambiguity, then the deferential approach required by Chevron is not acceptable. To him,

> the case for deference to agency decisions depends on congressional will, which in ambiguous cases is reconstructed on the basis of several factors, including the expertise of the agency, its relative accountability, and its ability to centralize and coordinate administrative policy. Because these factors have different force in different contexts, the appropriate degree of deference cannot be resolved by a general rule. The extent of deference should depend on the nature of the issue and, above all, on the applicability of distinctive administrative capacities.[57]

Breyer[58] is similarly dissatisfied with Chevron and argues that deference is inappropriate because 'the way in which questions of statutory interpretation may arise are too many and too complex to rely upon a single simple rule to provide an answer'.[59]

The longer term impact of Chevron

In recent years, there has still been confusion about the scope and domain of Chevron – to what sorts of statutes and what sorts of agency interpretations should the Chevron deference doctrine apply? While Chevron itself concerned environmental law and it was largely applied in environmental cases, there has been a push to extend the Chevron deference doctrine into other areas of law such as labour law and the law relating to securities and exchange[60] and customs law.[61] Merrill and Hickman[62] argue that as the Chevron doctrine has solidified and 'as government lawyers have relentlessly pushed for Chevron deference in new contexts, disputes have inevitably erupted over what kinds of statutes and what kinds of agency action trigger this strong deference'.[63] They detail four

cases which have confronted the Supreme Court in the 1999 and 2000 terms which question Chevron's domain and which reveal a lack of a unifying perspective in the Court's approach to Chevron. These four cases were: *United States v Haggar Apparel Co*,[64] *INS v Aguirre-Aguirre*,[65] *FDA v Brown & Williamson Tobacco Corp*,[66] and *Christensen v Harris County*.[67]

Two of these decisions involved questions regarding the kinds of agency decisions that are entitled to Chevron deference once the agency has been charged with administration of a statute. The other two involved questions about the strength of Chevron's presumption of delegated interpretational power and when this presumption can be overcome.[68] Of these decisions, *Christensen v Harris County*, is held to be the most important for it reveals deep divisions among the Justices about the basic principles that govern the scope of the Chevron doctrine.[69]

While Chevron appeared at the time of its issuance to represent a change in the direction of administrative law, there is increasing evidence to suggest that the apparently clear two-step approach in Chevron is not nearly as clear when it is applied. Analysis of step one has intensified to the point where judges will engage in extensive word battles to discern whether a given agency interpretation follows the will of Congress. The seeming advantages of simplicity and clarity achieved under Chevron have largely disappeared as courts have become more willing to make use of interpretative tools to delve more deeply into congressional intent.

When should Chevron not be applied?

It has been argued that there are some instances when Chevron deference should not apply. One instance where Chevron deference should not be applied is negotiated rulemaking.[70] Choo holds that: 'In addition to concerns about democratic legitimacy, courts can no longer presume that regulations formulated through private interest group bargaining embody either the agency's conception of the public interest, or an application of legal, technical, or policy expertise that is worthy of judicial deference'.[71] He continues that careful judicial scrutiny is particularly appropriate for negotiated rulemaking due to inherent problems surrounding the negotiation process. Such difficulties include ensuring the representation of relevant interests at the negotiating table and the potential for collusion among those who are present to distort statutory terms. Because of the nature of negotiated rulemaking, courts should decide independently all relevant questions of law that arise out of negotiated rules. 'Negotiated rules should be scrutinised objectively by a reviewing court for their conformity to statutory mandates as opposed to the normal deference accorded agency interpretations under the Chevron doctrine'.[72]

Davis and Pierce[73] list other situations when Chevron deference should not apply. These situations include informal pronouncements of position through formats Congress has not authorised for that purpose such as letters, briefs, guidelines or manuals. Chevron deference should not apply to agencies lacking power to make policy and it should also not be applied to interpretative rules.[74]

Merrill and Hickman's[75] study raises fourteen possible areas when Chevron should not be applied. Some of the situations include 'Does Chevron apply to statutes that are enforced by multiple agencies? Does Chevron apply to cross-referenced statutes?'[76]

The Australian situation

In Australia the system of judicial review of administrative action takes on a different hue from that in the United States. Justice Ronald Sackville[77] has identified two principles which have been accepted as fundamental in determining the proper scope of judicial review throughout the movements in Australian administrative law. These are, firstly, that:

> ... courts exercising powers of judicial review must not intrude into the 'merits' of administrative decision-making or of executive policy making. The second is that it is for the courts and not the executive to interpret and apply the law including the statutes governing the power of the executive.[78]

In *Attorney-General v Quin*[79] Brennan J cited Marshall CJ's dictum in *Marbury v Madison*:[80] 'It is, emphatically, the province and duty of the judicial department to say what the law is'.[81]

In discussing the role of the courts in judicial review, Sackville points out that while executive decision-makers must know and understand the law as it relates to the particular decision to be made, the decision-maker's view as to the meaning of the legislation governing their powers and functions counts for nothing as far as the courts are concerned for 'it is the judges who determine the meaning of the legislation, uninfluenced by the views of administrative decision-makers'.[82] This is the situation even though the construction of the legislation may turn on technical, economic or social considerations that the administrative agencies may have considered. The fact that the court may not be as well equipped as agencies to investigate and make judgments on these issues does not seem to matter either.[83] This may be contrasted with some of the American writings which see advantages in allowing agencies to use their expertise in interpreting statutes.[84] Sackville sees this as a paradox for 'Australian courts defer to decision-makers on factual and policy questions, even to the point of upholding obviously erroneous decisions. Yet they pay no attention to an agency's interpretation of the legislation it administers, even if the agency is peculiarly well-placed to analyse the issues'.[85]

The doctrine of judicial deference as defined by the Chevron decision in the United States has not really been accepted in Australia[86] and in fact was quite firmly rejected by the High Court in *Corporation of the City of Enfield v Development Assessment Commission*[87] (Enfield). Despite this, in the history of Australian jurisprudence, there have occasionally been hints to a doctrine of deference, though not necessarily in the exact same form as that conceived by Chevron. This section of the essay proposes to look at how a doctrine of deference has been perceived by the Australian judiciary and academic scholars over the years up to the dismissal of the doctrine in Enfield.

The High Court first enunciated a deference doctrine in 1945. In *R v Hickman; Ex parte Fox and Clinton*[88] (Hickman), the comments of Dixon J (as he then was), came to enshrine the notion that Parliament by enactment of a privative clause can direct the judiciary to adopt a deferential or non-interventionist role in the review of administrative action. His Honour held that the question of the validity of a decision to which a privative clause applies should be approached in the following way:

> No decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.[89]

The issue in Hickman was whether a road transport firm that was operating in the coal industry was subject to a specialist industrial tribunal. In discussing the meaning of the phrase 'coal mining industry' Dixon J held that the meaning might be gleaned from the common understanding of the phrase by those concerned with the coal industry and particularly with industrial matters. However, it is possible that there is not a common understanding of the expression. He held that if the application of the words was established by usage, it would be reasonable to:

> ... expect to find it evidenced by awards, determinations, reports and other papers dealing with the industrial side of coal mining. But we have not been referred to any such documents. On the contrary we have been left to ascertain as best we may what is the denotation of the very indefinite expression

> 'coal mining industry.' It is, I think, unfortunate that it has become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court must rest. As it is however, the question must be decided upon such considerations.[90]

This is a stark contrast to the United States system because as an integral part of the rule making process, agencies give meaning to ambiguous language in statutes in a variety of ways. The possibilities include legislative rules, adjudications, interpretative rules, policy statements, manuals, guidelines, staff instructions and opinion letters. It is through these means that agencies defend their interpretation of ambiguous language.

In Australia, one can look at judicial review for error of law to trace instances of deference although this is not necessarily the same intonation as the United States system. Aronson and Dyer[91] have formulated various models of judicial deference which they have classed as either 'covert deference' or 'overt deference'.[92] They define covert deference as being 'most easily achieved behind the applications of the extremely flexible distinction between an error of law on the one hand and an error of fact, value or policy on the other'.[93] 'Overt deference' to the opinion of the decision-maker is covered by several models. These range from judgments suggesting that an application for judicial review should be postponed until another body, tribunal or inferior court has had a chance to give its view of the law to judgments requiring the judicial review judge to abstain from granting a remedy even though they believe the decision-maker was wrong in law.[94]

An advocate of judicial deference to the legal opinions of specialist tribunals and administrators is Justice Kirby. *In Australian Broadcasting Commission Staff Association v Bonner*,[95] His Honour reasoned that there were sometimes good policy reasons for judicial deference to an administrator's interpretation of ambiguous statutory language. Such reasons included the superior and more detailed managerial skills of administrators who will usually be more in touch with legitimate and lawful policy considerations that are not able to be dealt with in proceedings before the courts, and the undesirability of courts becoming involved in the detail of administrative decisions.[96] In these circumstances, His Honour was referring only to an administrator's interpretation of its own Act for in such a context an administrator is more likely than a generalist court to be attuned to the subtleties of the whole Act and to the administrative consequences of competing possibilities of interpretation.[97]

The use of privative clauses in some industrial legislation gives some measure of protection from judicial review to industrial tribunals. Apart from protecting the decisions of industrial commissioners, registrars and courts, the use of privative clauses has some impact on the deference given to such tribunals. As a general rule, the deference influences the timing of judicial review of industrial bodies because would-be challengers are required to exhaust their remedies within the hierarchy of industrial tribunals before launching a judicial review application. One of the reasons given for this is that the work of the reviewing judge will be much easier in interpreting the relevant legislation if the challenger has exhausted all possibilities in the industrial hierarchy, because the reviewing court will have the benefit of a legal opinion from a specialist court with a much greater awareness of the legislation's detail, history and impact.[98] In some ways this has certain attractiveness about it and is similar to some of the reasons given to the acceptance of judicial deference in the United States.[99]

The reasons for resort to the industrial appeals system before applying for judicial review were detailed by Kirby P while President of the NSW Court of Appeal, in *Boral Gas (NSW) Pty Ltd v Magill.*[100] One of these reasons which supports deference is:

> It affords a proper place to the specialised tribunal which may have a superior advantage in ready knowledge of the developments of jurisprudence under scrutiny which this court does not initially

> enjoy. Furthermore, that tribunal frequently has a superior armoury of remedies at its disposal than this Court can offer.[101]

It is acknowledged that industrial cases are decided against a background of strong privative clauses and they must have some effect in encouraging a degree of judicial deference.[102] Such an example is given in *Public Service Association (SA) v Federated Clerks' Union (SA)*[103] when Deane J, though in dissent, argued for greater judicial deference to the decisions of industrial tribunals:

> Section 95 [the privative clause] manifests a legislative policy that, subject only to the exception in relation to 'excess or want of jurisdiction', the awards, orders and decisions of the Industrial Commission of South Australia should be immune from challenge or review in the ordinary courts. Such a legislative policy in relation to the decisions of industrial tribunals is commonplace in this country. ... Industrial tribunals, when they are not themselves specialist courts of law, customarily include members who either are judges of a court or are possessed of legal training and experience comparable to that required of an appointee to judicial office. Their functions commonly extend to the making of awards or orders which lay down general standards of conduct which bind whole sections of the community in their future conduct and relations. The efficient discharge of such quasi-legislative functions may well require departure from traditional curial methods and procedures. ... In a context where prompt action ... to prevent and resolve disputes is necessary in the public interest, there is much to be said for the view that such specialist industrial tribunals should be empowered to determine promptly and with finality the questions involved in the actual and potential industrial disputes which they are called upon to resolve. The delays and expense of proceedings in the ordinary courts of this country serve to reinforce such a policy and its rationale.[104]

As Justice Paul Stein of the NSW Court of Appeal has pointed out, the High Court rarely grants special leave to appeal in an environmental case 'partly because of the specialist jurisdiction often involved and also the preference for State Courts of Appeal to be the final arbiters of these issues, especially where the relevant law in the jurisdictions may vary considerably'.[105] However, one such grant was for Enfield.[106]

In Enfield, the High Court examined the Chevron doctrine of judicial deference. However, its examination concentrated on the deficiencies of the doctrine and made no mention of it attractions.[107] In dismissing the Chevron doctrine as not applicable the High Court said:

> In the written submissions, reference was made to the applicability to a case such as the present of the doctrine of 'deference' which has developed in the United States. However, this Chevron doctrine even on its own terms, is not addressed to the situation such as that which was before Debelle J. Chevron is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact finding at the administrative and judicial levels.[108]

The dismissal of the Chevron doctrine by the High Court was followed immediately by a re-affirmation of *Marbury v Madison*[109] and *Attorney-General (NSW) v Quinn*[110] as frameworks for judicial review in Australia.[111]

The High Court in Enfield did refer to a number of its earlier decisions which discussed whether a superior court should attach weight to a specialist tribunal's decision on matters peculiarly within their expertise, and qualified the earlier statements in a number of respects. The Court preferred to speak of the 'weight' which might be accorded the impugned decision, rather than of paying it deference. The weight which might be given to the decision would depend on circumstances which could 'include matters such as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning'.[112]

It is interesting to note, as Sir Anthony Mason points out,[113] that the High Court in Enfield did not make any reference to the comment of Dixon J in Hickman that the application of regulations should be determined according to some industrial principle or policy and not

according to legal rules.[114] This, in conjunction with a later comment of Dixon J on the powers of a Local Reference Board,[115] led Sir Anthony to the view that, 'within the area of constitutional power and within the limits of judicial review, it is possible to vest in the decision-maker a power to decide the limits of its jurisdiction'.[116] Sir Anthony continues that if:

> ... the decision-maker's opinion is made the statutory criterion and he addresses himself to the correct test and the relevant facts, his decision will stand unless, in an extreme case, Wednesbury unreasonableness can be established. This approach would seem to be different from Chevron or at least the High Court's understanding of Chevron as demonstrated in City of Enfield. The High Court did not treat the Chevron doctrine as resting on a legislative provision which makes the decision-maker's opinion the criterion.[117]

Conclusion

While Chevron initially appeared at the time to represent a dramatic resolution of tensions inherent in judicial review of administrative law in favour of a broader deference to agency interpretations of statutory terms, subsequent decisions such as *INS v Cardoza-Fonesca*,[118] *K Mart Corp v Cartier Corp*,[119] *Mississippi Power & Light Co v Mississippi*[120] have chipped away at the basic principle of judicial deference enunciated in Chevron. However, it would seem from the evidence presented in this paper, that the words of Robert Choo 'unless and until Chevron is effectively overruled, its legal and practical effect in promoting judicial deference to agency interpretations of law can hardly be disputed'[121] mean that the Chevron doctrine of judicial deference will be a part of United States administrative law for the foreseeable future.

In contrast, it could now quite safely be said that the general view is that the doctrine of judicial deference has no place in Australian jurisprudence although some commentators and academics would not be entirely happy with this. While Gummow J, one of the majority Justices in Enfield, has commented that 'the High Court has now turned its face against the adoption of any judicial deference doctrine derived from Chevron',[122] Sir Anthony Mason said that 'although the doctrine was not explicitly rejected, it is difficult to escape the conclusion the Court regarded the doctrine as amounting to an abdication of the judicial responsibility to declare and enforce the law'.[123] It would seem that comments such as these and the discussion on the United States situation, do not allow for a conclusion that the doctrine of judicial deference is suitable for universal application.

Endnotes

1 (1984) 467 US 837.
2 For comments hailing the significance of *Chevron*, see for example: K W Starr, 'Judicial Review in the Post-*Chevron* Era' (1986) 3 *Yale Journal on Regulation* 283 at 284 and 291; J Becker, 'The *Chevron* legacy: *Young v Community Nutrition Institute* compounds the confusion' 73 *Cornell Law Review* 113 at 118; R J Pierce, '*Chevron* and its aftermath: Judicial Review of Agency Interpretations of Statutory Provisions' (1988) 41 *Vanderbilt Law Review* 301 at 303; R Choo, 'Judicial Review of Negotiated Rulemaking: Should *Chevron* Deference Apply?' (2000) 52 *Rutgers Law Review* 1069 at 1070 and 1081-1082; P L Strauss, T Rakoff, R A Schotland, C R Farina. *Gellhorn and Byse's Administrative Law: Cases and Comments*, 9th ed Westbury, NY, Foundation Press, 1995 at 620-621.
3 R Pierce, '*Chevron* and its aftermath: Judicial Review of Agency Interpretations of Statutory Provisions' (1988) 41 *Vanderbilt Law Review* 301 at 303.
4 *United States v Vogel Fertilizer Co* (1982) 455 US 16 at 24.
5 Pierce, n 3 at 302.
6 (1944) 322 US 111.
7 29 USC § 151.
8 R J Pierce, S A Shapiro and P R Verkuil. *Administrative Law and Process*, 3rd ed NY Foundation Press, 1999 at 374.
9 Pierce, Shapiro and Verkuil, above n 8 at 375.
10 (1947) 330 US 67.
11 Pierce, Shapiro and Verkuil, above n 8 at 375.

12 S M Lynch, 'A framework for judicial review of an agency's statutory interpretation: *Chevron, USA, Inc v Natural Resources Defense Council*' (1985) *Duke Law Journal* 469 at 470.
13 (1984) 467 US 837 at 842.
14 (1984) 467 US 837 at 843.
15 K C Davis and R J Pierce, *Administrative Law Treatise*, 3rd ed v 1 Boston, Little, Brown & Co, 1994 at 28.
16 (1984) 467 US 837 at 866.
17 (1984) 467 US 837 at 865-866.
18 (1984) 467 US 837 at 865-866.
19 (1984) 467 US 837 at 866.
20 42 USC. §§ 7401.
21 Lynch, above n 12 at 474.
22 Pierce, Shapiro and Verkuil, above n 8 at 377.
23 K W Starr, C R Sunstein, R K Willard and A B Morrison. 'Judicial review of Administrative Action in a Conservative Era' (1987) 39 *Administrative Law Review* 353 at 356, 358.
24 (1986) 476 US 974.
25 Pierce, n 3 at 302 (footnote 6).
26 C R Farina, 'Statutory Interpretation and the Balance of Power in the Administrative State' (1989) 89 *Columbia Law Review* 452 at 455.
27 Farina, above n 26 at 456.
28 K W Starr, 'Judicial Review in the Post-*Chevron* era' (1986) 3 *Yale Journal on Regulation* 283.
29 Starr, above n 28 at 309.
30 Starr, above n 28 at 310.
31 Starr, above n 28 at 311.
32 Hon Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) *Duke Law Journal* 511 at 520.
33 S Breyer, 'Judicial review of questions of law and policy' (1986) 38 *Administrative Law Review* 363 at 373.
34 (1984) 467 US 837 at 843.
35 Breyer, above n 33 at 373.
36 Breyer, above n 33 at 373 and 377.
37 Breyer, above n 33 at 378.
38 Pierce, above n 3 at 304.
39 Pierce, above n 3 at 304.
40 (1984) 467 US 837 at 865.
41 Pierce, above n 3 at 305.
42 Pierce, above n 3 at 307.
43 (1984) 467 US 837 at 865-866.
44 Pierce, above n 3 at 307-308.
45 see for example: S G Breyer, R B Stewart, C R Sunstein and M L Spitzer, *Administrative Law and Regulatory Policy: problems, text, and cases* 4th ed NY, Aspen Law and Business, 1999 at 256; O S Kerr, 'Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Court of Appeals' (1998) 15 *Yale Journal on Regulation* 1 at 30.
46 (1985) 474 US 121.
47 (1985) 470 US 116.
48 (1987) 480 US 421.
49 (1988) 486 US 281.
50 Davis and Pierce, above n 15 at 126.
51 5 USC §§ 551.
52 (1803) 5 US 87 at 111; 1 Cranch 137 at 177.
53 Davis and Pierce, above n 15 at 114.
54 Davis and Pierce, above n 15 at 114.
55 Starr, Sunstein, Willard and Morrison, above n 23 at 366.
56 Starr, Sunstein, Willard and Morrison, above n 23 at 371.
57 C R Sunstein, 'Constitutionalism after the New Deal' (1987) 101 *Harvard Law Review* 421 at 466.
58 Breyer, above n 33 at 372-382.
59 Breyer, above n 33 at 377.
60 T W Merrill, and K E Hickman, '*Chevron*'s Domain' (2001) 89 *Georgetown Law Journal* 833 at 838.
61 'Judicial Deference Clarified' (2001) 70 US Law Week 3087.
62 Merrill and Hickman, above n 60.
63 Merrill and Hickman, above n 60 at 835.
64 (1990) 526 US 380.
65 (1990) 526 US 415.
66 (2000) 529 US 120.
67 (2000) 529 US 576.
68 Merrill and Hickman, above n 60 at 848.
69 Merrill and Hickman, above n 60 at 845.
70 R Choo, 'Judicial Review of Negotiated Rulemaking: should *Chevron* Deference Apply?' (2000) 52 *Rutgers Law Review* 1069.

71 Choo, above n 68 at 1071.
72 Choo, above n 68 at 1071.
73 Davis and Pierce, above n 15.
74 Davis and Pierce, above n 15 at 120-121.
75 Merrill and Hickman, above n 60.
76 Merrill and Hickman, above n 60 at 848-852.
77 Justice R Sackville, 'The limits of judicial review of executive action – some comparisons between Australia and the United States' (2000) 28 *Federal Law Review* 315-330.
78 Sackville, above n 77 at 315.
79 (1990) 170 CLR 1 at 37.
80 (1803) 5 US 87; 1 Cranch 137.
81 (1803) 5 US 87 at 111; 1 Cranch 137 at 177.
82 Sackville, above n 77 at 322.
83 Sackville, above n 77 at 322-323.
84 Starr, above n 28 (see above pages 7-8 for discussion).
85 Sackville, above n 77 at 323.
86 The decision in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 is not considered in this paper for it focuses more on the style of judicial review (that is, the importance of judicial restraint in the interpretation of administrative reasons for decision) rather than on judicial deference to an agency's interpretation of the law.
87 (2000) 199 CLR 135.
88 (1945) 70 CLR 598.
89 (1945) 70 CLR 598 at 615.
90 (1945) 70 CLR 598 at 613-614.
91 M Aronson and B Dyer, *Judicial Review of Administrative Action* 2nd ed Sydney, LBC, 2000.
92 Aronson and Dyer, above n 91 at 156-172.
93 Aronson and Dyer, above n 91 at 158.
94 Aronson and Dyer, above n 91 at 160.
95 (1984) 54 ALR 653.
96 (1984) 54 ALR 653 at 668-669.
97 Aronson and Dyer, above n 91 at 163.
98 Aronson and Dyer, above n 91 at 163.
99 Starr, n 28 at 310 and discussion p 7 above.
100 (1993) 32 NSWLR 501.
101 (1993) 32 NSWLR 501 at 511.
102 Aronson and Dyer, above n 91 at 165-166.
103 (1991) 173 CLR 132.
104 (1991) 173 CLR 132 at 148-149 as quoted by Aronson and Dyer, above n 91 at 166.
105 Justice P Stein, 'Reviewing Judicial Review in Environmental litigation' (2000) 6 *Local Government Law Journal* 79 at 79-80.
106 (2000) 199 CLR 135.
107 (2000) 199 CLR 135 at [41] and [42].
108 (2000) 199 CLR 135 at [40].
109 (1803) 5 US 87; 1 Cranch 137.
110 (1990) 170 CLR 1.
111 Sir Anthony Mason, 'Judicial review: Constitutional and other perspectives' (2000) 28 *Federal Law Review* 331 at 339 referring to *Enfield* [43] and [44].
112 (2000) 199 CLR 135 at [47].
113 Mason, above n 111 at 340.
114 (1945) 70 CLR 598 at 613-614 (see above pp 17-18 for full text of quote).
115 (1945) 70 CLR 598 at 617.
116 Mason, above n 111 at 340.
117 Mason, above n 111 at 340.
118 (1987) 480 US 421 (see above pp 11-12 for discussion).
119 (1988) 486 US 281 (see above pp 11-12 for discussion).
120 (1988) 487 US 354 (see Davis and Pierce n 15 p. 126).
121 Choo, above n 68 at 1083-1084.
122 Justice W M C Gummow, 'The permanent legacy' (2000) 28 *Federal Law Review* 177 at 184.
123 Mason, above n 111 at 339