REFORM OF JUDICIAL REVIEW IN VICTORIA: IS THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT THE RIGHT MODEL?

*Annette Rubinstein**

Presented to Victorian Chapter of the AIAL Seminar entitled "Reforming Judicial Review in Victoria", Melbourne, 8 February 1993 and first published in AIAL Newsletter No 13 1993.

I would like to start with a cautionary tale for law reformers, which might be called, with apologies to Rudyard Kipling, 'How the Administrative Law Act got its definitions'.

The problems that have been outlined earlier stem largely from the fact that the purpose of the legislation was radically enlarged between its conception and its eventual enactment, without corresponding changes being made to its structure. The ALA began life in 1968 in a report of the Chief Justice's Law Reform Committee. The original draft bill had an even more modest purpose than the Administrative Law Act itself. It was intended to clear up some practical difficulties in obtaining a writ of certiorari for error of law on the face of the record, in order to facilitate judicial review of statutory tribunals. At that time, the legislation establishing many such tribunals had no provision for appeals on a point of law.

There were three main difficulties facing applicants for certiorari. First, they were often unable to discover the grounds on which the Tribunal had made its decision. Secondly, even if reasons were given, and disclosed an error of law, the decision was not reviewable unless the error appeared on the fact of the record. Thirdly, the decision might be protected from review by a privative clause.

The main provisions of the bill were a requirement that tribunals give written reasons for their decisions, a statement that such reasons form part of the record, and a provision negating privative clauses in existing legislation. The definition section of the Bill was framed with this narrow purpose in mind. 'Tribunal' was defined as a body bound to act judicially to the extent of observing one of the rules of natural justice because, in 1968, it was accepted that certiorari was restricted to these bodies. This doctrine was a corollary of the other early twentieth century heresy that only bodies exercising judicial, as opposed to administrative, power were bound by the rules of natural justice, an error laid to rest by the House of lords in *Ridge v Baldwin* in 1964. However, it was not until the decision of the Court of Appeal, then years later, *(R v. London Borough of Hillingdon; ex parte Royce Homes Ltd* [1974] 2 All ER 643, 646) that it was made clear that certiorari would lie whenever a body had legal authority to determine a question affecting rights, regardless of whether it was obliged to act judicially. Consequently, in adopting its much maligned definition of 'tribunal', the Chief Justice's Law Reform Committee was merely defining, as economically as possible, the bodies amenable in 1968 to certiorari. Exactly the same reasoning was behind the definition of a 'decision' as one operating in law to determine a question affecting the rights of any person in law to determine a question affecting the rights of any person or to grant, deny, terminate or suspend a privilege or licence.

* Barrister at law.

Other limitations on the scope of the ALA are similarly explicable by reference to its origin. Courts were excluded, because their decisions, unlike those of many tribunals, were subject to appeal. Therefore certiorari was rarely used to quash decisions of courts. Standing was granted to any person whose interests are, or were likely to be, affected to a substantial degree, in order to overcome the very restrictive definition of standing by the Privy Council in *Durayappah v Fernando*.

If the draft Bill had been enacted as it stood, it probably would have served its limited purpose reasonably well. Instead, it was adopted by the Statute Law Revision Committee of the Victorian Parliament as a vehicle for general procedural reform of judicial review. Sections were tacked on permitting a person affected by a decision of a tribunal to make an application for review to the Supreme Court, and empowering the Court, on the return of an order for review, to grant any of the prerogative writs, a declaration or an injunction. The definitions of 'tribunal', 'decision' and 'person affected' were left untouched. As a result, many decisions which were reviewable by mandamus, declaration and injunction were not reviewable under the ALA because the applicant could not satisfy the more stringent test for certiorari. Instead of establishing a single, simplified procedure for judicial review, the result was the creation of two parallel systems, and an entirely new set of procedural traps for litigants.

I think it is worth dragging up this ancient history because there appears to me to be a very real risk of falling into much the same trap by adopting the ADJRA as a model for reform of judicial review in Victoria. The major criticism of the ALA seems to be that its coverage is not wide enough. Too many decisions can only be reviewed using the old remedies, without the benefit of reasons for decision. If the primary aim of legislative reform of judicial review is the creation of a single system of review which will cover the overwhelming majority of cases currently reviewable by the old remedies, then the ADJRA, at least in its present form, may not be the right model, for the same reason that the Chief Justice's Law Reform Committee's draft bill was not. It was drafted for a somewhat different purpose.

I think it would be fair to describe the purpose of the ADJRA as the simplification and partial codification of the law relating to the review of a particular category of decisions, the administrative exercise of statutory power. It is entirely understandable that legislative reform should have concentrated on this class of decisions. At the time the ADJRA was under consideration, before FOI and the AAT, these were the decisions least susceptible to scrutiny or challenge. Cutting judicial review free of the technicalities surrounding the old remedies, and setting out in statutory form the grounds for review and the available remedies, undoubtedly made the whole process more comprehensible, both to decision makers and to those affected by their decisions. However, the price paid for codification is the restricted coverage of the Act.

Legislation which, like ADJRA, was restricted to decisions of an administrative character, would inevitably fragment the system of judicial review in a State jurisdiction. There are not too many cases in the Federal jurisdiction in which litigants have fallen at this particular barrier. There are two reasons for this. The first is the wide definition of 'administrative' adopted by the Federal Court. The second, and more significant for State reformers, is the constitutional restriction on bodies other than Chapter III Courts exercising the judicial power of the Commonwealth. It has been held on a few occasions that, although a decision maker is not exercising the judicial character, but such cases are understandably rare. Decisions of a

judicial character in the Federal jurisdiction are almost always made by Courts, and are readily identifiable as such.

Of course, there is no equivalent restriction on the exercise of the judicial power of the States. Bodies which are not courts can and do exercise judicial power; clear cut examples include the Small Claims Tribunal, the Credit Tribunal, the Residential Tenancies Tribunal and the Equal Opportunity Board. Decisions of these bodies are currently reviewable under the ALA.

To make matters worse, some Victorian tribunals exercise powers which are not easy to categorise; do the Mental Health Review Board, the GAB, the Racing Appeals Tribunal and the Police Discipline Board make decisions of the administrative or a judicial character? Might the answer depend on the particular issue before the Tribunal? Judicial power has been characterised as involving a determination of a question as between defined persons or classes of persons as to the existence of a right or obligation *(R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361). Some Tribunals which review administrative decisions, most notably the AAT, do so by substituting their decisions for those of the original decision maker. The decisions of the review tribunal in these cases would appear to be administrative in character. However, other review tribunals, such as the recently abolished Accident Compensation Tribunal, adjudicate between the original decision maker and the person affected, and make determinations binding on both parties. Is this an exercise of judicial power? If so, whether a tribunal could be reviewed under a state ADJRA would often depend on matters of form rather than substance.

The requirement that a decision be of an administrative character would also preclude decisions concerning the validity of subordinate legislation being reviewed under the ADJRA type Act. Although such decisions in most cases cannot be reviewed under the ALA, they can be reviewed using the old remedies.

A further limitation on the coverage of the ADJRA is the requirement that the decision be made under an enactment. Decisions holding that the ALA does not extend to tribunals which do not derive their authority from statute, such as commercial arbitrators or the Victoria Racing Club, have been much criticised. Of course, these tribunals would also be excluded from review under ADJRA, although in some circumstances non-statutory judicial review may be available. The same is true of some decisions made under the royal prerogative.

The question that naturally springs to mind is 'could these limitations be overcome by expanding the definition of 'decision' in an ADJRA type Act to include both administrative and judicial decisions?' I think the answer is no, unless changes are made to the codification of the grounds of review. The existing grounds of review are appropriate for the review of bureaucratic decisions, and to narrow them would unjustifiably restrict the rights of those affected. However, they are considerably wider than the common law grounds for reviewing judicial decisions, namely jurisdictional error and error of law on the face of the record. In fact, incorporation of judicial decisions in to the ADJRA as it stands would have the potential to create an entire alternative system of appeal, extending to interlocutory decisions. Section 5(3)(b) of the ADJRA, which allows a decision to be reviewed on the ground that the decision maker based the decision on the existence of a fact, and the fact did not exist, would, if it were applied to judicial decisions appear to allow decisions of courts to be reviewed on the facts. Consequently, it would be desirable to have separate grounds of review for judicial decisions, or at least decisions of Courts. Obviously the

difficulties of categorisation would remain. However, since in borderline cases grounds would be pleaded in the alternative, this would be less likely to lead to disaster for litigants than using these same categories to define the scope of the Act. It would be relatively easy to incorporate review of justiciable decisions made under the Royal Prerogative and review of the validity of subordinate legislation in an ADJRA type Act. However, I have a lot of difficulty in seeing how review of domestic tribunals could be incorporated. Some decisions of such tribunals have been held to be susceptible to judicial review based on the old remedies, most notably the decisions of the English Panel on Takeovers and Mergers, which possessed neither statutory nor contractual power, and remarkably, had no legal authority of any kind. Whether judicial review is available appears to depend greatly on the facts of the particular case, including factors which are not readily susceptible of incorporation into a statutory definition, such as whether the existence of the body has dissuaded the Government from establishing a statutory body to carry out its functions. The price of adopting a definition which was too wide would be the shifting of what are essentially private law contractual disputes into the administrative law field.

What are the alternatives to adopting the ADJRA as a model? The main alternative approach, adopted in the UK, NZ, Ontario and British Columbia, is to adopt a uniform, simplified procedure for applying for judicial review. This approach has also been adopted in the Queensland legislation for decisions not covered by the part of the Act based on the ADJRA. On an application for judicial review, the court may grant an order in the nature of a prerogative writ, or a declaration or injunction, but only if the applicant would have been entitled to that particular form of relief outside the judicial review legislation.

Different restrictions have been adopted in the various jurisdictions to restrict applications for judicial review by way of declaration or injunction to traditional public law matters. In NZ, BC and Ontario, declarations and injunctions are only available in relation to the exercise of statutory powers. In the UK they are available if it would be appropriate, having regard to the nature of the matters in relation to which prerogative writs may be granted, the persons against which they may be granted and the circumstances of the case, a definition which could be said to lack a degree of certainty. The Queensland definition resembles that in the UK.

The major limitation of this approach is that it requires continued knowledge of the circumstances in which the prerogative writs were available. It does not permit the litigant to obtain a remedy not available at common law, giving fresh life to technicalities like the rule that mandamus does not lie against a Crown employee acting as an agent of the Crown, but does lie if he or she exercises power as *persona designata*. The attempt to limit judicial review by way of declarations and injunctions to public law matters created some nasty procedural traps in both Canada and the UK.

It seems to me that some of the limitations of legislation of this type could be removed by including a provision enlarging the power of the Court to grant remedies. A litigant could apply for an order to review in any case where he or she could apply for a prerogative writ, or in any case where the exercise of a statutory or prerogative power would be reviewable by declaration or injunction. An order to review could grant any of the remedies set out in s16 of the ADJRA, regardless of the specific type of relief available in relation to that particular decision at common law. So, for example, an injunction would be available against the Crown. A statutory requirement that reasons for decision be given could be added, together with a

uniform test of standing, based on the provisions of the ADJRA. This approach ought to pick up all decisions currently reviewable by the old remedies, since in those cases in which review of a body not exercising statutory or prerogative powers was permitted, the prerogative writs were held to lie. The price for this wide coverage would be that eligibility for review would depend on a definition unintelligible to anyone but an administrative lawyer. However, the more restrictive coverage of the ADJRA, at least in its present form, may be an even higher price to pay for more accessible legislation.