DELIVERING ADMINISTRATIVE JUSTICE: LOOKING BACK WITH PRIDE, MOVING FORWARD WITH CONCERN

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Introduction

This year is the 30th anniversary of the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*'). It was one of four major reforms recommended by the Kerr Committee, a committee the establishment of which I recommended when I was Solicitor-General and of which I was a member. The reforms were a giant step forward in the delivery of administrative justice.

So, this evening, I feel like a quasi-father who is celebrating the 30th birthday of one of his four children. There is, of course, one big difference. I am neither paying for the party nor giving anyone an expensive present.

When you play a part in creating something new, it is very interesting to look at what has happened thirty years later. You ask yourself two questions. "Has the new régime succeeded?" "Has it worked out as I thought it would?" You could ask yourself a third question "Could we have done better?" I don't intend to ask that question.

The *AD(JR) Act* has lost some of its early glitter; it looks a little tired and could benefit from some surgical enhancement.

The *AD(JR) Act* – was it successful?

That the *AD(JR) Act* has been successful is generally accepted. In providing for judicial review on specified grounds with a right to reasons, it introduced a coherent and simplified regime for judicial review which replaced the incoherent and confused system of review provided by the prerogative writs.

Justice Michael Kirby, who offered some criticism of the *AD(JR) Act*, nonetheless described it as "overwhelmingly beneficial"[1]. The main criticism, one made by Kirby J, has been that the Act stunted the judicial development of the common law grounds of judicial review. In 2004, Professor Mark Aronson, in an illuminating article entitled *"Is the AD(JR) Act hampering the development of Australian administrative law?"*[2], firmly rejected the criticism. At the same time he made some instructive and straightforward suggestions for amendment, a move supported by the Administrative Review Council ('the ARC') and taken up by Kathy Leigh in a splendid paper presented to this Forum in 2009[3] in which she suggested that the law could be simplified in the interests of clarity, effectiveness, accountability and accessibility.

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The grounds set out in the *AD(JR) Act* are declaratory of the common law grounds of review together with two residual umbrella grounds of review, namely "that the decision was otherwise contrary to law"[4] or was an "exercise of power in a way that constitutes abuse of power".[5] These two provisions certainly enabled the courts to move beyond the earlier prescribed grounds of review even if the judges were not minded to develop those grounds of review.

Judges like to think that judicial decisions clarify the law by making certain what was previously uncertain. Kathy Leigh challenged this assumption when she said last year:

> In addition, the grounds for review set down in the ADJR Act have of course been the subject of many court cases in the 30 years since the Act was established. This means that inevitably their meaning is now less clear than it appeared to be when the Act was first passed.

Kathy Leigh is unquestionably right. A cascade of decisions on particular points can create fine points of distinction and lead to confusion, if not uncertainty, especially when alternative regimes are available under the *AD(JR) Act* and s.39B of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). So, 30 years on, it is time to repeat the simplification exercise which led to the *AD(JR) Act*.

A criticism made by Stephen Gageler before he became Solicitor-General, was that the *AD(JR) Ac*t contains no statement of general principles.[6] In the 1970s we did not see any occasion to make a choice between the competing theories advanced in *Kioa v West*[7]*;* it was sufficient to declare the common law grounds of review and to supplement them. Indeed, to have gone further and to have raised for decision then the theoretical debate later exhibited in *Kioa v West* would only have ignited a further dimension of controversy to a package of reforms which was very finely balanced as things then stood.

There was, at that time, strong bureaucratic and political resistance to the reforms. Bureaucrats regarded enhanced review of administrative decision-making as a threat, not to "good administration", but to "administrative efficiency", a shorthand expression for the philosophy "because government knows best we do not need to give reasons or to be reviewed". The Kerr Committee made the point that:

> although administrative efficiency is a dominant objective of the administrative process . . . . the achievement of that objective must be consistent with justice to the individual.[8]

To-day there still linger pockets of bureaucratic opposition to review of administrative decision-making as well as political opposition which surges from time to time when decisions with political overtones, like deportation orders, are overturned. So lawyers need to maintain a constant vigilance to ensure that administrative law retains its integrity and vitality.

Innovative legislative reform is a difficult undertaking, much more difficult now than it was in the 1970s. Then the recommendations of an expert committee were likely to carry considerable weight, even on contentious issues. That is not so to-day when political and public relations campaigns, supported by heavy expenditure on advertising, may be harnessed by powerful interest groups against such recommendations, just as they are mounted against controversial legislative proposals. Substantial reform, once driven by expert policy judgment, is now largely a public relations battleground from which an uneasy compromise is cobbled together.

Have things worked out differently?

Some developments in the intervening 30 years have made a difference to judicial review. There was the introduction of s.39B of the *Judiciary Act* and the development of the "constitutional" writs under s.75(v) of the Constitution by the High Court. There was the adoption of the approach of Sir Gerard Brennan in *Attorney-General (NSW) v Quin*[9] which, while it places a politically acceptable face on judicial review, is based on a fictional view of the authority conferred by statute to engage in judicial review. Another development was the decision in *Kable v DPP (NSW)*[10] ('*Kable*') and that certainly surprised me. Although *Kable* was once described as "a guard-dog that barked but once", it promises to be a savage mastiff that is barking with frightening ferocity. A related development has been the identification of jurisdictional error in *Kirk v Industrial Commission (NSW)*[11]('*Kirk*') as the mainspring of both federal and state judicial review. And there has been our pursuit of a path in administrative law which has been described by that outstanding administrative lawyer, the late Professor Mike Taggart, as "Australian exceptionalism".

Some of the developments are to be commended. *Kable*, despite its dubious foundations and the incoherence of the dual but different implications in *Kable* and *Boilermakers*[12], has brought federal courts and state courts exercising federal jurisdiction into a more principled relationship, at least so far as the functions with which they can be entrusted. And the decision in *Kirk* has brought about a more uniform approach to judicial review in federal and state matters.

Australian exceptionalism has been driven very largely by separation of powers considerations. The separation of powers has a more pervasive and dominating influence in our jurisprudence than that of other common law jurisdictions, with the exception of the United States. The impact of this influence is to be seen in the marginalisation of *Wednesbury* unreasonableness, the rejection of proportionality as a ground of review and a pre-occupation with "jurisdictional error". In other jurisdictions where emphasis on the rule of law prevails, the correction of errors of law receives more attention.

The Administrative Appeals Tribunal ('AAT') and merits review

Despite the importance of the *AD(JR) Act*, the major reform was the introduction of "merits review" by the AAT, again coupled with a right to reasons. The introduction of the system of Tribunal merits review was a distinct break from the past. As there were constitutional difficulties in entrusting Ch.III courts with merits review across the board, merits review by the AAT was the preferred approach.

We thought that the establishment of a peak Tribunal with a general review jurisdiction would bring greater status, consistency and acceptability to administrative justice. Our thinking on this point was unquestionably correct. In 1995, the ARC sought to take this approach further by establishing the Administrative Review Tribunal[13]. Unfortunately, legislation to implement this proposal was rejected by the Senate in 2001.

Although the institutional foundations of judicial independence are very much stronger than those that relate to the independence of tribunal members, the AAT has won a high reputation for its impartiality, a reputation which must be maintained at all costs. The AAT is far more heavily engaged in the resolution of disputes to which government or government agencies are a party than are the ordinary courts. That is why the independence and impartiality of the AAT is so important and why any proposals for the creation of specialist review tribunals should be viewed with a critical eye. The general criticism made by Heydon J[14] of specialist tribunals was spectacularly vindicated by the judgment of Gray J in *Merkel v Superannuation Complaints Tribunal*[15].

You will recall that in 2004 the then Attorney-General, Mr Daryl Williams QC sought to introduce amendments which, if adopted, would have eroded the status, independence and effectiveness of the AAT by permitting shorter term appointments, relaxing the qualifications for appointment as President (including allowing the appointment as President of a legal practitioner enrolled for five years) and enabling a multi-member tribunal to sit without a lawyer. In the face of opposition from the Law Council and the ARC, the Government dropped the offending proposals.

One manoeuvre to marginalise or sideline the AAT has taken the form of a suggestion that the money expended on the AAT is wasted and would be better expended on primary decision-making. The very nature of the suggestion reveals a total absence of understanding of the purpose of administrative merits review. It offers independent and impartial review – review that is free from actual or ostensible bias, either for or against government. The primary decision-maker is an officer of government or a government agency. His primary duty is to his employer; he is not independent and he is unlikely to be impartial and even if he is impartial, he won't appear to be. Like the 2004 proposals, this suggestion seems to be designed to make administrative decision-making less independent and more responsive to the views of government.

The Ombudsman

The great success of the office of Ombudsman can be attributed to the dedication of the persons who have held that office, not least the recently retired Ombudsman, Professor John McMillan.

Administrative Review Council

The establishment of the Administrative Review Council was a pivotal element in the new administrative law. It maintained a continuing and constructive oversight of Australian administrative law and its structures with a reporting, advisory and educational role produced many illuminating reports on matters of administrative law, leading the way here and overseas. They included the very influential "*Automated Assistance in Administrative Decision Making".* As Professor McMillan has noted:

> The reports and recommendations of the Council have shaped Australian administrative law. All major aspects of administrative law have been covered.[16]

In recent times the Australian government has not given the ARC the support which it deserves. There was a long delay in the appointment of a President to succeed Jillian Segal, vacancies on the Council were not filled and the ARC no longer has an independent secretariat[17]. What are the reasons for this neglect?

In a response to a letter of concern from the Law Council of Australia, the Attorney-General, after drawing attention to the appointment of the new President and saying that further appointments would be made to the Council in the near future, stated that dedicated officers from the Attorney-General's Department are assigned to manage the Council's work. To deprive the Council of its secretariat and to make it dependent on the Department for services is to impair its independence and virtually to leave its activities to the discretion of the Department.

But that is by no means the complete story. The ARC's annual report for 2009, with reference to the withdrawal of the secretariat and its replacement by assistance from the Department, tells us:

> This change was in the context of the Attorney-General asking the Council to focus for the present on an advisory role, assisting the Department by giving expert input to the Department on matters of current Government priority. At the end of the reporting year, the Council was of the view that it was unable to initiate new projects pursuant to s 51 of the Administrative Appeals Tribunal Act as a result of the changed administrative arrangements. No referrals have been made to the Council under s 51B of this Act in this reporting period.[18]

The passage from the 2009 annual report is revealing. The withdrawal of the Council's independent secretariat is associated with a deliberate transformation in its role from that of an independent body into an advisory role of assisting the Department "*on matters of current Government priority*". In that role it has to rely on departmental officers whose primary loyalty is naturally to the government, not to the Council. Indeed, the ARC has no independent budget allocation; it is entirely dependent on such funds as the Department makes available from its budget. Following its change of role, for 2 years the Council has been unable to initiate new projects; it also has had no referrals.

All this reflects a government approach which looks on agencies simply as instruments in implementing government policies. In this brave new world there is not much space for independent agencies, for people who will look at issues impartially and objectively and may be minded to look at government proposals critically. A climate in which independent or critical views are discouraged or sidelined, presents a serious problem, particularly for members of the legal profession and lawyers whose approach is centred on impartiality and objectivity.

There was a time when the Commonwealth of Australia was at the cutting edge of administrative law, when the initiatives explored and recommended by the ARC led the way elsewhere. That is no longer the case. We are now well back in the pack. The recent publications of the UK Administrative Justice and Tribunals Council[19] illustrate the point. Contrast them with the Attorney-General's Department's draft "*Australian Administrative Justice System: Policy Guide*".

Conclusion

I should offer an apology for striking such a sombre note, a note more attuned to a graveyard burial ceremony than an anniversary. So I shall conclude on a brighter note. The theme of this Conference, "Delivering Administrative Justice", identifies the central purpose of our system of administrative law. It is to do justice to the individual affected by government decision-making as well as to the government. The papers here identify flaws and present issues for consideration and proposals for improvement. What we need is an active, resourced and expert body – and the ARC was such a body - to sift, assess these ideas and others and make recommendations as to what should be done. Administrative law is an ever-changing landscape that needs to be kept under constant surveillance if we are to deliver good administration in the future; administrative justice lies at the very heart of good administration.

Endnotes

1 *Re Minister for Immigration and Multicultural Affairs Ex parte Applicants 20/2002* (2003) 198 ALR 59 at [157].
2 (2004) 15 PLR 202, (2005) 12 AJ Admin.L.29; see also J.Griffiths SC, "Commentary on Professor Aronson's article" (2005) 12 AJ Admin L99.
3 "The Future Architecture of Judicial Review: could we improve accessibility and efficiency?" (2009) National Administrative Law Forum, Canberra, 2009.
4 AD(JR) Act, s.5(1)(j).
5 ibid, s.5(2)(j).
6 "The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 Fed.L.Rev.303.
7 (1985) 159 CLR 550.

8 Commonwealth Administrative Review Committee Report, Parl.Paper No.144 (1971), [12].
9 (1990) 170 CLR 1.
10 (1996) 189 CLR 51.
11 (2010) 239 CLR 531.
12 *Attorney-General (Cth) v Queen* [1957] AC 288 ('*Boilermakers*').
13 ARC Report No.39, *"Better Decisions: review of Commonwealth merits review tribunals"*.
14 *Kirk v Industrial Relations Commission* [2010] HCA, (13 February, 2010 at [122] (where the Industrial Commission of NSW was the target of trenchant criticism).
15 [2010] FCA 564 at [67-70].
16 The Whitmore Lecture 2009, Sydney, 16 September, 2009, p.9.
17 ARC Annual Report 2009, p.9 (the independent Secretariat was withdrawn in early 2009).
18 ARC annual report, 2009, Ch.3..
19 Consultation Draft, "*Principles for Administrative Justice: the AJTC's Approach"; The Developing Administrative Justice Landscape"*.