PURSUING DECLARATORY RELIEF TO EVADE TIME LIMITS APPLICABLE TO JUDICIAL REVIEW: THE EMERGENCE OF AN AUSTRALIAN ALTERNATIVE TO THE RULE OF PROCEDURAL EXCLUSIVITY

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Introduction

Time limits of 6 months or less apply to the commencement of judicial review proceedings in all Australian jurisdictions. The rationale for the relatively short limitation periods applicable to judicial review proceedings is to promote certainty and finality in government decision making which has the potential to impact on many and varied interested parties. However, no equivalent time limits apply to the seeking of declaratory relief.

The issue addressed in this paper, and considered recently by the South Australian Supreme Court,[1] is whether a plaintiff can simply walk around the time limits applicable to proceedings for judicial review by seeking declarations of invalidity instead of prerogative relief? On the one hand, access to justice considerations may suggest that the availability of declaratory relief should not be fettered by reference to limitations that may apply to the pursuit of judicial review; the declaration is often lauded precisely because of its procedural flexibility. On the other hand, it seems somewhat incongruous that the growing ascendency of declaratory relief in public law should render the long standing rules applicable to the pursuit of prerogative relief obsolete.[2]

In the United Kingdom, in 1983, the House of Lords developed the so called rule of 'procedural exclusivity' in the case of *O'Reilly v Mackman* to deal with just this problem.[3] *O'Reilly v Mackman* decided that it was an abuse of process for a plaintiff to seek declaratory relief where prerogative relief was available. The rule, which has since been abandoned in the United Kingdom itself, was never adopted in Australia. It is argued in this paper that a similar approach to the rule of procedural exclusivity can be achieved, not by the invocation of principles relating to abuse of process, but rather by resort to the principles that govern the availability of declaratory relief.

Time limits applicable to actions for judicial review

Time limits for the commencement of judicial review proceedings are notoriously short, ranging across the various Australian jurisdictions from 60 days to 6 months.[4] Further, not only is the time within which a plaintiff must commence judicial review proceedings short, it is also well established that delay in commencing proceedings, even prior to the expiry of the time limit, is a basis upon which prerogative relief may be declined.[5] This principle is expressly enshrined in South Australia by rule 200(2) of the *Supreme Court Civil Rules 2006*

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(SA) which provides that: "An action for judicial review must be commenced as soon as practicable after the date when the grounds for the review arose and, in any event, within 6 months after that date."

The strictness of time limits for commencing actions for judicial review can be contrasted with much more generous limitation periods that are applicable to commencing other kinds of proceedings. For instance, the general rule is that a plaintiff in an action for tort may wait 6 years before commencing proceedings.[6] And, there is no additional requirement that a plaintiff act promptly within this period. As long as the claim is ultimately lodged within the prescribed period, then the plaintiff may choose to keep a defendant in suspense for whatever reason.

What is the reason for the imposition of such stringent time limits for the bringing of actions in judicial review? Historically the answer may have been found in the discretionary nature of the prerogative remedies. As leave was required from the Crown to challenge one of its own decisions, the Crown hedged this right by imposing a self serving strict time limit. However, this justification does not sit comfortably with our modern, post-Diceyan, understanding of the rule of law that those who administer the law are as much bound by it as those who are the subjects of executive action.[7]

The modern justification for short time limits in judicial review is explained in a number of authorities. For instance, in *O'Reilly v Mackman* Lord Diplock said:[8]

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

More recently, Chief Justice Doyle of the Supreme Court of South Australia, in the leading judgment in the matter of *Hall v Burnside*, explained the rationale for the short time period as follows:[9]

> The relatively short limitation period reflects the fact that judicial review is concerned with the validity of decision making by individuals and bodies exercising statutory and other powers that must be exercised in the public interest. Such decisions often have direct and consequential effects on persons other than those immediately affected. In a range of circumstances it will often be a matter of significance for other persons and authorities to know whether or not such a decision is valid or has been subject to a legal challenge. There is a substantial public interest in being able to say, after a specified time, that such a decision can be treated as beyond attack.

The Availability of declaratory relief to evade the time limit for judicial review

Yet, if prerogative relief is unavailable to plaintiffs by virtue of the operation of time limitations then what is to prevent plaintiffs pursuing declaratory relief instead? The ascendency of the declaration as a public law remedy has been commonly noted. For instance, In *Bateman's Bay* it was said:[10]

> Writing extrajudicially, Sir Anthony Mason has said that:
>
> > '[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.'
>
> In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration. There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction. The position is expressed in traditional form by asking of the plaintiff whether there is 'an equity' which founds the invocation of equitable jurisdiction.

This passage was affirmed in *Egan v Willis*[11] and in *Enfield* in which it was also said that:[12]

> Significant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes such as that provided by the Administrative Decisions (Judicial Review) Act 1977 (Cth)…
>
> No … common law action was in issue in this litigation. Nor was the proceeding instituted by Enfield one to which r 98 of the Rules applied. The jurisdiction of the Supreme Court which Enfield invoked was its jurisdiction as a court of equity[13] to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.

More recently, Chief Justice French has written:[14]

> The utility of the declaration that makes it worth talking about derives from its flexibility and procedural simplicity. Sarah Worthington made the point explicitly in her monograph Equity:
>
> > 'Declarations can be made that a person is a member of a club; that her purported expulsion is invalid; that she is the owner of land; that the terms in a will or a trust have a particular meaning; that a contract exists or has been breached or terminated; that an agreement is binding or illegal; or that a form of notice is reasonable. The list is endless. Indeed a declaration may prove appropriate in virtually any situation imaginable.'
>
> Well may we ask rhetorically of declarations as Homer Simpson asked of donuts – 'is there anything they can't do?

The time within which declaratory relief must be sought is not restricted in the same way as judicial review. Limitation of actions legislation does not deal generally with the granting of declaratory relief.[15] As such, there is no statutory or rule based prescribed time limit within which to seek declarations.

In light of the absence of a rigid time limit, together with the much lauded procedural flexibility of the declaration, one might ask, 'why would a plaintiff ever bother with the prerogative writs?' Given the Crown's model litigant obligations, a declaration of invalidity would be likely to be just as effective, in practice, as an order for *certiorari* quashing an administrative decision.

The question posed by this paper is, will the ascendancy of the declaration of invalidity, as a means by which to challenge administrative decisions, render the traditionally strict time limit for prerogative relief redundant? Why would a plaintiff, and particularly one who is out of time to bring judicial review proceedings, not simply pursue declaratory relief instead? What implications does this have for the need for public certainty in government decision making?

O'Reilly v Mackman – procedural exclusivity

In the United Kingdom, the case of *O'Reilly v Mackman* established what became known as the rule of procedural exclusivity. O'Reilly was one of four prisoners charged with disciplinary offences while serving sentences in the Hull Prison. The Board of Visitors found the charges proved and imposed penalties. The prisoners alleged that the Board had fallen into various errors, including failing to afford them procedural fairness and bias. However, the prisoners were out of time to commence judicial review proceedings. Therefore, instead, they sought declarations that the penalties were void and of no effect.

Lord Diplock, on behalf of the House of Lords, held that where a plaintiff could have pursued prerogative relief it would be an abuse of process to pursue declaratory relief and thereby evade the time limit and other safe guards applicable to judicial review instead.[16] His Lordship essentially agreed with Lord Denning who in the Court of Appeal had said:[17]

> Where a good and appropriate remedy is given by the procedure of the court – with safeguards against abuse – it is an abuse of process to go by another procedure – so as to avoid the safeguards.

However, it did not take long for cracks to emerge in the apparently simple rule laid down in *O'Reilly v Mackman*. The United Kingdom courts found in practice that its application in certain circumstances was too harsh. Exceptions were created. For example, it was considered unfair to deny defendants to criminal proceedings the capacity to collaterally challenge administrative decisions as part of their defence.[18] This must often be the case given that a defendant would frequently be unaware of the impugned executive act (for example, an invalid search warrant) until well after the expiry of the time limit to seek prerogative relief, and even if the defendant did become aware of the decision there would often be no reason to challenge its validity until criminal proceedings were commenced. For similar reasons, this exception was extended to defendants in civil proceedings.[19]

Yet, the exceptions were extended beyond those who sought to rely upon the declaration as a shield, to those who sought to use it as a sword. Therefore, plaintiffs were able to pursue declaratory relief, rather than judicial review, where any administrative issues that they raised were relatively minor or incidental to an overarching civil claim. Such exceptions were recognised, for instance, where a plaintiff had a contractual relationship with a public authority,[20] or a civil right to debt payable arising out of a statutory scheme.[21]

Almost 20 years after *O'Reilly v Mackman* was decided, Sir William Wade and Christopher Forsyth said in the leading English text that:[22]

> Lord Diplock's speech in O'Reilly v Mackman was a brilliant judicial exploit, but it turned the law in the wrong direction, away from the flexibility of procedure and towards a rigidity reminiscent of the bad old days of the forms of action a century and a half ago.

As a result of growing criticism the effects of *O'Reilly v Mackman* in the United Kingdom were remedied by a combination of changes to the rules and judicial ingenuity.

The rule of procedural exclusivity has not been adopted in Australia.[23] It is the author's view that in light of the importance of the declaration in the development of administrative law in Australia there has been a well founded scepticism about the wisdom of excluding the availability of the declaration for the purpose of challenging the validity of executive decision making.

Yet, without adopting a rule of procedural exclusivity, together with all of the difficulties that were encountered in the United Kingdom, it is arguable that the 6 month time limit that applies to the seeking of prerogative relief can also be brought to bear upon the seeking of declaratory relief. This conclusion was reached in two recent South Australian cases, but for different reasons. I will now turn to consider the way in which this issue was resolved in those cases.

Hall v Burnside **– the doctrine of laches by analogy**

In the *Hall v Burnside* litigation, the Halls were engaged in a bitter local planning dispute with their neighbours. The Halls sought to challenge the relevant development approvals that had been granted to their neighbours to build a house on what the Halls alleged were unstable foundations. They did so by seeking judicial review 5 months after the expiry of the 6 month time limit. The Full Court, relying on the strict time limit applicable to judicial review proceedings, refused an extension of time to do so despite the fact that the Halls had not been, in the words of Justice Gray in dissent, "lying by" as the time limit expired.[24]

The Halls then sought leave to amend their pleadings to include declaratory relief. In support of their application to amend, it was said on behalf of the Halls that had they simply sought declaratory relief in the first instance there could be no time point brought against them.

Justice Bleby refused the application to amend. In dealing with the argument that declaratory relief would not have been time barred His Honour noted that if the Halls had sought declaratory relief at first instance the equitable defence of laches may have been available.[25] The operation of the doctrine of laches was explained in *Knox v Gye*:[26]

> [W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.

In support of the doctrine it has been said that: "It would have been a blot on our jurisprudence if those selfsame facts give rise to a time bar in the common law courts but none in a court of equity".[27] The doctrine of laches is an illustration of the maxim that equity follows the law.[28]

Yet, there are some important limitations to the operation of the doctrine of laches by analogy. First, the analogy must be a sound one. Therefore the defence is limited to cases in which there is a "sufficiently close similarity between the exclusive equitable right in question and the legal rights to which the statutory provision applies."[29] In my view, the analogy between a declaration of invalidity and *certiorari* will generally be good. In this regard, Justice Bleby noted:[30]

> The practical effect of the alternative remedies of judicial review and declaration and injunction is, in this case, identical. They are truly alternative proceedings. Apart from the time limitation, there is no identifiable benefit of one procedure over the other. To allow the application to proceed by way of declaration and injunction would be to allow the plaintiffs to gain a procedural advantage merely because of their reliance on an alternative remedy.

A further limitation upon the operation of the doctrine of laches by analogy is, somewhat unsurprisingly given the doctrine's equitable origins, that the defence will not be applied "if in the circumstances of the case it would be unjust to do so." [31]

Although it was unnecessary for Justice Bleby to make any conclusive finding about the operation of the doctrine of laches in this case (given that the question before him was whether leave to amend should be granted), it appeared open upon His Honour's reasoning that the 6 month time limit applicable to judicial review could be extended to the seeking of declarations of invalidity by analogy.

The decision of Justice Bleby was upheld on appeal,[32] although the reasons of the Full Court did not expressly endorse or reject the operation of the doctrine of laches in this context.

***Tavitian v Commissioner of Highways* – the discretionary nature of declaratory relief**

Most recently, the issue of delay in challenging administrative decisions has been considered by Justice Kourakis in the matter of *Tavitian v Commissioner of Highways*.[33] In this matter the plaintiff owned land that abutted the Sturt Highway, north of Adelaide. In 2003, the Governor, on the recommendation of the Commissioner of Highways, had declared a stretch of the Highway to be a "controlled access road" under the *Highways Act 1926* (SA). The effect of the proclamation was to prevent land owners along that portion of the Highway, including the plaintiff, from entering directly on to the Highway. Instead it was necessary to use side roads. The plaintiff was unrepresented.

After four and a half years of attempting to negotiate with the Department, and the bringing of a complaint to the Ombudsman, the plaintiff filed an application seeking a declaration that the proclamation of the Highway as a controlled access road was invalid, on the basis that he had not been afforded procedural fairness as required by the *Highways Act 1926*. The Crown submitted that the doctrine of laches applied by analogy to the 6 month time limit found in the Supreme Court Rules.

Justice Kourakis rejected the submission that the doctrine of laches had any application. His Honour undertook a detailed survey of the historical origins of the Supreme Court's jurisdiction to grant declaratory relief (including consideration of that jurisdiction which was derived from the Courts of Exchequer, Chancery and the King's Bench), before concluding that the source of the Supreme Court's jurisdiction to grant declaratory relief is now derived from the *Supreme Court Act 1935* (SA), not equity. Having concluded that the source is a statutory one, it followed that the doctrine of laches was not an available defence.[34]

However, despite concluding that the doctrine of laches was unavailable, Kourakis J considered that a question arose as to whether or not relief should be refused on discretionary grounds. That discretion arose, in His Honour's view, from the permissive language of s 31 of the *Supreme Court Act* which empowered the Court to make declarations.[35] His Honour considered that the usual discretionary considerations, such as the length of the delay, the reasons for delay, and the prejudice to the parties caused by the delay, should be weighed in determining whether relief was available.

Importantly, for the purposes of this paper, His Honour held that the policy that informs the strict time limit for judicial review should also be considered in determining whether a declaration of invalidity of an administrative decision should be granted.[36]

Ultimately, His Honour refused the declaratory relief sought by the plaintiff on discretionary grounds, despite also concluding that the plaintiff had been denied procedural fairness. In other words, His Honour concluded that despite his findings that would lead inevitably to the conclusion that the proclamation is invalid, he was not prepared to declare that to be so in light of the long delay.[37]

Conclusion

Recent litigation in the South Australian Supreme Court suggests that despite the fact that Australia has not adopted the rule of procedural exclusivity espoused in the case of *O'Reilly v Mackman*, there are other means by which effect can be given to the important policy that challenges to administrative decisions are made promptly. Those means include the application of the equitable doctrine of laches or the discretionary nature of declaratory relief. Determining which of these approaches is correct turns on a difficult question of the true source of the courts' jurisdiction to grant declaratory relief.[38]

From a practical perspective, however, it probably matters little whether the doctrine of laches 'picks up' the time limit that applies to judicial review and applies it by analogy to proceedings for declaratory relief, or whether the policy considerations that inform the strict time limit are taken account of in the exercise of the courts' discretion.

These approaches share an important advantage over the rule of procedural exclusivity, namely they have a malleability that the rule of procedural exclusivity did not. The flexibility of the defence of laches lies in its equitable origins. If, on the other hand, the source of granting declaratory relief is statutory, then flexibility is derived from the courts' discretion. These approaches, therefore, allow for limitations upon the courts' ability to provide relief to be determined on a case-by-case assessment of such matters as the reasons for delay and the significance of the challenge to a decision to third parties.

In this way, these approaches allow for the appropriate acknowledgment of the need for certainty and finality in administrative decision making without unduly restricting plaintiffs' access to declaratory relief, which has been so instrumental in the development of public law in Australia.

Endnotes

1 This issue was considered in the recent decisions of *Hall v Burnside* (2006) 102 SASR 298, *Hall v Burnside (No 4)* [2007] SASC 460, *Hall v Burnside (No 9)* [2008] SASR 361 and *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010).

2 Although this paper focuses on time limits, rules other than time limitation that apply to judicial review proceedings but not to the seeking of declaratory relief include, for example, the requirement that plaintiffs set out the grounds of judicial review in a supporting affidavit and obtain leave of the court before serving the proceedings: see, for example, rule 200(3) of the *Supreme Court Civil Rules 2006* (SA).

3 [1983] 2 AC 237.

4 The ACT, NT and Victoria have limits of 60 days. South Australia, Western Australia and the High Court have limits of 6 months. References to the relevant rules are set out in M Aronsen, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 830 [12.180]. See also E Campbell and M Groves, "Time Limitations on Applications for Judicial Review" (2004) 32 *Federal Law Review* 29.

5 The relevant authorities are referred to in Aronsen, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 830 [12.180].

6 This is the case in all jurisdictions except the Northern Territory: P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 95 [5.10.740].

7 *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135, 157 [56] per Gaudron J ('*Enfield*').

8 [1983] 2 AC 237, 281 per Lord Diplock. References to a series of statements to similar effect are collected in E Campbell and M Groves, "Time Limitations on Applications for Judicial Review" (2004) 32 *Federal Law Review* 29.

9 (2006) 102 SASR 298, 304 [49].

10 *Bateman's Bay Local Aboriginal Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 256 [24]-[25] per Gaudron, Gummow and Kirby JJ (footnotes omitted). See also McHugh J at 280 [92]-[94] ('*Bateman's Bay*').

11 (1998) 195 CLR 424, 439 [5] per Gaudron, Gummow and Hayne JJ.

12 *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135, 143-144 [17]-[19] per Gleeson CJ, Gummow, Kirby and Hayne JJ (most footnotes omitted). See also Gaudron J at 157-158 [57]-[58].

13 *Supreme Court Act 1935* (SA), s 17(2).

14 R French, "Declarations: Homer Simpson's Remedy – Is there anything they cannot do?" in Dharmananda & Papamatheos, *Perspectives on Declaratory Relief* (2009), 28-29.

15 Equitable proceedings are generally not directly caught by limitations of action legislation: P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 60 [5.10.270].

16 *O'Reilly v Mackman* [1983] 2 AC 237, 285 per Lord Diplock.

17 *O'Reilly v Mackman* [1983] 2 AC 237, 254 per Lord Denning MR.

18 *R v Wicks* [1998] AC 92 and *Boddington v British Transport Police* [1999] 2 AC 143, 172-173 per Lord Steyn. See also *Ousley v R* (1997) 192 CLR 69.

19 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624; *Chief Adjudication Officer v Foster* [1993] AC 754; *Wandsworth London Borough Council v Winder* [1985] AC 461, 509-510 per Lord Fraser of Tullybelton.

20 In *Mercury Ltd v Director General of Telecommunications* [1996] 1 All ER 575, the dispute at issue was contractual in nature and the Director General's function, whilst a public one, was one inherently referential to the contract between Mercury Ltd and British Telecommunications.

21 In *Rye v Sheffield City Council* [1997] 4 All ER 747 the statutory scheme of housing grants gave to a person entitled to the benefit of a grant a right to payment of the grant on compliance with the conditions contained in the legislation, and consequently the plaintiff was able to sue in civil proceedings to recover a debt payable. Likewise in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, the plaintiff had a "bundle of rights… regarded as his individual private rights against the [defendant]" (at 649 per Lowry LJ).

22 W Wade and C Forsyth *Administrative Law* (8th ed, 2000), 664.

23 *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568, 592-593 per Besanko J; *Hall v Burnside (No 9)* [2008] SASR 361, [63] per Doyle CJ.

24 *Hall v Burnside* (2006) 102 SASR 298, 316 [109].

25 *Hall v Burnside (No 4)* (2007) SASC 460, [42].

26 (1872) LR 5 HL 656, 674 per Lord Westbury.

27 *Couthard v Disco Mix Ltd* [2001] 1 WLR 707, 730, referred to with approval in *Duke Group Ltd (Liq) v Alamain Investments Ltd* (2003) 232 LSJS 58, [130] per Doyle CJ. See also *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112.

28 P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 61 [5.10.280]
29 Spry, *Equitable Remedies* (6th ed, 2001), 419, quoted with approval in *Baker v Duke Group Ltd (Liq)* (2005) 91 SASR 167, [83] per Perry J, Duggan and White JJ agreeing.
30 *Hall v Burnside (No 4)* (2007) SASC 460, [38].
31 *Baker v Duke Group Ltd (Liq)* (2005) 91 SASR 167, [82]-[84] per Perry J, Duggan and White JJ agreeing.
32 *Hall v Burnside (No 9)* [2008] SASR 361.
33 [2010] SASC 206 (unreported, Kourakis J, 9 July 2010).
34 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [53].
35 The equivalent provisions in the other Australian jurisdictions are collected in R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002), 609 [19-025].
36 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [62] and [64]. A similar approach was taken in *Hall v Burnside (No 9)* [2008] SASR 361, [69] per Doyle CJ.
37 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [80] and [84].
38 This question was addressed at some length in paragraphs [13]-[61] of the reasons of Justice Kourakis in the matter of *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010). It is beyond the ambit of this paper to explore this question in any detail.