THE FUTURE ARCHITECTURE OF JUDICIAL REVIEW: COULD WE IMPROVE ACCESSIBILITY AND EFFICIENCY?

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Introduction

Since taking office in late 2007, the Government has been focussed on improving access to justice and promoting transparency and accountability in order to strengthen trust and integrity in government. The Attorney, in a recent speech, noted that "…without an accessible system of justice, the public's confidence in the rule of law is compromised. If justice is accessible only to the very wealthy, it loses relevance for the vast bulk of Australians."[1]

A vast number of people are affected by administrative decisions taken by government, so obviously this must be a major component of any consideration of access to justice.

It is within this framework that I want to discuss some ideas for examining our system of judicial review.

Objectives of judicial review

Judicial review enables a person who is aggrieved by a decision of government to challenge that decision in an independent forum. A fundamental purpose of judicial review is to ensure that executive decisions are made in accordance with the rule of law. It seeks to achieve consistency and certainty in the exercise of government power. It is a means of maintaining the accountability of officials and others exercising decision-making powers.

As Brennan J said in 1982 in *Church of Scientology v Woodward*, "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."[2]

History of judicial review

To examine whether our system of judicial review could better provide access to justice, we should look briefly at its origins.

Judicial review of administrative action has been a feature of Australia's legal landscape since the inception of the Commonwealth. Section 75(v) of the Constitution gave jurisdiction to the High Court to issue remedies against an officer of the Commonwealth to ensure the legality of government administrative action.

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However, in the period immediately following Federation, there was little significant litigation about administrative law. Prior to the 1970s, while some tribunals had been created, the system was developing in an ad hoc manner and seems to have been poorly understood by the public.

The appointment of the Kerr Committee in 1968 established the first comprehensive review of administrative law mechanisms in Australia. The present Commonwealth system of administrative review, including the *Administrative Decisions (Judicial Review) Act 1977* (Cth) *('ADJR Act')*, was the result of the work of the Kerr, Bland and Ellicott Committees.

The reforms were a major step forward in administrative law. In his second reading speech on the *ADJR Act*, the then Attorney-General, the Hon RJ Ellicott QC noted that, "the law in this area is clearly in need of reform – indeed, it could be said to be medieval…"[3]

The Kerr Committee report, in particular, outlined the major points upon which the current system was founded. The theme underlying the report was the need to develop more coherent and comprehensive review. The report identified that this review must be accessible, inexpensive, not overly procedural and transparent.

Government powers and decision making today

Some of the challenges faced within the current system no doubt stem from the sheer amount of regulation that now exists and the number of decisions made under enactments. A quick look at the bound copies of the Commonwealth laws shows that the 161 Bills introduced in 1977 are contained within one volume of approximately 1200 pages. In 2008, the 159 bills introduced comprised over 6,000 pages printed in 6 volumes!

Even though not all legislation is new legislation, amendments to existing legislation also result in changes to the law and to agency practices and procedures for decision making. Indeed, amendments to existing legislation may result in more complex decision making than new legislation.

To add to this, the power to make decisions is not just found in Acts of Parliament. Regulations and other subordinate instruments can all be sources of decision-making power for agencies.

The reality of the extent and complexity of power held by the Government means that decisions must necessarily be delegated. Powers entrusted to Ministers or Departmental and agency heads must be delegated to staff within agencies for practical reasons.

It is useful to consider some examples.

Department of Immigration and Citizenship

The Department of Immigration and Citizenship deals with issues of migration, refugee and humanitarian entry, border security, settlement, citizenship and multicultural affairs. The subject matter is broad and the legislation governing these issues complex. The people about whom decisions are being made have a lot at stake. With a workforce of just over 8,000, in the 2007-2008 financial year, the Department granted 4,637,259 permanent and temporary visas, settled 13,014 refugees and humanitarian entrants and approved the citizenship of 107,662 people.[4] Absolute consistency would indeed be difficult to achieve given this volume.

The Department's annual report for 2007-08 notes that, each year, thousands of decisions made under the *Migration Act 1958* (Cth) by officers of the Department are reviewed by

tribunals and courts. As noted by the Solicitor-General, Stephen Gageler SC, in an address to the Supreme Court and Federal Court Judges' Conference in January 2009, litigation on the subject of migration law in the 2007-2008 financial year, accounted for approximately 23 per cent of all cases commenced in the Federal Court.[5]

Centrelink

Another agency which deals with vast numbers of decisions is Centrelink. Issues of employment, emergency payments, family assistance and welfare are all covered by this agency. In fact, in 2007-08 Centrelink dealt with over 6.5 million customers and granted 2.4 million new claims.[6] In the same period, Authorised Review Officers within Centrelink heard 55,761 internal merits review applications.[7] The number of internal review matters conducted is low for the number of customers dealt with, but it represents a significant number of decisions being challenged.

Merits review

If a dispute over a decision cannot be resolved internally, it may become the subject of an application to an external tribunal to determine whether the agency decision maker has made the correct and preferable decision according to the facts. In 2007-2008, 6,312 matters were lodged with the Administrative Appeals Tribunal,[8] 13,770 in the Social Security Appeals Tribunal,[9] 6,325 matters in the Migration Review Tribunal and 2,284 in the Refugee Review Tribunal.[10] Under legislation and the Constitution, decisions of tribunals are then subject to judicial review.

Despite the fact that primary (and secondary) decision makers may be well equipped with policy and procedure manuals and apply due care and diligence throughout the decision-making process, challenges to decisions may still be made if a person is unhappy with the outcome of the decision, or does not understand or cannot accept why it was made. Even with appropriate support, training and internal processes in place to ensure consistency and fairness to the greatest possible extent, that there will be some errors in decision making is inevitable.

A challenge for agencies, particularly in these times of budget cuts and increased efficiencies, is how to most effectively ensure both that government power is exercised properly and fairly, and that the business of government is conducted efficiently. The importance of systems to ensure that executive decisions are made in accordance with the rule of law, and of systems of accountability to give the public the confidence that this is the case – becomes even clearer. As I outlined earlier, this is a key role of judicial review.

The future?

Recent commentary identifies a number of issues[11] relevant to improving the system.

One issue is the distinction between merits and judicial review. Under our constitutional separation of powers, it is well accepted that it is the role of the courts, not the executive, to make binding determinations on the meaning and lawfulness of applications of the law and that it is for the executive, not the courts, to assess non-jurisdictional facts and determine what is the correct and preferable decision. A criticism often made of the system is that the distinction between review on the merits and review of an error in law can become blurred. It is quite easy to imagine a scenario where in considering unreasonableness in a judicial review context, one could reach a grey area where the considerations were very similar to those in play in merits review. Similarly, issues of fact that determine the merits of a matter are also relevant considerations that a decision maker could err in law by not properly considering.

Another possible issue is that there are multiple and overlapping routes for seeking judicial review of a decision. The *ADJR Act* sought to codify the principles of judicial review and reform the procedures for commencing an action. It was designed to overcome the complexities of judicial review at common law. The remedies largely replicated those already existing in the common law but made them more accessible. It could not of course reduce the scope of judicial review under s75(v) of the Constitution. A person affected by a decision can thus apply for an order for review under the *ADJR Act*, or they can apply for Constitutional writs. The Federal Court, as well as having jurisdiction under the *ADJR Act*, has jurisdiction under s39B of the *Judiciary Act 1903* in the terms of s75(v) of the Constitution. It is now usual for a person bringing an ADJR action to bring a s39B action cumulatively or in the alternative, just in case the court finds that the s39B grounds are stronger. When one considers that the original objective of the *ADJR Act* was to provide a simplified process, this may be evidence that this particular objective is being undermined in practice.

The restricted scope of the *ADJR Act* has been commented on extensively and, in practice, is the main factor leading to concurrent applications being made under the *ADJR Act* and the *Judiciary Ac*t. The *ADJR Act* requirement for reviewable decisions to be made 'under an enactment' means that it does not give the Federal Court jurisdiction to review the potentially illegal exercise of non-statutory public power. There is also the restricted application to final or operative and determinative decisions as a result of the High Court's interpretation of administrative decisions in the *Bond* decision[12]. These restrictions do not apply if the Federal Court's jurisdiction under s39B is relied upon.

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.

These points might suggest that we need to look afresh at the codification of the grounds of judicial review – to update them to again provide a clear and simple source for those needing to seek judicial review of government decisions.

You might even question whether the grounds of judicial review were ever clear. As commentators have pointed out, from the beginning, you need a knowledge of the common law in order to understand them.

The Solicitor-General, Stephen Gageler SC, has suggested that there might be a case for some general principles[13] to give direction for the particularised grounds.

Former Justice Kirby looked at the issue of codification from another angle. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002,*[14] his Honour suggested that the *ADJR Act's* codification of the grounds of review had, to some extent, "retarded" the development of judicial review through the common law.[15] His Honour suggested that "the effects of the ADJR Act were overwhelmingly beneficial and review of federal administrative action was more commonly pursued under that Act than had been the case under the earlier common law".[16] However, he went on to note developments in the English common law since 1977 and suggested that "the common law in Australia might have developed along similar lines" but "the somewhat arrested development of Australian common law doctrine that followed [enactment of the *ADJR Act*] reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally."[17]

Others focus their remarks on the matters excluded either from review or from the obligation to provide reasons for decisions under the *ADJR Act*. There has also been debate about whether judicial review should extend to decisions of all bodies exercising public power,

rather than just public bodies. The courts to date have not supported the application of the *ADJR Act* to decisions of bodies outside government even if those bodies are exercising public power.[18] While developments in the UK in extending judicial review to private sector bodies have been noted, they have not at this stage been followed in Australia.

So, a number of issues have been raised by commentators. I note them, not to give any particular support to them, but to acknowledge that, in the 30 years since the Act was passed, its interpretation has inevitably developed and issues have inevitably been raised about its operation.

So far, I have focussed on comments about the content of judicial review. The ability of a person affected by an administrative decision to readily understand the standards applying to the making of the decision, and thus the grounds on which the decision might be challenged, is but one aspect of an accessible system of judicial review.

Should we also be considering enhancements to court processes to improve accessibility and handling of matters? After all, it is our courts in which remedies are actually provided in this area. In June 2009, the Attorney-General introduced the Access to Justice (Civil Litigation Reforms) Amendment Bill into the Parliament. This was intended to send a clear message that the Court, parties and their lawyers are expected to manage litigation efficiently and cost-effectively. It introduced an overarching obligation to 'facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible'. As part of an increased focus on case management, the Court will also need to consider whether a case should be referred for alternative dispute resolution. Both the Federal Court and the legal profession worked very constructively with the Government in developing these reforms.

The reforms can be expected to improve the experience of litigants in taking a matter to court. But questions remain - are there particular ways we could tailor the process for courts examining judicial review applications? Could we, for example, simplify the procedures for getting a matter before the court, provide for judicial review of certain decisions to be heard by lower level courts, or review fees for some matters or under certain circumstances?

Access to justice is about all the ways in which we can strengthen people's capacity to address legal problems, not just through court proceedings. Indeed the earlier disputes are resolved, the less adverse the impact on the person affected and the less cost there is to the taxpayer. Moving the focus to the beginning of the justice system to prevent disputes developing in the first place, rather than just trying to fix the problems at the end, should be a key aim of any moves to improve access to justice.

The *ADJR Act* took a significant step to assist in quicker resolution of disputes by creating a statutory obligation upon administrative decision makers to provide a written statement of reasons upon request. This assists the person affected to understand the decision and potentially to resolve it more easily.

Judicial review itself also assists in improving primary decision making. Court decisions about the legality of decision making are fed back into the government decision-making processes and thus prevent future disputes.

Are there ways in which we can further assist in the prevention and early resolution of disputes about government decisions?

Information failure is a significant barrier to justice. Information about legal issues that is easy to find and easy to use is of fundamental importance to access to justice. People also need reliable information. We all know from personal experience that there is a wealth of information on the internet, but we also know that not all of it is accurate. Informing people of

their rights and responsibilities can prevent disputes from occurring and escalating. This is particularly important in the area of administrative law, where often people are trying to seek more information about why a particular decision affecting them was made in the manner it was.

For disputes that cannot be prevented, better outcomes will often be achieved if they can be resolved without recourse to courts. Means by which disputes can be prevented include community education and targeted early intervention services, and greater use of ADR processes such as mediation and conciliation. Is there more scope for these mechanisms in relation to government administrative decisions?

Conclusion

In the area of judicial review, it may be time to examine whether there is more that can be done. There may be ways in which our law could be simplified, so as to achieve the desired outcomes of clarity, effectiveness, accountability and accessibility, and also allow the proper process of government to carry on.

Access to justice is not just a fashion of the day. It is about getting to the heart of what people should reasonably be able to expect in a justice system.

Endnotes

1 The Hon. Attorney-General, Second Reading Speech, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, 22 June 2009
2 *Church of Scientology v Woodward* (1982) 154 CLR 24 at p 70
3 Mr Robert J. Ellicott QC, Second Reading Speech, *Administrative Decisions (Judicial Review) Bill 1977*, 28 April 1977
4 Australian Government, Department of Immigration and Citizenship Annual Report 2007-08
5 Mr Stephen Gageler SC, Solicitor-General for the Commonwealth, Address to the 2009 Supreme and Federal Courts Judges Conference, Hobart, 27 January 2009, '*Recent trends in Administrative Law — Have the decisions of the High Court on immigration matters impacted upon traditional and established principles?*'
6 Australian Government, Centrelink Annual Report 2007-08
7 Ibid
8 Australian Government, Administrative Appeals Tribunal Annual Report 2007-08
9 Australian Government, Social Security Appeal Tribunal Annual Report 2007-08
10 Australian Government, Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08
11 A particular source drawn on for this presentation has been Aronson M 'Is the ADJR Act hampering the development of Australian administrative law?' (2005) 12 (2) *Australian Journal of Administrative Law* 79
12 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11
13 Gageler S, *The underpinnings of judicial review of administrative action: common law or Constitution* (2000) 28 Fed L Rev 303
14 (2003) 198 ALR 59; 77 ALJR 1165
15 Ibid, at [166]
16 Ibid, at [157]
17 Ibid, at [166]
18 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179; 77 ALJR 1263