

Judicial Review in Australia: Consultation Paper

Submission by Greg Weeks^{*}

Introduction

The Consultation Paper (CP) prepared by the Administrative Review Council is a thorough and thought-provoking document. I wish to engage with a few of the questions that it poses in some detail, rather than attempting to address every issue raised. In this regard, this submission will be consistent with my oral presentation to the Administrative Review Council on Friday 24 June 2011.

I have had the benefit of reading the submission made to the ARC by my colleague, Professor Mark Aronson, dated 13 May 2011. Where I have nothing to add to his comments or the CP, I will briefly state my agreement.

Options for Australia

In *Plaintiff S157*, the majority famously referred to constitutional judicial review under s 75(v) as the “entrenched *minimum* provision of judicial review”.¹ To my mind, this indicates clearly that the role of a statutory judicial review scheme should be to expand upon the constitutionally entrenched minimum where that is desirable. What a statutory review scheme ought not to do is offer some features which go beyond what is available under the *Constitution*, while at the same time falling short of the constitutional standard of review in other respects. This is the case currently and has led the ARC to express concern about the “bifurcation” between statutory and constitutional judicial review (CP [5.22]).

To the extent that anomalies exist between the two avenues for judicial review at Commonwealth level, the failure of the *ADJR Act* to match the constitutional minimum level of judicial review is the cause of those anomalies. “Bifurcation” between constitutional and statutory schemes of judicial review need not be an issue provided that the statutory scheme does not fall below the “entrenched minimum” standard guaranteed by the *Constitution*, as is currently the case. I do not support the suggestion that the *ADJR Act* be repealed.

What role then, if any, should a statutory review scheme play in the future, given that judicial review is constitutionally guaranteed? The constitutional guarantee of judicial review is not a compelling reason not to have a statutory review scheme because that conclusion implies that the “minimum” guaranteed by the *Constitution* is also sufficient. It is desirable to make certain advances upon constitutional judicial review, just as it was when the administrative law reforms of the 1970s were being proposed.

For one thing, the concept of jurisdictional error which is the central concept underlying constitutional judicial review is fraught with difficulty and, following the decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, seems here to stay at all levels. A statutory scheme that allows review for all errors of law ameliorates this situation. The provision of reasons for administrative

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¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

decisions is not mandated by the *Constitution* or the common law but is widely seen as a key benefit of the *ADJR Act*. Additionally, the *Constitutional* guarantee of review in s 75(v) was developed at a time when public power in the federal sphere was inevitably exercised by “an officer of the Commonwealth”. This has been less and less frequently the case for some time. Ideally, a statutory scheme should build upon the *Constitution* in this regard in order to allow for review of the way that public power may be exercised in fact, through outsourcing and soft law to name two examples.

The ambit or scope of review

There are a few matters which it suffices for me to mention only briefly:

- It is anomalous that subordinate legislation is beyond the scope of the *ADJR Act* and there is no purpose served in maintaining that state of affairs as far as I can see.
- I agree that the *ADJR Act* should be extended to cover decisions of the Governor-General, as has been the case at common law for 30 years, since *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170.
- I support the suggestion in the CP that the coverage of the *ADJR Act* be extended to include decisions made under schemes funded by government.

It would be problematic for judicial review to extend to government’s commercial decisions under contract. For one thing, it is difficult to see how existing judicial review remedies could be effective in the event that a commercial decision was held to fall foul of judicial review’s principles. There is no need, in my view, for judicial review to extend this far when there are already integrity mechanisms in place which are capable of making government accountable for its commercial choices. The Ombudsman’s capacity to inquire into government contracting is of particular significance. It would be preferable not to extend the scope of the *ADJR Act* too far past the traditional ambit of judicial review in this regard.

Private bodies exercising public power

Like Professor Aronson, I see the issues of the preferable focus of a test for judicial review jurisdiction and the question of whether and how judicial review can be extended to cover private bodies exercising public power as essentially being the same problem.

ADJR’s restriction of review to decisions, conduct and failures to act or engage in conduct “under an enactment” is unduly narrow and should be reformed. There is no principled reason why statutory judicial review should be limited to decisions which are “expressly or impliedly required or authorised by [an] enactment” and which “confer, alter or otherwise affect legal rights or obligations”.² This formula is more restricted than the extent of common law judicial review and, if it was ever appropriate, is now inappropriate at a time when government control is increasingly exercised by means other than enacted legislation. The common law has long since allowed judicial review of decisions made in the exercise of prerogative or executive power.

To the extent that judicial review is an inappropriate means of addressing certain issues, the scope of review is more properly controlled by the question of justiciability. I do not favour changing the *ADJR Act* to address this issue (as considered at CP [4.42]-[4.49]). Rather, the related concepts of justiciability and whether or not there is a matter are better left to the courts, as they are under every other piece of Commonwealth legislation. Of more specific importance is the fact that justiciability is a better organising concept for restricting access to judicial review than the existing limitation to decisions made “under an enactment”. Take, for example, the case of *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, where a majority of

² *Griffith University v Tang* (2005) 221 CLR 99, 130-1 [89] (Gummow, Callinan & Heydon JJ).

the Full Court of the Federal Court of Australia (Bowen CJ and Wilcox J) held that the deliberations of Cabinet were not properly subject to judicial review. This result must, with respect, be correct but it proceeds from the fact that Cabinet deliberations are inherently political and therefore non-justiciable rather than from the fact that Cabinet decisions are not made “under an enactment”. There is no need to reduce the courts’ capacity to restrict judicial review on this basis to statutory language.

The High Court clarified the scope of the “under an enactment” formulation in *Griffith University v Tang* (2005) 221 CLR 99. That was a welcome result, but served mainly to emphasise the air of unreality that follows when examining the source of a power rather than its character forms the basis of a court’s jurisdiction to engage in statutory judicial review. Leaving aside the decision of the majority in *Tang* that Griffith University had not exercised power at all because its relationship with Ms Tang was entirely consensual,³ what should have been relevant to the dispute was whether the University was exercising public power and not whether any exercise of power was “under an enactment”. This is because the source of power is largely irrelevant to its nature or effect. The *ADJR Act*’s drafting, however, left the High Court with no capacity to take that option.

Bodies like Universities and the Panel on Take-overs and Mergers from *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1987] 1 QB 815 are capable of exercising power which is *de facto* the equivalent of that exercised by government: not for nothing did Lloyd LJ remark in *Datafin* that the Panel had “a giant’s strength”. This is no less the case if such power is sourced neither in statute nor the executive. While the source of the power is irrelevant to its effect, what should be relevant to a court exercising a judicial review function is whether or not the power is *public*.

I would favour replacing the words “under an enactment” in the *ADJR Act* with a form of words which covers decisions, conduct and failures to act or engage in conduct which constitute an exercise of public power in breach of law. “Law” should be defined to include both statute and the general law. I would not favour using the test of whether or not the body in question is obliged to observe the rules of natural justice, largely for the reasons given by Professor Aronson in his submission.

It is my submission that the source of a public authority’s power (be it under an enactment, as an exercise of executive or prerogative power, et cetera) ought not to be determinative of the question of whether its exercise should be subject to supervision by a court exercising judicial review and that the relevant question ought to be whether the power is of a public nature, or whether the repository of the power exercises a public function. This would, for example, exclude powers which are bestowed by contract because they are not public in their nature but an expression of an agreement reached privately between two or more parties. However, this submission is affected by the oft-noted difficulties in determining which functions of a body are sufficiently ‘public’ to attract the jurisdiction of a court to engage in judicial review. By contrast, the main argument in favour of adopting a natural justice test would seem to be the ease of its application.

A public function test would have the benefit of not being restricted to government entities; it could also cover private bodies to the extent that they exercise public regulatory functions. Criticisms of such a test, on the basis that it would be uncertain in its application, will be misplaced if the test is legislatively defined. An example of how this could be achieved can be seen in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). “Public authority” is defined by the Charter at s 4(1)(c) to include:

an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

³ *Tang* at 131 [91] (Gummow, Callinan & Heydon JJ). Note the criticism of this aspect of the Court’s judgment, with which I agree, in Mark Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’ (2007) 35 *Federal Law Review* 1.

Clarification of when an entity will be exercising functions “on behalf of the State or a public authority” is provided in subsections 4(4) and (5).

Section 4(2) of the Charter then provides a non-exhaustive list of considerations which will indicate whether a particular function is “of a public nature”:

In determining if a function is of a public nature the factors that may be taken into account include:

- (a) that the function is conferred on the entity by or under a statutory provision;
- (b) that the function is connected to or generally identified with functions of government;
- (c) that the function is of a regulatory nature;
- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the *Corporations Act*) all of the shares in which are held by or on behalf of the State.

Such a test would have covered the Panel in *Datafin*, which performed a regulatory function. It would also have covered Griffith University in *Tang*, since University education is generally identified as a function of government and Universities are publicly funded to that end. By contrast, in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, AWBI would not have been held to have been exercising a public function which was amenable to judicial review because it was operating under a statutory scheme which empowered it to act selfishly – and anti-competitively – in the interests of its shareholders.

A public function test must exclude decisions which are made pursuant to privately granted powers (most typically under contract) but should extend to decisions made by private bodies in the exercise of public power. This would be a most desirable policy outcome, since it would increase the coverage of judicial review to include acts done on behalf of, but without, government.

Although I do not favour a ‘natural justice’ test of jurisdiction being introduced to replace the existing “under an enactment” formulation, such a test would have one highly beneficial outcome. That is, it would result in statutory judicial review coverage of decisions made pursuant to soft law or policy where they induce a legitimate expectation that the terms of the soft law or policy would be applied. In the absence of a jurisdictional test with this coverage, I submit that the legislation should nonetheless be framed to allow judicial review in such circumstances. A public function test could do this.

As I will discuss below, soft law and policy are increasingly being used as tools of regulation which are beyond the supervision of judicial review as it has traditionally been conceived. However, other areas of administrative law have recognised for some time that it is proper to attach some meaning to instruments of this nature. The *ADJR Act*'s jurisdiction should cover, at least, decisions made pursuant to an agency's “operational information” as defined in the *Freedom of Information Act 1982* (Cth) s 8A(1):

An agency's **operational information** is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

This would recognise the increased regulatory role of “rules, guidelines, practices and precedents relating to ... decisions and recommendations”. It would also be a logical extension of the rule of law principles already served by the *FOI Act* requiring soft law and policy documents to be made publicly available.

Right to seek judicial review

I respectfully agree with the arguments put by Professor Groves in favour of replicating the standing test under s 27(2) of the *AAT Act* for groups to seek standing in matters brought under the *ADJR Act* (CP [4.100]). This would serve to standardise standing requirements for groups and remove the effect of contradictory cases in different specialised areas, such as environmental law or health law.

Grounds of review

I agree generally with the comments made by Professor Aronson in his submission about desirable reforms to the grounds of review codified in the *ADJR Act*. I would like to make some additional comments about only one ground of review, that in s 5(2)(f).

As it is currently drafted, s 5(2)(f) provides for judicial review where a decision-maker has engaged in “*an exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case*”. This formulation is certainly in step with the existing common law, for example in *Green v Daniels* (1977) 13 ALR 1. However, it gives no recognition to the fact that there is a competing consideration of consistency, particularly when so much regulation is done through the means of soft law.⁴ The complexity of applying policy and guidelines arising from a need to balance consistency with the merits of each case was articulated by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634. This judgment remains highly influential and should now inform the drafting of s 5(2)(f).

Regulation through soft law and policy has increased over the course of the last three decades. There has accordingly been a recognition of the fact that published soft law and policies must mean *something*; in other words, that those who use them as a regulatory tool ought not lightly to be able to apply any other standard. On the other hand, soft law cannot be applied as though it were hard law. The problem, in essence, is not simply regulation with soft law but the fact that the soft law applies asymmetrically: it operates as *de facto* hard law on those who are being regulated but is decidedly soft in its effect on the regulators.

It is unlikely that Australia will take recognition of the need for soft law, guidelines and policies in areas of high-volume decision-making to the extent that it has been taken in the UK. There, the Supreme Court has held recently that departure from a published policy in favour of an unpublished policy is unlawful.⁵ Previously, in its final judgment, the House of Lords ordered the Director of Public Prosecutions to issue guidelines indicating when he would prosecute a person for assisting someone else to commit suicide.⁶ These judgments are inconsistent with current Australian case law. The decision in *Lumba* is an ill-fit with Australian law which says that courts will not give substantive effect to soft law, policies, guidelines or representations which do not have the enforceable status of law.⁷ Similarly, it is hard to know how an Australian court would view a set of guidelines published pursuant to a court order, as happened as a result of the decision in *Purdy*. Will the DPP be bound by these guidelines in a way that s/he otherwise would not?

It is not necessary for the ARC to unravel all of these issues in order to send a signal that, in engaging in judicial review, courts need to weigh the benefits of an unfettered exercise of discretion against the benefits of consistency. There are occasions upon

⁴ See Commonwealth Interdepartmental Committee on Quasi-regulation, *Grey-letter law: Report of the Commonwealth Interdepartmental Committee on Quasi-regulation* (1997); Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* No 49 (2008).

⁵ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.

⁶ *R (Purdy) v Director of Public Prosecutions* [2009] 1 AC 345.

⁷ See *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.

which a court may legitimately decide that soft law or policy should be applied exactly on its published terms. I would therefore commend Professor Aronson's submission that s 5(2)(f) of the *ADJR Act* should be replaced by something like the following:

"applying a rule or policy that unlawfully purports to narrow the breadth or content of an applicable discretionary power;"

While this formulation begs the question to some extent, it would serve as a reminder to courts and those seeking relief under the *ADJR Act* that there is a necessary balance to be struck between consistency and the merits of individual cases.

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