11 April 2011

The Director
Legislation, Policy & Criminal Law Review Division
Department of Attorney General & Justice
GPO Box 6
Sydney NSW 2001

**By email:** lpd_enquiries@agd.nsw.gov.au

Dear Director

**Reform of Judicial Review in NSW: Discussion Paper**

I wish to make a submission on some aspects of the Discussion Paper referred to above. If required, I am happy to discuss the content of my submission in greater detail as this project continues.

## Option 3: Creating a NSW statutory judicial review jurisdiction

I am broadly in favour of a statutory judicial review jurisdiction, based on the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), being created in NSW. The opportunity should also be taken to remedy some of the shortcomings of the ADJR Act in drafting the NSW legislation. I wish to make detailed submissions on two of these, being the ADJR Act's exclusion of decisions made pursuant to policy or soft law, and its limitation to decisions made "under an enactment".

### *Coverage of soft law and policy documents*

Although, for reasons I will articulate below, I do not favour a 'natural justice' test of jurisdiction for a NSW *Judicial Review Act*, such a test would have one highly beneficial outcome. That is, it would result in statutory judicial review coverage of decisions made pursuant to either a policy or 'soft law' where they cause an individual to entertain a legitimate expectation that the terms of the policy or 'soft law' 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.

Under s 18(c) of the *Government Information (Public Access) Act 2009* (**GIPA Act**), agencies are required to publish their policy documents, which are defined in s 23 to include the following types of non-legislative instruments:

> (a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents,
>
> (b) a document containing particulars of any administrative scheme,
>
> (c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme,
>
> (d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme,
>
> (e) any other document of a similar kind.

Any statutory judicial review scheme should attach to exercises of public power even if statute is not the source of that power. A NSW *Judicial Review Act* should therefore cover, at least, decisions made under policy documents as defined in the GIPA Act. This would recognise that agencies are increasingly able to effect regulatory aims through the

use of 'soft law' and policy statements and would also be a logical extension of the rule of law principles already served by requiring policy documents to be made publicly available.

Such an increase in the courts' statutory jurisdiction when compared with the ADJR Act is unlikely to result in a vast increase in litigation. I would expect that the most noticeable result of such a reform would be greater care in the drafting of policy documents. It should be borne in mind that the remedies for their breach would remain procedural only. As the High Court remarked in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, a decision-maker could satisfy the requirements of procedural fairness by warning the public against reliance on the policy, or by warning a party of an intention to depart from it.

***The 'under an enactment' jurisdictional limitation***

A NSW *Judicial Review Act* should not replicate the ADJR's restriction of review to decisions, conduct and failures to act or engage in conduct "under an enactment".[1]

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] As the Discussion Paper notes, the ADJR Act formula is more restricted than the extent of common law judicial review (paras 9.13.1 and 9.15). This restriction, if it was ever appropriate, is inappropriate now 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.[3] The scope of review is more properly controlled by the question of justiciability. This was the case in *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, where a majority of 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 should proceed 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".

The High Court's recent clarification of the scope of the "under an enactment" formulation in *Griffith University v Tang* (2005) 221 CLR 99 ("***Tang***"), while welcome, signals cause for concern in one major respect. This is that *Tang* emphasises the air of unreality that follows from examining the source of a power rather than its character. 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,[4] 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 power 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 ("***Datafin***") 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

[1] For convenience, I will henceforth refer simply to decisions rather than also to conduct and failures to act or engage in conduct.
[2] *Griffith University v Tang* (2005) 221 CLR 99, 130-1 [89] (Gummow, Callinan & Heydon JJ).
[3] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.
[4] *Tang* at 131 [91] (Gummow, Callinan & Heydon JJ). This aspect of the Court's judgment has been criticised, rightly in my opinion, in Mark Aronson, 'Private bodies, public power and soft law in the High Court' (2007) 35 *Federal Law Review* 1.

source of the power is irrelevant to its effect, what is relevant to a court exercising a judicial review function is whether or not the power is public.

I would favour a NSW *Judicial Review Act* 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 will expand upon the definition of "public power" below.

## Option 4: statutory judicial review using a natural justice test

Dr Matthew Groves has argued, in "Should the *Administrative Law Act 1978* (Vic) be repealed?" (2010) 34 *Melbourne University Law Review* 451, in favour of using natural justice as a test of jurisdiction. I am opposed to this option, despite Dr Groves' persuasive arguments.

My main reason for opposing this option is that it is apt to confuse by using a procedural requirement to test whether the jurisdiction exists to conduct judicial review. The obligation to observe the demands of natural justice is not coextensive with judicial review. More importantly, the obligation to observe the procedures of natural justice does not necessarily result in the availability of a judicial review remedy (such as in regard to clubs and associations). Consequently, a test of jurisdiction based on natural justice will cover bodies who are required to provide natural justice for reasons other than those of public law. This in turn will make those bodies subject to judicial review's remedies under the proposed *Judicial Review Act*, even though that would not be the case at common law because decisions of clubs and associations are usually not public, but sourced in contractual powers. As a general principle (although not universal), it is preferable to keep any statutory judicial review jurisdiction roughly in step with the common law.

A secondary reason for opposing this option is that it will affect the test of standing which exists under the ADJR Act. ADJR's "person aggrieved" sometimes allows groups and organisations to obtain standing to challenge decisions to which they are opposed. However, a jurisdictional restriction to "natural justice" would exclude groups from coverage by the ADJR Act because natural justice is an obligation owed to individuals rather than to groups.

## Option 5: statutory judicial review using a 'public function' test

I have submitted above that the source of a public authority's power (be it under an enactment, as an exercise of executive or prerogative power, etc) should not be determinative of the question of whether its exercise should be subject to supervision by a court exercising judicial review. Rather, the relevant question ought to be whether the power is of a public nature, or 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.

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) (**Charter**). "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).

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.

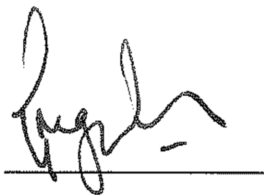
A public function test would therefore exclude decisions which are made pursuant to privately granted powers (most typically under contract) but would extend to decisions made by private bodies in the exercise of public power. This would be a most desirable policy outcome, since it would increase the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

## Summary of recommendations

I am in favour of a statutory judicial review regime being created in NSW and specifically submit that the NSW legislation:

(a) grant jurisdiction to courts to conduct judicial review of decisions made pursuant to policy documents, as they are defined in the GIPA Act;
(b) should discard the ADJR Act's jurisdictional limitation to decisions made "under an enactment" in favour of "exercising a public function in breach of law";
(c) reject the option of a 'natural justice' test of jurisdiction; and
(d) instead adopt a 'public function' test modeled on s 4(2) of the Victorian Charter.

Yours faithfully,



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