The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights

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The growth of the modern, welfare state and the expansion in regulatory activity have resulted in an increased influence of government in many aspects of the lives of the citizen. At the Commonwealth level, judicial power is and must be vested in the courts. But recent decisions on the nature of judicial power have made it clear that many decisions which affect the rights and interests of citizens do not involve an exercise of judicial power and may therefore be validly reposed in a non-judicial tribunal.[1] This means that decisions affecting individuals are increasingly made by administrative bodies which give paramountcy to policy and administrative goals and lack the protection of judicial independence. Because government is the source of many benefits claimed by the citizen, an individual's right to review of government decisions is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen. As I observed in *R v Toohey; Ex parte Northern Land Council*:

> [T]he doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[2]

Judicial review of administrative action is particularly important at the Commonwealth level; under s 75(v) of the Constitution it cannot be excluded by the Parliament. Indeed, Sir Owen Dixon said that s 75(v) was written into the Constitution to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding federal power.[3] There is no equivalent at State level. Consequently, the extent to which State legislatures may qualify or exclude prerogative or other relief in relation to the decisions of State governments, their agencies or administrative bodies depends upon different considerations.

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1 See eg *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656; *R v Ludeke; Ex parte Australian Building Constructions Employees' and Builders Labourers' Federation* (1985) 159 CLR 636.

2 (1981) 151 CLR 170 at 222.

3 See *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

The Scope and Purpose of Judicial Review

It has sometimes been said that the purpose of judicial review (in the Anglo-Australian sense of that description) is to ensure that administrative decisions are lawful, fair and reasonable. Sir Robin Cooke, President of the New Zealand Court of Appeal, is a prominent exponent of this view. In this context, 'fair' means procedurally fair. As a broad, general statement of the purpose of judicial review, it may be accepted.

But I doubt that it is a completely accurate statement of the position in Australia. My doubts centre largely upon the concept of *Wednesbury*[4] unreasonableness and how far it can be taken. Initially the concept was a limited one. It signified a manifestly unreasonable decision, one which was so unreasonable that it might be inferred that it was the product of irrelevant considerations or of a failure to take into account irrelevant considerations [5] or even of bad faith.

Since then, the concept has been extended. Thus, in England, it has been said that the notion of wrongful abuse of power extends to irrationality, an expression which Lord Diplock applied to decisions which were "outrageous" in their "defiance of logic or accepted moral standards".[6] The *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the ADJR Act') apart, the ramifications of all this remain to be finally determined in Australia.

But no matter how it be determined, judicial review for unreasonableness, in some sense of that expression, forms part of our law. And that notwithstanding the critical view of some commentators that judicial review should be restricted to excess of power, procedural unfairness and bad faith.[7] That view, it seems to me, is a reflection of the administrative culture which gives less emphasis than the legal culture to the protection of individual rights and interests. The strength of the restricted view should not be underestimated.

Time permits reference to a few issues only that are current in administrative law today. By way of preliminary comment, there are two points that I should make. First, the High Court has made it clear that the obligation to accord natural justice or procedural fairness stems from the common law; it is not something which is within the gift of the statute law.[8] Secondly, it is now accepted that an obligation to accord natural justice or procedural fairness will arise when the legitimate expectations of a party are adversely affected by the proposed exercise

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4 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
5 n 4 at 229 per Greene MR.
6 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410.
7 Compare this view with the statement of Sir Owen Dixon as to the purpose of s 75(v), previously referred to.
8 See *Kioa v West* (1985) 159 CLR 550 at 576, 582-585, 632; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574-575.

of power.[9] I mention these points because they make it clear that the fundamental principles of our administrative law have their roots in the common law and that the jurisdiction by way of judicial review of administrative action is a jurisdiction that has been developed by the courts in accordance with the common law tradition. That is important in the consideration of the effect of privative clauses.

The Separation of Powers and Exclusion of Judicial Review

General

Debate about issues in administrative law centres, as it has always centred, upon the inter-relationship between the three arms of government and upon the tensions which are inherent in that inter-relationship. In no other field of law are those tensions so clearly visible as they are in administrative law. The Diceyan theory of parliamentary supremacy naturally encouraged judicial deference to the legislative will. And, in a representative democracy, judicial deference to the legislative will, when it is clearly and unmistakably expressed within the limits imposed by a constitution, is obligatory. The doctrine of the separation of powers to the extent to which it applies reinforces that position.

Nevertheless, in the modern representative democracy, respect for the rule of law as well as respect for the fundamental rights and interests of individual citizens is an essential element. Recognition of this important aspect of modern democratic government has led some judges to suggest that there are some limits to extreme theoretical versions of legislative omnipotence. In New Zealand (which has a unicameral legislature), it has been suggested that some values are so deeply entrenched in the common law that they cannot be overriden by Parliament.[10] And here in Australia it has been suggested that the grant of legislative power for the peace, order and good government of the relevant territory may operate as a qualitative restriction on the exercise of legislative power.[11] These suggestions have not been endorsed by the High Court.[12]

Recognition of the rule of law as an indispensable element in modern democratic government along with the increasing emphasis given to the importance of protecting fundamental rights does however indicate that the courts might scrutinize more carefully provisions which may have a tendency to trench upon the rule of law or interfere with fundamental rights. Perhaps a distinction

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9 *Annetts v Mcann* (1990) 170 CLR 596. In *Ah Hin Teoh v Minister for Immigration and Ethnic Affairs* (unreported, 14 April 1994,) the Federal Court held that the *Convention on the Rights of the Child*, ratified by Australia but not enacted as part of our domestic law, gave rise to a legitimate expectation that one of its provisions would be respected in the making of an administrative decision. Special leave to appeal was granted by the High Court on 30 June 1994. The appeal was heard on 24-25 October 1994 when judgment was reserved.

10 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 per Cooke P.

11 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 376 per Street CJ.

12 See *Union Steamship Co of Aust Limited v King* (1988) 166 CLR 1 at 10 where the Court discounted the view that the words "peace, order and good government" are words of limitation.

should be drawn between interference with the rule of law and interference with fundamental rights. Absent constitutional or other protection of such rights, they are subject to legislative abrogation or modification. The courts can insist upon a manifestation of a clear and unmistakable intention to abrogate or modify them. That approach will focus the attention of legislators on the impact of proposed legislative provisions and ensure that their impact will be closely considered.[13] Whether legislative provisions having a tendency to deny or inhibit access to the courts lend themselves to different treatment is perhaps a question for the future. An intention to exclude judicial review must be made unambiguously clear.[14] In *Kioa v West*,[15] the High Court held that the *Migration Act 1958* (Cth) does not manifest an intention to exclude judicial review of deportation orders, in this respect departing from its earlier decision in *Salemi v Mackellar (No.2)*.[16] The broad unregulated nature of the discretion to deport was no obstacle to the conclusion that judicial review was available.

Privative clauses

The prevalence of privative clauses in the field of administrative justice stands in marked contrast to the existence of a right of appeal from a first instance decision in the orthodox court system. In a society which prides itself on the rule of law, one might have expected that it would be axiomatic that administrative decisions would be subject to judicial review for legality, procedural fairness and errors of law. That was the philosophy which inspired the ADJR Act. That philosophy, which seemed to me to be compelling, may not be as widely accepted as it was.

This is not the occasion to identify the possible reasons for any change in attitude. They may relate to the breadth of the grounds of review, eg, unreasonableness. Or they may relate to considerations of expense and delay, considerations which have led to criticism of the legal system, coupled with a view that judicial review for procedural unfairness may not often lead to a change in the substantive decision. Or they may relate to a feeling that judicial review in some instances, even for error of law, leads to no more than the substitution of one view of the facts for another view.

Lawyers need to examine these attitudes. Indeed, we should be building bridgeheads between lawyers and administrators. The Administrative Review Council ('the ARC') has made significant progress in this field but more needs to be done. Ultimately, we must have confidence in a system of review which is designed to ensure that administrative action is lawful, procedurally fair and based on reasonable grounds.

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13 *Coco v The Queen* (1994) 120 ALR 415.
14 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 110 per Barwick CJ.
15 (1985) 159 CLR 550.
16 (1977) 137 CLR 396.

An Obligation to Give Reasons

The imposition by s 13 of the ADJR Act of the obligation on a decision-maker to state findings of fact, the material on which they were based and the reasons for the decision was a distinct advance in arming the citizen with effective remedies designed to ensure administrative justice. The statutory obligation to give reasons is all the more significant in light of the High Court's decision in *Public Service Board of New South Wales v Osmond*[17] that the common law does not impose a general duty on an administrator to give reasons for a decision. *Osmond* has been criticized. And, in England, the courts have recently stated that, in some circumstances, an obligation to give reasons may be implied. Thus, it has been said that such an obligation arises where the nature of the process itself calls for reasons to be given or where something peculiar to the decision in fairness calls for reasons to be given.[18] There is an air of imprecision about this but it seems that the law on this topic is in the process of beneficial development in England.

Locus Standi

For some considerable time our public law was bedevilled by a narrow view of locus standi which derived from *Boyce v Paddington Borough Council*.[19] The rules enunciated in that case appeared to require an assertion of injury to legal rights or interests or special damage as a pre-condition of entitlement to seek relief. So expressed, the rules were more appropriate to the enforcement of private rights than to the enforcement of public law duties.[20] More recently, it has been settled in a series of decisions that neither interference with a private right nor special damage needs to be established. It is enough if the plaintiff has a special interest in the subject-matter of the action, being an interest over and above that enjoyed by the public generally.[21] Whilst a mere belief or concern is not enough, a special interest is sufficient. Thus, the special interest of persons claiming to be descendants and members of a particular Aboriginal people and custodians of the relics of those people according to their laws and customs, the relics being of cultural and spiritual importance to them, was held sufficient to give them standing to commence an action restraining the defendant from contravening s 21 of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) which prohibited defacement of, damage to or interference with an Aboriginal relic .[22]

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17 (1986) 159 CLR 656.

18 *Ex parte Doody* [1993] 3 WLR 154; *Ex parte Cunningham* [1994] 4 All ER 310; *Reg v High Education Funding Council* [1994] 1 WLR 242, especially at 258.

19 [1903] 1 Ch 109. The narrow view in *Boyce* continues to govern English law. see *Lohnro Limited v Shell Petroleum (No 2)* [1982] AC 173 at 185-186.

20 See, for example, the emphasis given by Dixon J in *Liston v Davies* (1937) 57 CLR 424 at 441-442 to the notion that the relator and prosecutor in prerogative writ applications and informations seek a remedy in the interests of the public rather than by way of vindication of a private right.

21 See *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 327-328; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 526, 547; *Day v Pringlen Pty Ltd* (1981) 148 CLR 289 at 299; *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27.

22 *Onus v Alcoa of Australia Limited*

Justiciability

Just as the requirements of locus standi have been relaxed, the concept of justiciability may be in a process of development. Justiciability is a term employed to denote several different, but related, ideas. I shall refer to one such idea only: the concept that an administrative decision is not reviewable if its nature is such that it does not lend itself to judicial review. This notion conjures up nuances of the 'political questions' doctrine which has its origins in United States constitutional law.

For my part, I doubt that the refusal of the courts to review a decision on the ground that it is not justiciable necessarily signifies that there are no legal criteria by reference to which review can be achieved. In some instances, at least, non-justiciability is assigned as a ground when a court concludes that the decision-making function lies within the province of the executive and that it is inappropriate that the courts should trespass into that preserve. Some decisions made in the exercise of prerogative power are examples. Although these decisions are no longer immune from review simply because they are decisions made in the exercise of prerogative power, their nature may be such that they are not susceptible of review. Decisions affecting national security, foreign affairs, to prosecute or not to prosecute and the grant of pardons to convicted persons come to mind.[23] Of course, decisions on topics not ordinarily subject to judicial review which are illegal or ultra vires will be subject to judicial review on that score.[24]

Attorney-General (NSW) v Quin,[25] which concerned the exercise of a statutory power to appoint magistrates, is an illustration. In that case I pointed out that the Court is reluctant to intervene by way of judicial review in the executive's traditional functions of appointing judicial officers.[26] Brennan J went further, stating that it is not a function of the courts to direct or effect the appointment of judicial officers.[27]

On the other hand, in *FAI Insurances Limited. v Winneke*,[28] the High Court held that a decision of the Governor in Council refusing an application for renewal of an insurer's licence was reviewable for denial of procedural fairness, the insurer not having been given an opportunity to meet adverse comments of the Minister concerning its investments and financial position. The decision broke new ground in that the Court decided for the first time that the fact that a statutory power is vested in the Govenor in Council does not mean that it is beyond review.[29] The decision is in accordance with the approach that has been taken in

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23 In England, the refusal to grant a pardon has been subjected to judicial review. See *R v Home Secretary; Ex parte Bentley (DC)* [1994] 2 WLR 101. The issue has not arisen for consideration by the High Court of Australia in recent times.
24 See *Church of Scientology v Woodward* (1982) 154 CLR 25.
25 (1990) 170 CLR 1.
26 n 25 at 18.
27 n 25 at 33.
28 (1982) 151 CLR 342.
29 See also *South Australia v O'Shea* (1987) 163 CLR 378.

Canada[30] and New Zealand.[31] The amenability of the Govenor in Council to judicial review offers some protection to the citizen against the legislative practice of conferring statutory discretion on the Govenor in Coucil instead of a Minister or statutory officer as a possible means of avoiding judicial review, particularly for procedural fairness.

Cabinet decisions

It is one thing to say that Executive Council decisions are susceptible of judicial review. But what of Cabinet decisions which are involved in the exercise of statutory power? Are they even reviewable? And, if so, in what circumstances? In the golden age of classification of functions it would have been anathema to suggest that a Cabinet decision could be the subject of judicial review; no doubt it would be anathema to many today. But, with the classification of functions no longer accepted as a governing criterion, other grounds may need to be assigned for the immunity of a Cabinet decision from review.

The issue arose indirectly in *South Australia v O'Shea*. That case concerned the decision of Cabinet not to order the release of a person who had been convicted of sexual offences against chidren and detained at Her Majesty's pleasure, notwithstanding the recommendation of the Parole Board that he be released. The High Court held, by majority, that the offender was not entitled to a further hearing before the Govenor in Council, on the advice of Cabinet, refused to exercise a discretionary power to release the offender on licence.

No member of the Court expressed the view that a Cabinet decision was immune from judicial review. There are some indications that, if the Cabinet decision turned on matters personal to the offender or was influenced by fresh matter relating to him personally, a duty of fairness might conceivably arise.[32] Deane J and I dissented in the result. We considered that the decision was not immune from review merely because it was a Cabinet decision. I thought that, although Cabinet is primarily a political institution concerned with political, economic and social concerns, it might be called upon to decide questions more closely concerned with justice to the individual, when a duty to act fairly could arise.[33] Deane J stated that "the common law rules of procedural fairness extend, in the absence of a clear contrary legislative intention, to control any administrative decision which is made pursuant to a statutory power and which 'directly affects the rights, interests, status or legitimate expectations of another in his individual capacity'".[34] At the same time, the Court has recently recognised that the confidentiality of Cabinet proceedings should be respected.[35]

30 *Attorney-General (Canada) v Inuit Tapirisat of Canada* (1980) 115 DLR (3d) 1 at 11.
31 *Reade v Smith* [1959] NZLR 996.
32 n 29 at 405, 412.
33 n 29 at 387.
34 n 29 at 417.
35 *Commonwealth of Australia v Northern Land Council* (1993) 176 CLR 604.

It is unlikely that Australian legislatures will often confer statutory power on Cabinet as such to determine matters affecting directly the rights and interests of individuals. On the other hand, it is to be expected that Ministers will continue to take to Cabinet matters relevant to the exercise of statutory power when those matters are thought to be of such political importance as to warrant Cabinet's attention, Cabinet being the paramount political decision-maker in our system of executive government.

Review of Policy

The reasons underlying judicial reluctance to review policy decisions are various. Policy is thought to stand within the realm of politics rather than law. Moreover, in countries like Australia where there is a federal separation of powers and a vesting of judicial power in the courts, the formulation of policy stands outside of the exercise of judicial power.[36] It has been thought that administrators should not be fettered in their discretion to change policy. Judicial review, even to the extent of requiring compliance with the rules of natural jusitice, is thought by some to erode that discretion. What is more, courts are ill-equipped to review policy and there is strong opposition on the part of politicians and officials to the notion that judges should undertake such a role or that they should 'second guess' what administrators have decided. Judicial review of so-called policy decisions in immigration cases, particularly deportation cases, has generated claims that judicial review is anti-democratic or anti-majoritarian. It is not surprising therefore that the courts have exercised judicial restraint in response to attempts to secure judicial review of policy decisions.

However, there is a difficulty in the notion that decisions applying policy to the circumstances of an individual are always immune from judicial review in the absence of statutory authority. Policy comes in many shapes and sizes. Because policy is capable of spanning an infinity of subjects much depends upon the nature of the particular policy. Its application may depend very much upon the individual's circumstances.

Despite the courts' general reluctance to review policy, particularly at an abstract level, there are cases where the critical question is whether the established policy should be applied to an individual in particular circumstances or what weight should be given to policy, along with other relevant factors. Judicial review may be available in some of these cases. In some instances where the critical question relates to the application of policy, it is possible not to apply the policy without prejudicing the objects which the policy is designed to achieve.

Executive policy is enunciated not only in various forms but also at various levels of government. Naturally the courts will accord a greater measure of respect to policy as it is determined at Cabinet or ministerial level. Policy determined at

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36 *R v Spicer; Ex parte Australian Builders Labourers' Federation* (1957) 100 CLR 277 at 289, 310; but cf *R v Joske; Ex parte Shop Distributive & Allied Employees' Association* (1976) 135 CLR 194 at 217.

departmental level which excludes, on discretionary grounds, a certain category of persons from the receipt of social welfare benefits when the excluded category falls within the larger class of persons to whom the benefits may be paid, can scarcely be equated to a policy settled by Cabinet or a Minister relating to international affairs or the national economy.

Conclusion

Judicial review continues to be a very important safeguard of the rights and interests of the individual. We must strive to develop and clarify the relevant principles of law, recognising the tensions which lurk beneath the surface of administrative law and encourage better understanding of those principles.