Judicial Review of Administrative Decisions

Terms of Reference

In 1971 the Committee was asked to recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.

Background of Reference

The conduct of this reference was taken over by the Commission when it was formally established to replace the Committee in January 1973. The reference was divided into three parts, described in Project No 26(I) above. This Part deals with review of administrative action by way of the supervisory jurisdiction of the Supreme Court.

The twin pillars of judicial review of administrative action in Australia are, firstly, that the courts exercising powers of judicial review must not intrude into the "merits" of administrative decision-making or of executive policy-making and secondly, that it is for the courts and not the executive to interpret and apply the law, including the statutes governing the power of the executive.[1] Judicial review of administrative decisions is firstly concerned with ensuring that duties imposed on decision-makers by Parliament are performed. A decision-maker who fails to perform such a duty can be compelled to perform it by the Supreme Court. Secondly, judicial review is concerned with ensuring that a decision made was within the power of the decision-maker.

During 1979 a Registrar of the Supreme Court was briefed to complete a study of the law and procedure in Western Australia relating to the supervisory jurisdiction of the Supreme Court. This study was used to prepare a working paper, issued in June 1981, which discussed the desirability of codifying the grounds of judicial review of administrative action and certain procedural changes.

Nature and Extent of Consultation

The working paper was widely distributed for comment and consultations were undertaken with Australian and English experts on the subject. These included a number of judicial officers of the Supreme Court of Western Australia including the Chief Justice, the Hon Justice Woolf of the English Court of Appeals Queen's Bench Division, the Law Society of Western Australia, the Crown Solicitor's Offices of Western Australia and New South Wales, eminent academics[2] and senior members of the profession.[3]

After considering the views of those involved in the consultation process the Commission decided to narrow the scope of its report to a reform of the procedures for judicial review and a requirement, subject to exceptions, that administrative decision-makers give reasons for decisions. The principal reason for taking this approach was that there were reforms in the federal sphere being considered by the Administrative Review Council. The Commission delivered its final report in January 1986.[4]

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1 Justice R Sackville, 'The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States' (2000) 28(2) *Federal Law Review* 315, 315–316.

2 Professor E Campbell, Monash University; Professor JM Evans, Osgoode Hall Law School (Canada); Professor JPWB McAuslan, University of Warwick (UK); Professor DC Pearce, Australian National University; Associate Professor LA Stein, University of Western Australia; Professor HWR Wade QC and Professor DGT Williams, University of Cambridge (UK).

3 Such as Mr AM Gleeson QC (Australia) and Mr RCH Briggs, Secretary of Justice (England).

4 Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions*, Project No 26(II) (1986).

Recommendations

The Commission recommended that:

- The existing procedures for obtaining certiorari, prohibition, mandamus and quo warranto should be replaced with a procedure whereby relief in the nature of these remedies would be obtained by an order in an ordinary civil action, commenced either by a writ of summons or an originating motion. The power of the court to grant this relief should continue to be discretionary and the court should have power to determine during the proceedings whether they should continue on the basis of affidavits or pleadings.

- Proceedings for relief in the nature of certiorari, prohibition or mandamus should generally be heard by a single judge of the Supreme Court, unless a matter is referred to the Full Court for cause shown. There should be a right of appeal from a single judge to the Full Court of the Supreme Court.

- A person seeking relief in the nature of certiorari, prohibition or mandamus should be required to commence proceedings promptly and in any event within six months from the date when the grounds for the first action arose, but the court should be empowered to extend that period if there is good reason for doing so.

- The court should be conferred additional powers, such as:
  (a) the power to dismiss proceedings on the ground that no matter of substantial importance is involved;
  (b) the power to give directions or make orders as necessary for the convenient and expeditious determination of the proceedings;
  (c) the power to make interlocutory orders for a stay of proceedings or to preserve the status quo; and
  (d) the power, where a decision is quashed or set aside, to make an order referring the matter to the person who made the decision for further consideration, subject to such directions as the court thinks fit.

- Any person with a sufficient interest in a decision made in the exercise of a public function should be entitled to obtain a statement in writing from the decision-maker setting out: the findings on material questions of fact; referring to the evidence or other material on which those findings were based; and giving reasons for the decision. The reasons should be deemed to form part of the decision and be incorporated in the record by anTin the 3095 Tw (0 2sThe Commis Tc (Rdenhouldfings (inchapterlocthe the evgs on material) Tj 0 0.124j

to which it is desirable that the Western Australian reforms reflect the law and procedures of the judicial review of Commonwealth administrative decisions.

At the federal level, the Administrative Review Council undertook a review of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in 1989[5] and made 26 recommendations to the federal government with respect to entitlement to reasons in 1991.[6] There has, however, been no formal government response to date.

Action Required

The action required to effectively implement the Commission's recommendations in Project No 26(II) is detailed in the report itself. Appendix IV of the report contains suggested provisions to be included in the *Supreme Court Act 1935* (WA) which are based on sections of the New South Wales and United Kingdom Supreme Court Acts[7] and provisions of New Zealand legislation.[8] Appendix V contains suggested amendments to the *Rules of the Supreme Court*, again drawing upon provisions of other jurisdictions.

There is no common law obligation upon an administrative decision-maker to provide reasons for an adverse administrative decision.[9] Appendix VI draws upon existing statutory provisions from other jurisdictions and suggests comprehensive provisions for an Administrative Decisions (Reasons) Bill.[10]

Priority – High

The *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) recommended that an Administrative Decisions (Reasons) Bill be drafted and enacted as a matter of urgency[11] and that the other recommendations in Project No 26(II) be implemented forthwith. However, the terms of reference in Project No 95 – which are directed to specifically address both the judicial review of administrative decisions and the provision of reasons – appear to revisit the issues contained in this report. For that reason it may be prudent to await the outcome of the Commission's investigation expected in early 2002, before pursuing implementation.

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5 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

6 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991).

7 *Supreme Court Act 1970* (NSW) ss 12 (proceedings in the nature of quo warranto are abolished), 69 (mandamus, certiorari or prohibition) and 70 (quo warranto and ouster from office), *Supreme Court Act 1981* (UK) s 31(5) (additional power where relief in the nature of certiorari granted). Note that although in New South Wales the writ of quo warranto has been abolished, equivalent remedies are available; see also Law Commission (UK), *Judicial Review and Statutory Appeals*, Report No 226 (1994).

8 *Judicature Amendment Act 1972* (NZ) s 8 (interlocutory orders).

9 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

10 The proposed enactment draws upon the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 13 and 13A, and the *Tribunals and Inquiries Act 1971* (UK). Note that the latter Act has been replaced by the *Tribunals and Inquiries Act 1992* (UK) with the relevant provision being s 10; see also the *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Administrative Decisions Tribunal Act 1997* (NSW), ss 3(e), 49–52; *Administrative Law Act 1978* (Vic) s 8; Administrative Review Council, above n 6.

11 *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) para 2.210.