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Judicial Review of Administrative Decisions in Western Australia - Procedural Reform

Address by

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Over the past 40 years, administrative law in Australia in Australia has been substantially reformed to the point where its current configuration would be largely unrecognisable to one who studied law in the early 1970s, such as me. The appropriate course of reform has been well charted by the Commonwealth, which has passed legislation creating an Ombudsman, an umbrella tribunal to review a wider array of administrative decisions on their merits (the AAT), providing for rights of access to documents held by public agencies (freedom of information), and substantially simplifying and reforming the law relating to judicial review of administrative decisions which, significantly, confers upon any person whose interests are affected by an administrative decision, a right to obtain reasons for that decision.

All of these reforms have been replicated in Western Australia except one - the reform relating to judicial review of administrative decisions (judicial review).

In 2001, when I was President of the Law Reform Commission of Western Australia, the Commission received, at my request, a reference to inquire into the law relating to judicial review. The Commission's report (report number 95) was published in 2002, and although I was no longer President of the Commission, I must confess to a significant role in the development of that report and its recommendations.

The report was published by the then Attorney General, the Hon Jim McGinty, at a function held at the Parmelia Hilton. In what was I think something of a record for Law Reform Commission reports, not only did the Attorney publish the report, but he simultaneously announced that the government had accepted its recommendations, and had resolved to

proceed to implement the substance of those recommendations by legislative change.

That commitment was reiterated by the Attorney General in Parliament the following year when he introduced the legislation to create the State Administrative Appeal Tribunal. Although drafting of the legislation was delayed, a Bill was sufficiently advanced for the Attorney General to give me permission to publish an article dealing with its terms in 2007 (see Admin Review, May 2007 published by the Administrative Review Council). However, the legislation had not been introduced at the time the government lost office in September 2008.

A number of Australian jurisdictions have followed the lead of the Commonwealth and reformed the substantive law and procedure relating to judicial review. Those jurisdictions include Queensland, Victoria, Tasmania and the ACT. Consistently with the recommendations of the Law Reform Commission, the draft legislation in Western Australia was modelled largely upon the Queensland version of the law. In other jurisdictions, procedural reform has been achieved by changes to the rules of court.

The current government has made no statement of its position in relation to legislative reform of the law relating to judicial review, and it seems unlikely that the limited legislative time available in a pre-election year would be devoted to a subject of this kind. As substantive reform of the law relating to administrative review seems unlikely in the short to medium term, the Judges of the Supreme Court have resolved to consider the implementation of procedural reform by way of changes to the Rules of Court.

The purpose of my address this afternoon is to identify some of the issues that are likely to arise in the course of considering such a reform, to indicate some tentative views on those issues, and most importantly of all, to seek your feedback in relation to them.

The ambit of procedural reform

However, it is important at the outset to identify the constraints which apply to any procedural reform achieved by amendment to the Rules of Court. The power to make such rules is conferred by s 167 of the *Supreme Court Act*. There are many paragraphs in that section which it is unnecessary to replicate in this paper, but which have the unifying characteristic that, with two exceptions, they relate to the practice and procedure of the court to be followed in the exercise of its jurisdiction. The first exception concerns the power of the court to make rules providing for the practice and procedure to be followed in respect of access to documents prior to the commencement of proceedings (*Supreme Court Act*, s 167(1)(oa)), and the second concerns the making of rules relating to the practice and procedure to be followed in respect of "the making of applications by any person prior to the commencement by that person of any cause" (s 167(1)(ob)).

The first exception provides the authority for Order 26A which empowers the court to order that discovery be given by non-parties or potential parties. I must confess that it is not immediately clear to me what the second exception was intended to authorise - perhaps what is described in other jurisdictions as pre-action protocols, where certain steps must be taken before a party can commence proceedings.

Save for these exceptions, the rule-making power is restricted to rules relating to the practice and procedure of the court. It does not extend to the alteration of the substantive law to be applied by the court in the exercise of its jurisdiction. And like all delegated legislation, the Rules of Court must not be inconsistent with the Act which authorises their making.

These general principles impose three significant constraints upon the ambit of the reform of judicial review that might be achieved by amendment to the Rules of Court.

Reasons

First, it would be beyond the power of Rules of Court to confer a general right to a statement of reasons upon any person whose interests are affected by an administrative decision, of the kind conferred by s 13 of the *Administrative Decisions (Judicial Review) Act 1975* (Cth). That is because the specific extension of the court's power to make rules with respect to matters which precede the commencement of litigation is limited to access to documents, or steps to be taken by a party preparing to commence proceedings and would not extend to the provisions of information or the creation of documents which do not then exist, such as a document containing a statement of reasons for the relevant decision.

This is regrettable, as the conferral of a right to reasons which is independent of the commencement of litigation has generally been regarded as one of, if not the most beneficial aspects of the Commonwealth legislation. I was working in a Commonwealth department when that legislation was introduced. I saw first hand the revolutionary impact which it had upon departmental processes and

procedures, quite irrespective of whether or not litigation was threatened. For the first time, every decision-maker within that department came to appreciate that any person who was affected by a decision which they made had a right to a statement of reasons for the decision, including a statement of material facts found and a reference to the evidence or other materials upon which those findings were based. In many cases this meant that, for the first time, active consideration had to be given to the unwritten policies that were being applied in decisions routinely made by the department. The enunciation of those policies in written form provided an opportunity for them to be reconsidered and reviewed in full. And perhaps most significantly the possibility that reasons might be demanded imposed a discipline upon all decision-makers to undertake a logical process of reasoning towards a conclusion, and to make an adequate record of that process of reasoning so that any request for reasons could be satisfied.

The net effect of these changes was to revolutionise administrative decision-making at a Commonwealth level, across the entire spectrum of Commonwealth administration, irrespective of whether or not litigation was threatened. Plainly, procedural reform achieved by Rules of Court in Western Australia will be incapable of having that effect.

Consistency with the *Supreme Court Act*

Second, because the Rules of Court must be consistent with the *Supreme Court Act* itself, the Rules cannot derogate from jurisdiction conferred upon the Court by the Act. Section 16 of the Act invests the court with all the jurisdiction exercised by the English superior courts on 17 June 1861, and directs the court to exercise that jurisdiction. The jurisdiction thus conferred includes jurisdiction to issue the various prerogative writs

and equitable remedies that are commonly invoked in proceedings for judicial review. Although rules of court in other jurisdictions (such as the Northern Territory and South Australia) have purported to abolish the specific prerogative remedies (*certiorari*, *mandamus*, prohibition, *quo warranto*, etc), it seems to me to be fairly clear that any rules of court purporting to do that in Western Australia would be inconsistent with s 16 of the Act, and to that extent invalid.

However, that is, of course, not to say that the practice and procedure to be followed in the exercise of the court's jurisdiction with respect to the grant of relief of that character cannot be specified by rules of court. Accordingly, in the current context, there is no need to debate the sometimes contentious issue of whether the prerogative and equitable remedies should be abolished, or alternatively, left to stand alongside a newly created procedure. In Western Australia, abolition of the prerogative and equitable remedies relating to judicial review would require legislative amendment.

Substantive law of review

Third, because there is no capacity to change the substantive law to be applied by the court in the exercise of its jurisdiction, it follows that the grounds upon which a remedy might be granted cannot be modified by any rules of court. Accordingly, there is no prospect of codifying the grounds upon which review can be sought, as has occurred in the Commonwealth legislation and in the State and Territory legislation which has followed that model.

Pre-commencement procedures

For the reasons I have already given, it seems to me that there is no capacity for Rules of Court to confer upon a person whose interests are affected by an administrative decision a right to reasons for that decision either generally, or pursuant to an order of the court, prior to the commencement of proceedings in the court. However, because of the express power to make rules with respect to access to documents prior to the commencement of proceedings, there is no reason why the rules which currently empower discovery to be ordered prior to the commencement of proceedings can not be applied to potential proceedings for judicial review. In this way, the disadvantages of being unable to confer a general right to reasons could be ameliorated, albeit only slightly. However, in my experience, Order 26A has seldom been invoked for the purpose of obtaining discovery prior to the commencement of judicial review proceedings.

The time for commencement

The *Limitation Act 2005* (WA) does not make express provision for a limitation period with respect to the commencement of proceedings for judicial review, although the general limitation period of 6 years prescribed for cause of action generally would probably apply to a cause of action for judicial review. However, s 9 of the *Limitation Act* provides that the Act does not affect the operation of limitation provisions in other written laws, which would include rules of court made under the *Supreme Court Act* (see the *Interpretation Act 1984* (WA) s 5). The current Rules of Court are somewhat inconsistent with respect to the time within which prerogative proceedings must be commenced. Under O 56, proceedings for *certiorari* must be commenced with 6 months of the date of the relevant decision, whereas if *mandamus* is sought, proceedings must be

commenced within 2 months of the alleged failure to perform the relevant duty. On the other hand, O 57 makes no provision for any time within which proceedings for *habeus corpus* must be commenced.

The WA Law Reform Commission considered this issue in its 2002 report. It was not attracted to the Commonwealth model under which proceedings are to be commenced within 28 days of the provision of a statement of reasons, and instead recommended that proceedings should be commenced as soon as reasonably practicable and in any event within 6 months of notification of the decision under review, subject to a proviso that the court might extend the period of 6 months if satisfied that such an extension would not be likely to cause substantial hardship to any person or to substantially prejudice the rights of any person, or be detrimental to good administration. It also recommended that if the proceedings are not commenced as soon as reasonably practicable, the court should have power to dismiss the proceedings even if brought within 6 months, if the court is satisfied that the delay in commencement of proceedings would be likely to cause substantial hardship to any person, or to substantially prejudice the rights of any person or be detrimental to good administration (recommendation 16, pp 31-2). Those recommendations were embodied in the draft Bill which was prepared under the previous government. You will probably not be surprised to hear that I remain of the view that they reflect an appropriate balance between the desirability of encouraging parties who seek to challenge administrative decisions to commence those proceedings promptly, and the need to avoid injustice by the imposition of arbitrary time limits which cannot be extended.

Initiating process

Under the current Rules of Court, different forms of initiating process are specified for each of the prerogative remedies. Further, it is at least arguable that if equitable relief is sought, proceedings need to be commenced by writ, although an informal practice is well established whereby the court permits claims for equitable relief to be joined in with claims for prerogative relief commenced using the form appropriate to that relief.

It would appear obviously desirable to follow the reforms in all other jurisdictions by providing for a single form of initiating process under which all forms of potentially applicable relief can be sought. Unless and until the Rules of Court are amended to provide for a single form of originating process for all proceedings (a reform long overdue in my view), the most appropriate form of initiating process would appear to be by way of originating summons.

The grounds upon which relief is sought

The general form of originating summons requires the applicant to specify the relief sought, but does not require a statement of the grounds upon which that relief is sought. The usual practice is to require an affidavit to be filed with the originating summons, from which the grounds upon which the relief is sought will usually be apparent.

There is, I think, a nice question as to whether this approach should be maintained, or whether the rules should require some greater specificity with respect to the grounds upon which relief is sought. My tentative view is that this is probably best left to specific direction by the case manager in the context of the management of the particular case.

That view corresponds with the general trend of case management embodied in the Rules of Court. We have moved deliberately away from the notion of process or procedure whereby "one size fits all", and have moved much more towards "bespoke" or "tailor made" procedures aimed at the early identification of the issues.

Within the current case management framework, there are a number of different tools we have at our disposal to enable identification of the issues. They include pleadings, statements of facts, issues and contentions, or the direction of a process of conferral between the parties for the purpose of identifying a statement of issues. Because of the myriad range of circumstances that are capable of falling within proceedings for judicial review, it seems to me to be undesirable for the rules to be prescriptive with respect to the particular way of identifying the issues that will be followed in each and every case. Rather, it seems to me to be preferable to leave the matter to the discretion of the case manager.

Entry into the CMC List

It will apparent from the views that I have just expressed that it appears to me that judicial review proceedings are of a kind which should be entered into the CMC list by default, and without need for any application by any party. This will enable them to come before a managing Judge as soon as possible, and appropriate directions made for the procedures to be followed prior to trial.

The order *nisi* process

The current rules retain the order *nisi* process which has characterised prerogative proceedings since their early days. The process is designed to provide a filter upon unmeritorious or frivolous proceedings. However, it seems to me to have outlived its usefulness.

The traditional approach was for the application for an order *nisi* to be heard without notice to any other party. Because *ex parte* proceedings offend accepted notions of procedural fairness, there is a natural tendency for Judges to require that notice be given of the application for an order *nisi* to any party whose interests might be adversely affected by its grant. That has in turn encouraged not just preliminary skirmishing, but extensive argument on the merits of the proceedings at a stage when the argument is unlikely to be productive of final resolution. That process is in turn encouraging Judges to write lengthy reasons for the grant of an order *nisi* (a practice recently disparaged by the Court of Appeal - see ***Attorney General v Judge Schoombee*** [2012] WASCA 29).

It is my tentative view that this is a waste of time and effort, which is inconsistent with the overriding principles of case management embodied within the Rules of Court, and which is unjustified by any evidence that this area of the court's jurisdiction is more likely to encourage frivolous or vexatious proceedings than other areas.

There is, in any event, ample power for the court to dismiss proceedings which have no prospect of success, or which are frivolous or vexatious, or which constitute an abuse of process. Any concerns which might arise from the abolition of the order *nisi* procedure could be ameliorated by the inclusion of an express power for the court to summarily dismiss

proceedings by way of application for judicial review, either of its own motion or upon the request of another party, if the court was satisfied that the application had no reasonable prospect of success. Such a provision would slightly expand the current powers of the court with respect to summary dismissal of proceedings, and would be consistent with the criterion for summary dismissal now adopted in the Federal Court, and in a number of other jurisdictions.

Interlocutory processes

On the face of it, there is no reason why the full range of interlocutory procedures should not be available in proceedings for judicial review, if the case manager considers the procedure to be appropriate, and consistent with the overriding principles embodied in the Rules of Court relating to case management. Although there has been debate in the past about the extent to which, for example, discovery is available in prerogative proceedings, it is generally accepted that the power is available, and the question is whether or not it should be exercised in the particular circumstances of the case - see, for example, ***Perpetual Trustees WA Ltd v City of Joondalup*** [1999] WASCA 108, ***B v The State of Western Australia*** [2002] WASC 298. More recently, Buss JA expressed the view that discovery would be available in prerogative proceedings where it was "necessary for the proper administration of justice and for disposing fairly of a ground of judicial review" - see ***Cazaly Iron Pty Ltd v Minister for Resources*** [2006] WASCA 282, [92].

Once proceedings for judicial review have been commenced, there would not seem to be any reason why the court could not make rules which required the provision of reasons for any decision under review. It has

long been accepted that the court has the power to compel a party to proceedings to produce evidence in a variety of forms, including the physical production of evidence on summons, or by providing information in answer to interrogatories. An interrogatory directed to the provision of reasons for a decision subject to judicial review would seem to be permissible if those reasons are relevant to the grounds of review.

It seems to me that the statement of reasons for a decision under review is likely to be so inextricably tied up with the basis for the review as to be well within the scope of directions that might be made by the court to enable the fair trial of the review proceedings, and therefore within the scope of the powers conferred by Order 4A rule 2. However, for the avoidance of doubt, it would seem to me to be desirable to specifically provide that the court has a power to direct the provision of a statement of reasons, setting out the findings on all material questions of fact found for the purpose of the decision, together with a reference to the evidence or other materials upon which those findings were based (ie, using the well established Commonwealth formula: see *AD(JR) Act 1977* (Cth), s 13, *AAT Act 1975* (Cth), s 37).

Single Judge or Court of Appeal

Prior to 2005, the default position was that all judicial review proceedings were heard in the first instance in the Full Court, unless a contrary order was made (for example for reasons of urgency). However, since the creation of the Court of Appeal in 2005, the Rules provide the Judge granting the order *nisi* with a discretion as to whether the order should be returned before a single Judge or the Court of Appeal. Unless there is good reason for the matter to be returned before the Court of Appeal in the first instance (for example, because of urgency, or because there is an

important question of law involved) the usual practice is for an order *nisi* to be made returnable before a single Judge.

If the order *nisi* procedure is removed (as I would suggest), there would be no specific occasion for a Judge to determine the division of the court within which the case should be first heard. However, s 58(d) of the *Supreme Court Act* confers jurisdiction upon the Court of Appeal to hear and determine "cases … directed by a Judge to be argued before the Court of Appeal" and would therefore appear to empower a Judge to direct that judicial review proceedings be heard in the first instance by the Court of Appeal. However, the current rules of court dealing with references to the Court of Appeal contemplate the reference of a limited case, or a question of law only - see Order 31; Court of Appeal rule 67. Court of Appeal rule 68 presently deals specifically with the return of applications for prerogative writs. For the avoidance of doubt, it is probably desirable to specifically empower a Judge to direct that any application for judicial review be heard by the Court of Appeal. It could be expected that this power would be exercised on the same basis upon which orders *nisi* are currently made returnable before the Court of Appeal.

The orders for relief

For the reasons I have already given, it does not appear to me to be possible for Rules of Court to abolish the jurisdiction of the court to grant relief in the form of the issue of prerogative writs. However, that does not preclude the court from modifying its processes and procedures to enable orders to be made which are equivalent in character to the prerogative remedies, and which therefore fall within the scope of the jurisdiction conferred upon the court, but which do not necessarily follow

their arcane form. It would therefore appear to me desirable for the Rules of Court to provide that in proceedings for judicial review, the court may make orders of any kind falling within its jurisdiction, including orders equivalent to the grant of prerogative or equitable relief (which would, of course, include both declaratory and injunctive relief which would enable the court to order a party to do, or refrain from doing any particular act or acts).

Summary

Applications for judicial review of administrative decisions in Western Australia are relatively rare. That may be because of the lack of a general right to reasons, and the arcane procedures that must be followed with respect to such relief. There are limits to the court's power to address the lack of a general right to reasons, but it is within the power of the court to simplify and modernise the procedures adopted with respect to judicial review, and to provide a party who invokes the jurisdiction of the court with a right to reasons in an appropriate case. In the absence of any evident ambition by government to reform the substantive law with respect to judicial review, it is likely that the court will proceed to implement such procedural reform as is possible within the Rules of Court. The input of the legal profession and other interested parties into that process would be welcomed.