ADMINISTRATIVE LAW: FORM VERSUS SUBSTANCE

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Introduction

The claim that Australian administrative law focuses on form, rather than substance, is largely associated with the criticism that the federal system which was introduced in the 1970s is too heavily dominated by legal procedures and the judicial approach to the detriment of quality in substantive decision-making. To that extent, the claim is one which was present to the minds of the members of the Kerr Committee when they delivered their report recommending the establishment of the present system. We were mindful that judicial review might result in over-emphasis on form, a tendency which was clearly discernible in the mesh of technicalities which surrounded the remedies by way of prerogative writ. We thought that, by providing for the grounds of judicial review in the *Administrative Decisions (Judicial Review) Act* 1975 (Cth) ("the AD(JR) Act"), setting up the Administrative Appeals Tribunal ("the AAT") with jurisdiction to review on the merits and establishing the Ombudsman, we would bring about a distinct improvement in the quality of administrative decision-making and hence ensure that substance was not overlooked through emphasis on form.

Our recommendations proceeded on the footing that it was not possible to replicate in this country the French administrative review system, a system which, in my view, had many attractions. The problem was that the introduction of that system would have required a remarkable change in our administrative and legal cultures. Further, there would have been very considerable political opposition to the introduction of an alien system. Better then to adopt a regime which had legal foundations that were more familiar. Provision for merits review by the AAT would, we thought, assist in generating a substantive approach to decision-making that would flow through to primary decision-makers. That approach, we hoped, would not be too legalistic because the AAT was to be composed mainly of persons who were not lawyers. Even in the context of judicial review of administrative action, I then considered, and still consider, that jurisdiction in relation to judicial review should be reposed in judges who have skill and experience in that field. Not every judge has an understanding approach to review of administrative decision-making and that may be due to lack of familiarity with what it entails.

The distinction between review on the merits (not to be undertaken by judges) and judicial review on the statutory grounds (to be undertaken by judges) was, of course, critical to the regime. That distinction underlies the reasoning in *Australian Broadcasting Tribunal v Bond*[1]

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and it supports the rejection in that case of the attempt to achieve judicial review of factual findings for which provision is not made by or under a statute [2] whether as an ultimate and operative decision or as one which is prescribed as an essential preliminary to the ultimate and operative decision.

We sought to attain a balance between providing an effective means of redress in respect of deficient government decision-making processes and ensuring efficient administration[3]. That balance would have been tilted too far against efficient administration if judges were to engage in review of fact finding generally or in review of the merits.

Moreover, that balance was consistent with the separation of powers according to which the courts may legitimate review decisions committed to the executive if those decisions are unlawful, procedurally unfair or unreasonable in the *Wednesbury* sense. Such decisions may be regarded as void and, accordingly, subject to the exercise of judicial power.

The purpose of judicial review

That approach to judicial review was entirely consistent with classic statements of the purpose of judicial review. Sir Robin Cooke, the President of the New Zealand Court of Appeal, has said on more than one occasion that the end purpose of judicial review of administrative action is to ensure that administrative decisions are lawful, procedurally fair and reasonable. For present purposes, that statement may be taken as broadly correct, so long as the reference to "reasonable" is understood in the *Wednesbury* sense. Whether proportionality is an independent ground of review is another question; it certainly is an element to be taken into account in ascertaining whether subordinate legislation is within statutory power, at any rate when the power in question is a purposive power.[4]

Sir Gerard Brennan has said that judicial review is:

> the enforcement of the rule of law over executive action

and that it is:

> the means by which executive action is prevented from exceeding the powers and functions assigned to it by law and the rights and interest of the individual are protected accordingly.[5]

That statement expresses the purpose of judicial review according to the Anglo-Australian tradition. Whether it takes account of all the grounds of review stated in s.5 of the AD(JR) Act is another question, and the answer to that question depends upon the scope of some grounds such as the grounds stated in paragraphs 5(1)(a)[6], (f)[7], (h)[8], (j)[9] and 5(2)(g)[10].

The traditional view is based very largely on the doctrine of separation of powers. According to that doctrine, the function of the judiciary is to determine the legality of executive action and that includes determination of any departure from the requirements of natural justice and procedural fairness. But it is no part of the function of the court to substitute its decision for that of the executive when, by law, that decision is vested in the executive. The function of the court is to set limits on the exercise of the administrative discretion and any decision made within those limits cannot be challenged[11].

There is nothing in these statements of the purpose of judicial review which would support the proposition that it is more concerned with matters of form rather than substance. The same comment applies to the observation of Dixon J. that s.75(v) of the federal constitution:

> was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the

> Commonwealth from exceeding Federal power.[12]

All these statements suggest that substance - the application of the rule of law to administrative action - lies at the heart of judicial review. And merits review should reinforce that characteristic of judicial review.

Does experience accord with expectation?

From the lofty heights of Mt Olympus which, as you will recall, was often surrounded by cloud, it has not been easy, without god-like capacities, to divine what is actually happening in the administrative world below. The intermittent experience of the High Court in cases concerning administrative law does not provide a panoramic picture of what is happening at the level of primary decision-making; nor does it provide insights into the culture of primary decision-makers. The office of Solicitor-General gave me a window on that world but, since then, my associations have been with lawyers or, to be exact, judges, so that my knowledge of the administrative and political culture derives from knowledge of particular instances.

Complaints about review of politically sensitive decisions

In some of those instances, dissatisfaction has been expressed with review, especially judicial review, of decisions in politically sensitive areas. Typical examples are migration cases and, more recently, Mr Tickner's response to the Federal Court's Hindmarsh Bridge decision. These criticisms are complaints about substance rather than form in that the assertion is that the courts have gone too far in overruling the administrative decision. Essentially they are claims that the courts have exceeded their function by not deferring to the administrative judgment and by undercutting important executive policies.

Whether these claims are valid in particular cases, I do not pause to consider.

The point is that there is political and executive resistance - just how much is for others to judge - to review of administrative decisions where those decisions impinge significantly on policy areas regarded as very important by government or on politically sensitive questions. Hence the establishment of more specialist tribunals in areas such as migration, along with the statutory amendments designed to curtail judicial review in that area. But, to repeat what I said before, that seems to be a controversy about substance rather than form.

It is, of course, an important question. However, it is a question that extends beyond review of administrative decisions. It has echoes in criticism directed at the High Court on the ground that it is trespassing into the field of the executive and, for that matter, the legislature. That criticism rests on the proposition that executive judgment should reign supreme subject to legislative direction in all matters of policy and in relation to politically sensitive questions. The difficulty is to devise a line which will be effective and at the same time to provide for worthwhile review of the administrative process.

However, the existence of dissatisfaction is an important matter. It may lead to the introduction of legislation imposing jurisdictional limitations which are undesirable and it may perhaps induce governments to believe that they should be looking for judges and tribunal members who will respect the viewpoint of government. So we have a problem because independence of mind is a quality as essential in the case of the tribunal member as it is in the case of the judge. Merits review requires independent decision-making; without it, merits review would be discredited and there might be

pressure on the Federal Court to engage in what in substance amounts to merits review. Like other problems, this problem arises because there is an inadequate appreciation by each constituent element in our system of government of the role of other constituent elements in that system. That inadequate appreciation means that it is very difficult to build bridgeheads across the divides between the legal, political and administrative cultures which have a significant impact upon the decision-making process.

Complaints about judicializing the administrative process

It was Lord Devlin who, in his book *The Judge*, noted that over time the courts had effectively judicialized the process of criminal investigation leading to the criminal trial by prescribing the governing rules which were to be applied. In a more direct way, the Federal Court and the AAT have had a similar impact upon the administrative decision-making process. The application of the legal principles relating to procedural fairness have played a large part of this evolution but I shall deal with procedural fairness and its consequences later in this address.

The point I seek to make here is that the availability of judicial review and the partial adoption of the judicial model by the AAT have imposed a legal discipline on the administrative process. That means that decision-makers are more conscious of the legal issues that arise in connection with decisions to be made and of the principles of procedural fairness. It also means that they generally act upon legal advice. That is all to the good. But it entails more emphasis upon the importance of the legal approach and there is the risk that overt and ostensible compliance with legal rules assumes an undue significance. In other words, legal forms may play a predominant part in decision-making.

Whether that is so or not, I am not in a position to say with any confidence. But what I can say is that is how it works in the orthodox court system and, for that matter, in tribunals which are subject to direct and continuous review by the courts. There is an unwillingness to run any risk of departure from what are thought to be the rules prescribed by the higher courts; there is even a desire to seek guidance in what a court or the AAT has said, notwithstanding that the statement may not have been directed to the question which subsequently arises for decision. This is an approach which I have described in other contexts as "precedent as an attitude of mind". It can lead to a preoccupation with abiding by rules and a stultification of a more flexible approach to decision-making.

Mind you, it doesn't always work that way. Far from it. One can find examples of executive refusal to abide by decisions of single judges on the footing that the executive is entitled to act on its view of the law until it is declared to be incorrect by the High Court or an intermediate court of appeal.

It is possible that the impact of judicial review and merits review by the AAT is an administrative version of what is called "defensive medicine". No doubt some critics of the existing system would say that is the position and that too much attention is directed to compliance with legal requirements to the detriment of substantive decision-making. The consequences of such an approach may be more disadvantageous to administrative decision-making than to curial decision-making. As with the claims made about defensive medicine, claims of this kind do not deny that the review system has advantages but assert that the detriments outweigh the advantages.

Too much concentration on procedural fairness

Viewed from the perspective of the High Court, much time and expense seems to be expended on cases involving allegations of departures from standards of procedural fairness. This is somewhat surprising. One would have thought that, by now, the standards of procedural fairness would be well known. And so they are. Yet the prevalence of these cases is not to be explained by reference to lawyers' persistence in arguing cases that are doomed to fail.

One of the misgivings one has about these cases is that the reconsideration of a matter, following upon a court determination that the initial consideration involved a departure from standards or procedural fairness, may result infrequently in a different decision. In other words, the expenditure of much time, effort and expense may not yield very much in the way of positive and different results. I am not sure that this perception is accurate but it is an impression that I have formed. However, it is important to stress that the courts still find that proper standards of procedural fairness are not observed. That, in itself, is a sufficient justification for the present system to the extent to which the review jurisdiction provides a remedy for denial of procedural fairness. Futility might be recognised as an answer to these cases but the problem with that answer is that it deprives the party of the adequate initial hearing to which the party was entitled by law.

Judicial initiatives to extend the scope of judicial review under s.5 of the AD(JR) Act

That brings me to the particular grounds of review in the AD(JR) Act. All the grounds stated in s.5(1) and s.5(2) are capable of being understood in such a way as to result in invalidity either by reason of excess of power or error of jurisdiction or error of law.

But there have been persistent attempts to use the grounds as a platform for a more wide-ranging review of administrative decisions - something which is closer to merits review. Notwithstanding the absence of any ground relating to erroneous findings of fact, the Federal Court regarded the "no evidence" ground in paragraph 5(1)(h) as a basis for challenging findings of fact, even findings of fact that are preliminary to, and do not form part of, the relevant decision[13]. However, *Australian Broadcasting Tribunal v Bond* [14] rejected that approach on the ground that it would, if adopted, expose all findings of fact to review on that ground and subject executive decisions to wide-ranging review by the courts. Underlying the decision in *Bond* was a concern that the administrative decision-making process, hitherto viewed as a simpler and less complex process than the curial process, would take on characteristics of the curial process if the Federal Court were to engage in a wide-ranging review of findings of fact.

A finding of fact, including an inference of fact, is reviewable for error of law and on the "no evidence" ground, when the finding is made by statute, an essential preliminary to the making of the final decision or the order. Indeed, the making of a finding and the drawing of an inference in the absence of evidence is an error of law[15]. However, in Australia, statements of high authority favour the view that "there is no error of law simply in making a wrong finding of fact"[16]. Lack of logic is not an error of law. Hence, if there is some basis for an inference, ie., it is reasonably open, it is not susceptible to review.

On the other hand, in England, there is support for a "no sufficient evidence" test as applied to findings of fact. There is also support, in England, for review of findings of fact for error of law on the ground that they could not reasonably be made on the

evidence or reasonably drawn from the primary facts. And, perhaps more significantly, in *Mahon v. Air New Zealand Ltd* [17], the Privy Council considered that natural justice requires that the decision to make a finding must be based upon some material "that tends logically to show the existence of facts consistent with the finding and the reasoning supportive of the finding"[18]. In *Bond* Deane J. expressed his agreement with the English approach, but the other members of the Court in *Bond* did not deal with the question.

Overall in Australia, as in the United Kingdom, it is accepted that courts exercising jurisdiction by way of judicial review should leave the findings of fact to the public body appointed by the legislature for that purpose except where the public body acts "perversely", that is, without any probative evidence[19]. It is not for the courts to substitute their views on the facts for the view of the tribunal or officer chosen by the legislature to make the decision. For the courts to do so would be to exceed their role and intrude into the province of the executive or some agency contrary to the disposition made by the legislature.

Another initiative taken by the Federal Court is to use the duty to accord procedural fairness as a formulation for generating a duty to make inquiries or cause inquiries to be made before rejecting the case presented by an applicant. This development in the concept of procedural fairness did not encounter much enthusiasm in the High Court in *Minister for Immigration and Ethnic Affairs v. Teoh* [20].

The irony in these initiatives taken by the Federal Court is that they would possibly lead to wider-ranging judicial review, with the result that the Court would be dealing more with the substance of the administrative decision. As it is, subject to the limitations on its powers described above, the Court is unable to review the merits of the decision so that much of the argument and much of the reasons for judgment are necessarily directed to these limitations on the review ground. For example, much depends on whether an error is an error of law. The time-honoured distinction between error of law and error of fact is less than satisfactory but, in confining the Federal Court's power to review to the grounds enumerated in s.5, the Parliament appears to have intended to restrict the Court's power to review for error of fact.

The Federal Court's initiatives in endeavouring to extend the boundaries of judicial review would bring about more wide-ranging review. If that object were achieved, it would provide greater scope to examine the substance of the impugned decision. Whether that development would meet with executive and political approval is a real question. It assumes that, in a contest between the courts and the AAT for merits: indeed, they might well favour specialist tribunals.

Shortcomings of the system

Despite reassuring statements that the system has brought about a significant change in the administrative culture and an improvement in the quality of administrative decision-making, I am not altogether convinced that these statements are entirely accurate. I accept that there is a better administrative appreciation of what procedural fairness entails and that, in this respect, the quality of decision-making has improved. I accept also that the participation of lawyers in the decision-making process has led to a clearer appreciation of the relevant issues by decision-makers and an improvement in the quality of the reasons given for decisions. These are certainly significant advances.

However, for my part, I doubt that these improvements would endure at the same level if the existing system were to be dismantled. That is because I doubt that

they have succeeded in bringing into existence a new and enduring administrative culture. I suspect that, at the bottom, the legal, political and administrative cultures remain largely separate and distinct. My suspicion may be unduly pessimistic and I hope that it is unfounded.

One question which arises is whether the policy of prescribing general rules and principles to be applied to primary decision-making should be relaxed in favour of a more discretionary approach. It is application of general rules across the board that contribute to the notion that form prevails over substance. This, of course, is a question which traces back to Aristotle though, fortunately for him, he was not called upon to consider it in this context. No doubt arguments can be mustered in support of each of the contending views. For my part, I continue to prefer a unified system of review in which, under the Administrative Review Council ("the ARC"), general rules or guidelines are followed by primary decision-makers. Overall, that is likely to enhance the consistency of decision-making and that is a very important element in administrative, as in other spheres of, justice. It should be possible in the formulation of general rules or guidelines to provide for qualifications or exceptions to cater for unusual cases.

In retrospect, it might be said that the system was introduced in the belief that its virtues would be evident to all so that administrators would be converted into true believers in the advantages which judicialized review would bring to the administrative process. Perhaps, when the system was established, we did not put in place adequate institutional bases for building bridgeheads between lawyers and administrators. Certainly the ARC was given a role and an important one which it has discharged effectively. But it may be that the magnitude and the diversity of the problems were not fully recognised.

Conclusion

Notwithstanding my references to some deficiencies in the existing system, I have no doubt that on balance it has improved the system of administrative justice. The existence of merits review, judicial review under the AD(JR) Act and the Ombudsman have imposed proper standards enforced by appropriate remedies. And the requirement for reasons has improved the quality of decision-making, though this point would have greater force if there were an antecedent obligation to give reasons when the decision is published. As it is, reasons may follow the conclusion not only in time but also in thought.

I doubt myself that citizens' or consumers' charters or codes of conduct would, on their own, be effective. However, I can see a place for them alongside or within the existing system of review so that the courts might be required to take them into account or even to enforce them. Anything that will improve the quality of primary decision-making should be supported and that may mean that we need to formulate both better guidelines for primary decision-making and new criteria for court and tribunal review.

Finally, administrative law training and education, it seems to me, is a very important matter, something which deserves close consideration if we want to develop an administrative law culture which is neither dominated by administrative self-interest nor legal insistence on form and procedure. It may well be unreal to think of a separate system of administrative courts. But that should not deter us from endeavouring to develop a distinct administrative law culture by means of appropriate training and education.

Endnotes

1 (1990) 170 CLR 321

2 ibid. at 341 per Mason CJ

3 ibid. at 336-337 per Mason CJ

4 *State of NSW v Law* (1992) 45 Ir 62; *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307.

5 *Church of Scientology v Woodward* (1983) 154 CLR 25 at 70.

6 "breach of the rules of natural justice"

7 "error of law"

8 "no evidence"

9 "decision otherwise contrary to law"

10 "exercise of the power so unreasonable that no reasonable person could have so exercised the power".

11 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J.

12 *Bank of NSW v The Commonwealth* (148) 76 CLR 1 at 363.

13 *Minister for Immigration v Pashmforoosh* (1989) 18 ALD 77.

14 (1990) 170 CLR 1.

15 *Sinclair v. Maryborough Mining Warden* (1975) 132 CLR 473 at 481, 483.

16 *Waterford v. The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.; see also *Australian Broadcasting Tribunal v. Bond.*

17 [1984] AC 808.

18 ibid at 831. See also *R. v. Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] QB 456 at 488; *Minister for Immigration and Ethnic Affairs v. Pochi* (1981) 149 CLR 41 at 67-68 per Deane J.

19 *Puhlhofer v. Hillingdon London Borough Council* [1986] AC 484 at 507, 518; *Broadbridge v Stammers* (1987) 16 FCR 296 at 300-301; *Apthorpe v Repatriation Commission* (9187) 77 ALR 42 at 53-54; *Television Capricomia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511.

20 Unreported, 7 April 1995.