ADMINISTRATIVE LAW: CHOICE OF REMEDIES

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Why is the choice of remedies an important issue?

The growth of administrative law has led to the availability of a wide choice of remedies against undesirable administrative action. Given this choice, the first step to be taken by an administrative lawyer advising a client often entails a careful consideration of the range of applicable remedies. The available remedies may offer very different means of redress, be mutually exclusive, and be subject to different time limitations. Other factors which should influence the choice of remedies include the availability of evidence, the projected costs, and tactical considerations such as the need to maintain a working relationship with the relevant decision-maker. These and other issues will be discussed in this paper, with an emphasis on recent developments.

Some basic choices

One of the first questions to be considered is whether recourse should be had to "sharp-edged remedies" such as review or appeal, or whether "softer" remedies such as the Ombudsman or, where available, mediation should be utilised. At an early stage consideration should also be given to the use of avenues which may assist the gathering of information and evidence, such as freedom of information[1] and parliamentary questions.

Two further choices, namely between administrative appeal and judicial review, and between the various judicial review remedies, merit closer attention.

Administrative appeal or judicial review?

Where an administrative appeal is available, and in general terms appears to be a feasible avenue of attack, careful consideration may need to be given to what issues other than the straight forward merits of the decision can be raised before the particular appeal tribunal. Can the administrative decision in issue for instance be challenged on the basis that it infringes the implied constitutional freedom of political discourse? Can other grounds of unconstitutionality (eg conflict with particular provisions of the federal constitution) or the conflict of state and federal legislation be raised? Can delegated legislation supporting the impugned decision be attacked before the appellate tribunal on the basis of *ultra vires*? Is an attack on the basis of *ultra vires* generally available, or is the tribunal limited to matters going to the merits of the administrative decision?[2]

While jurisdictional limits on what a particular appellate tribunal can decide, may preclude arguing some of the issues mentioned, this hurdle can often be overcome or at least alleviated by appealing to the tribunal and then having it refer an appropriate question of law to a court before conclusion of the administrative appeal. An example of such a provision allowing for an interlocutory question of law to be stated is the rarely

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used section 45 of the *Administrative Appeals Tribunal Act* 1975 (Cth).[3]

When choosing between instituting an administrative appeal or seeking judicial review, it should also be borne in mind that there is a growing tendency for the courts, both at federal[4] and state[5] level, to refuse judicial review remedies in the exercise of their discretion, if appropriate avenues of appeal have not been exhausted.

Recent decisions of the New South Wales Court of Appeal suggest that where an administrative appeal to superior court and judicial review are instituted simultaneously merely to gain a procedural advantage, such as an appeal without leave to an appellate court, if the judicial review proceedings turn out to be unsuccessful, the entire judicial review application may be struck out as an abuse of process.[6] But there may be quite legitimate reasons for instituting both an administrative appeal and judicial review, for instance to ensure that there is compliance with the time limits in respect of both remedies. A party wishing to challenge and in the first instance pursue matters of lawfulness rather than the merits may have to file, protectively, an appeal to the appropriate administrative tribunal.[7]

Choice of judicial review remedies

An important but often neglected question is whether administrative action should be challenged directly or collaterally.[8] Where for instance goods have been seized, there may be distinct procedural advantages in suing Customs in conversion rather than reviewing the decision to seize the goods.[9]

In the sphere of (the direct) judicial review remedies, administrative law unfortunately still exhibits a marked "remedy orientation", reflecting what Maitland had said in respect of English law, namely that "to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms".[10] This is particularly so in states like Western Australia where (unlike say Queensland) there has been no significant reform of judicial review remedies. However, even at the Commonwealth level, there appears to be an increasing remedy orientation. Particularly as a result of the *Bond* case[11] any application for judicial review under the Administrative Decisions (Judicial Review) Act now appears to face a routine jurisdictional challenge on the part of the decision-maker at the interlocutory stage. As a result of this, and other developments such as the foreshadowed exclusion of large areas of migration law from the scope of the AD(JR) Act, the importance of the "traditional" judicial review remedies under section 75 of the federal constitution and section 39B of the Judiciary Act have increased.

In Western Australia a potential applicant for judicial review must decide, at the outset, whether to take the prerogative route or to sue for a declaration or injunction. Fortunately the High Court has recently affirmed that on application for prerogative relief, a declaration may be granted instead.[12]

In respect of the various judicial review remedies, the persisting remedy orientation manifests itself in respect of:

- the rules of standing;[13]
- scope of the remedy;[14]
- available grounds of review;[15]
- the operation of statutory ouster clauses;[16]
- judicial discretion to grant or refuse the remedy;[17]
- differences in procedure (more may be said about this aspect).

The obvious point is that prerogative writ proceedings are not suitable for cases involving serious disputes of fact. In such proceedings applicants also face a leave requirement and relatively short periods within which to commence the proceedings. On the other hand an applicant in jurisdictions such as WA is able

to obtain a final decision before the Full Court within a significantly shorter period than by bringing an action for a declaration.

Although traditional interlocutory aids to litigation such as discovery,[18] interrogatories,[19] cross-examination of deponents[20] and subpoenas[21] do not feature in prerogative writ applications, I can see no reason why even in jurisdictions with "unreformed judicial review proceedings" the Rules could not be applied in a flexible way so as to allow for instance the cross-examination of deponents to take place before a single Judge, or even a Master, with the record of a cross-examination then going before the Full Court. In any event, there does not appear to be any sound reason why any judicial review application should at first instance still go to a Full Court, as is the case in WA. Should such matters go before a single Judge (as occurs in the Federal Court), this will not only save judicial time, but allow for more flexibility in the conduct of proceedings.

Current judicial attitudes to historical restrictions on the scope and procedure of judicial review remedies

In states like Queensland state administrative law has now been reformed in a far-reaching manner based essentially the Commonwealth model. However, in states like WA the old prerogative writs still prevail, while in most other states and territories limited reforms have taken place but the prerogative remedies (in the form of prerogative orders) still occupy centre stage.[22] In all these jurisdictions I would urge a court sitting in a judicial review matter to take the view of the New South Wales Court of Appeal which has asserted that accidents of history should not be determinative of the scope of the traditional remedies, and that a question such as what constitutes the "record" for the purposes of certiorari should be determined by an examination of the present role of the court and the proper extent of its supervisory jurisdiction.[23]

Given the English law background of the prerogative remedies, the following observation on the state of modern English law by Clive Lewis in his excellent work *Judicial Remedies in Public Law* (1992) should be noted:

> The previous limitations on the availability of certiorari have gradually been eroded. These restrictions were disappearing before the introduction of the new judicial review procedure [in 1977]. The advent of that procedure added a renewed impetus to the modernisation of judicial review. The major obstacle to the development of the prerogative remedies was the dictum of Atkin L.J. in the *Electricity Commissioners* case that the supervisory jurisdiction of the courts only extended to bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. This dictum no longer represents the law, if indeed it ever did, and is seriously misleading. It is now clear that the judicial review jurisdiction and prerogative remedies are available against anybody exercising public law powers, whether they be derived from statute, the prerogative, or other non-statutory powers. Any exercise of public law power having a discernible effect may be challenged by a person with sufficient interest in the matter, whether or not it affects "rights," however broadly or narrowly that concept is defined. The concept of a "judicial" act is now completely discredited and has no role to play in determining the availability of the public law remedies. (p 145-6; footnotes omitted)

It should be noted that in English law certiorari and prohibition now lie in respect of:

- decisions which cannot be labelled "judicial" in the sense of subject to the requirements of procedural fairness;
- decisions which do not "affect rights" (see quote above);
- ministerial (ie non-discretionary) functions;
- delegated legislation;

- prerogative and (other) common law powers;
- decisions taken by statutory bodies with reference to a statutory framework but not under any distinct or specific statutory power;
- the exercise by a non-statutory body of public or governmental powers resting on *de facto* control of an area of activity such as company mergers and take-overs, at least where such control is exercised with the consent of government and has some statutory underpinning or support.

Endnotes

1 On FOI as "substituted discovery" prior to review proceedings, see Wayne Martin, "Administrative Law and Commercial Disputes", Paper 1, The WA Law Society Seminar "Federal Administrative Law" (1987), p 24-5, and in a criminal context, *Sobh v Police Force of Victoria* (1994) 1 VR 41 (Appeal Div); Special leave refused: [1993] 13 Leg Rep Page SL 1.

2 On the AAT (Fed), see *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251; *Collector of Customs, NSW v Brian Lawlor Automotive Pty Ltd* (1979) 2 ALD 1 at 7 (Bowen CJ) and *Re McKie & Minister for Immigration* (1988) 8 AAR 90.

At state level see *Smith v Allen* (1993) 31 NSWLR 52 (CA); *Milentis v Minister for Education* WA Full Ct, 5.11.93, [1993] 15 SAWAJB 108 (on Government Teachers' Tribunal), and generally: Campbell E, "The Choice between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *Fed LR* 24 (esp 43-52).

3 See eg *Commonwealth v Sciacca* (1988) 78 ALR 279.

4 Compare *Queensland Newsagents Federation Ltd v Trade Practices Commission; Ex Parte Newsagency Council of Victoria Ltd* (1993) 118 ALR 527 with *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 25 FCR 523 at 530; 90 ALR 280 at 286-7. The High Court is particularly strict in refusing to entertain judicial review proceedings in industrial matters if an appeal is available, eg *Re Walsh; Ex p. MS* (1992) 66 ALJR 644.

5 See eg *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 (CA).

6 See *Meagher v Stephenson* (1993) 30 NSWLR 736 (CA) 739 E-F; *Hill v King* (1993) 31 NSWLR 654 (CA).

7 See *Smith v Allan* (n2) 62G.

8 See my discussion of Collateral Challenge in LBC: *Laws of Australia* Vol 2 'Administrative Law', Subtitle 2.6, Chapter 11, para [282]-[286].

9 *Australian Federal Police v Craven* (1988) 20 FCR 547, 550 (Bowen CJ), 550 (Sheppard J) and Foster J passim. But note, in the context of cross-vesting: *Aerolineas Argentinas v Federal Airports Corporation* (1993) 118 ALR 635 at 652:35-653:10.

10 *The Forms of Action at Common Law* (1909) 298.

11 (1990) 170 CLR 321.

12 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2; *R v Wilson; Ex parte Robinson* [1982] Qd R 642 at 646G.

13 There is no uniform test for standing - eg the standing rules for certiorari and prohibition are 'more liberal' than those relating to injunctions and declarations: *Re Smith; Ex parte Rundle* (1991) 5 WAR 295 at 305, per Malcolm CJ.

14 Certiorari and prohibition appear not to be available to review the performance of ministerial (non-discretionary) functions or delegated legislation (see H Schoombee (n8) Subtitle 2.6, Ch 4, para [114] and [113], and generally Ch 4). There is now a (regrettable) wealth of case law on the meaning of a decision taken "under an enactment" in the context of the *AD(JR) Act* 1977 (Cth).

15 At common law non-jurisdictional error of law on the face of the record can only be raised by means of certiorari.

16 Note the significance of the remedies contained in s75(v) of the Constitution - *David Jones Finance v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 459-60.

17 For instance "if the defect of jurisdiction is apparent on the face of the proceedings, (an)

order of prohibition must go as of right and is not a matter of discretion". *R v Comptroller-General of Patents and Designs: Ex parte Parke, Davis & Co* [1953] 2 WLR 760 at 764, per Lord Goddard CJ.

18 But see *R v City of Tea Tree Gully, Ex parte Concrete Systems Pty Ltd* (No 1) (1986) 65 LGRA 56 (SC SA Full Ct), and in the Federal Court: *Nestlé Australia Ltd v FC of T* (1986) 10 FCR 78 at 82; *FC of T v Nestlé Australia Ltd* (1986) 12 FCR 257 at 263-5.

19 But compare *Sixth Ravini P/L v FCT* (1985) 6 FCR 356 at 365.

20 In the Federal Court cross-examination of deponents frequently occur in judicial review cases. Under the traditional rules (eg WA RSC O 36 r2(3) the general power to order cross-examination of deponents appears wide enough to encompass applications for prerogative relief.

21 But compare *Mostyn v Deputy FCT* (1987) 73 ALR 396.

22 For a summary of the position regarding judicial review remedies in the various Australian jurisdictions, see H Schoombee (n8) Subtitle 2.6, Ch 1, para [2].

23 See *Glenville Holmes Pty Ltd v Builders Licensing Board* [1981] 2 NSWLR 608 (CA) at 611 (Hope & Samuels JJA); *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368 (CA) at 378 (Mahoney JA) & 394 (Priestley JA); *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 (CA) at 614-618 (Kirby P), and further *Ex parte Helena Valley/Boya Association (Inc)* (1989) 2 WAR 422; *Tea Tree Gully* case (n16) LGRA at 65-6 (Olsson J). But contrast: *Hinton Demolitions Pty Ltd v Lower* [No 2] 1971 1 SASR 512 (FC) at 537 (Weeks J); *WA v Bropho* (1991) 5 WAR 75; *Victorian Taxi Assoc Inc v Road Traffic Authority* [1989] VR 593 at 605 (Fullagar J).