

The Role of Administrative Law as a Foundation for Good Governance

What is Good Governance?

'Governance' and 'good governance' are terms that apply equally to small not-for-profit organisations to those engaged in global politics.

When people talk about what constitutes 'good governance' they usually use terms that reflect the best elements of a liberal democracy.

So it was for Rose Verspaandonk, a notable contributor on public service accountability issues over many years, who in an Australian Parliamentary Library paper¹ said the following could be said to be manifestations of good governance:

- accountability
- democracy
- efficient and effective administration and program delivery
- equal rights for all citizens
- ethical use of public resources and authority
- individual liberty
- participation
- rule of law, and
- transparency.

The three arms of government, the executive, the parliament and the judiciary, are, in different ways, guided by such principles.

Administrative law, which is concerned with the rules and institutions that regulate the exercise of governmental power, is fundamentally concerned with good governance.

In this seminar, I will focus on administrative law review processes and the fundamental role that both merits review and judicial review play in promoting good governance, through their impact on accountability and transparency of administrative action, in promoting adherence to the rule of law and expanding access to administrative justice for individuals.

It is important to note, in this rights-conscious age, that administrative law review processes are about more than just the rights of citizens to contest decisions affecting them, although this is important. However, the value of administrative law review processes is wider than the sum of particular decisions affecting individuals. It is also vital to promoting the rule of law within administrative agencies and accountability in government administration more generally.

Administrative Law in Australia

The twentieth century has seen huge growth in the size and complexity of the Administrative state and, at the same time, the institutions of administrative law.

In Australia, the late 1960s and early 1970s saw fundamental reforms at the Commonwealth level, arising out of a major review of the system of review of Commonwealth government administrative decisions. The Kerr,² Bland³ and Ellicot⁴ reports resulted in a fundamental restructure of the system of administrative review at the Commonwealth level, including by the establishment of an Ombudsman, an external merits review tribunal (the Administrative Appeals Tribunal) and, through the *Administrative Decisions (Judicial Review) Act 1977* (the **ADJR Act**), a statutory judicial review

¹ [Research Note11 2001-02](http://www.aph.gov.au/library/pubs/rn/2001-02/02rn11.htm), Good Governance in Australia, 25 September 2001, Downloaded 25.7.2011, <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn11.htm>

² *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971.

³ *Interim Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 of 1973; *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 of 1973.

⁴ *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973.

jurisdiction, which included a statutory right for persons affected by decisions to obtain a statement of reasons for the decision.

It has been suggested that these reforms paved the way for 'a distinctively Australian jurisprudence in public law' and that there are now two principles which determine the proper scope of judicial review. They are, to adopt the words of Justice Ron Sackville, that courts must not intrude into the 'merits' of administrative decision making or executive policy making, and 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.⁵

But Justice Sackville has also reminded us that 'the lack of enthusiasm for lawyers and legal processes (especially judicial review) is not confined to administrators, but extends to business people, union officials and above all politicians'. I hope to dispel any notion that that might apply to the state's first law officer.

A number of states have introduced parallel legislation to the ADJR Act, but in NSW judicial review is still governed by common law review. However, the former Chief Justice, Jim Spigelman, ensured that a significant body of law developed in this area. The enthusiasm with which he greeted the High Court decision in Kirk indicates that he approves of the fact that the principles of S157 have come to NSW.

But NSW has not been idle. There has been the establishment of the NSW Ombudsman in 1974 and an Administrative Decisions Tribunal in 1997. These institutions expanded the accountability of Government for particular actions or decisions as well as expanding the capacity of members of the public to challenge these. They might be said to contribute to aspects of good governance such as accountability, rule of law and transparency.

Arguably, some of those reforms in NSW have not gone far enough.

Judicial Review

Judicial review is more than merely an avenue for an individual to challenge the legality of administrative and/or executive decisions. Because it provides for courts to determine whether administrative bodies and officials have acted within the legal boundaries of their powers and functions, it defines the limits on executive action and statutory powers, a crucial component of the rule of law. On a practical level, judicial review promotes lawful and accountable decision-making by public agencies, primarily through the 'psychological impact' of government agencies knowing that their actions may be subject to review. It also plays an important role in encouraging compliance with the law in agency decision-making. There is evidence to suggest that in a substantial number of cases where applications were successful, judicial review has led to substantive changes to agency practice.⁶

There are limitations on the capacity of judicial review to provide remedies for individual disputes. That is because judicial review allows for challenge only on the basis of the legality, not the merits, of a decision. In a practical sense, the costs of judicial review proceedings are also likely to be prohibitive in many cases. There are also limitations on the impact of judicial review at the systemic level. The 'psychological impact' may be limited in government agencies whose decisions are only rarely challenged by way of judicial review. While government decision-making increasingly impacts on many areas of life, only a few areas of administrative activity are routinely subject to judicial review, such as planning and development decisions.

Nevertheless, judicial review still arguably holds a pivotal place in our system of governance. As put by former Chief Justice Spigelman, judicial review by courts can be considered as one of the 'integrity institutions' of modern government, whose role, as a whole, is to ensure that community

⁵ 28 Federal Law Review (2000) 315 at 315-316.

⁶ Creyke, R., and McMillan, J., "Judicial review outcomes – An empirical study" (2004) 11 *Australian Journal of Administrative Law*, 82, at 87; Creyke, R., and McMillan, J., "Executive Perceptions of Administrative Law – An Empirical Study" (2002) *Australian Journal of Administrative Law* 163, at 168. It should be noted however, that agency views on the impact of judicial review on agency practice were, in many instances, qualified.

wide expectations of how governments should operate in practice is realised.⁷ That is, it contributes to another principle of good governance – accountability of government.

Reform of Judicial Review in NSW

Earlier this year the NSW Government released a discussion paper setting out a number of options for review of judicial review in NSW.

One avenue of possible reform is to replicate some aspects of the statutory judicial review jurisdiction established by the Commonwealth. These included improving the accessibility of judicial review by making it more ‘user friendly’. The ADJR Act’s creation of a statutory list of grounds and simplification of application procedures and flexibility of remedies were key components of that reform. Creating a right to obtain reasons upon request for administrative decisions was another.

The discussion paper also asked what effect significant changes to the administration of government and provision of government services, including through deregulation, corporatisation of government service agencies, outsourcing of services and privatisation⁸, is having on the traditional role of judicial review in setting limits on exercise of governmental powers. Do these changes mean that judicial review’s role in ensuring accountability has diminished where powers that were once exercised by government are instead exercised by non-government bodies?

Part of the answer to this question may lie in the increasing focus of common law judicial review on the *subject matter* of the decision, in the context of whether or not there is a public duty or power in the nature of a public power being exercised’.⁹ However, this focus is not replicated in the jurisdictional test defining the scope of judicial review under the ADJR Act, which defines the limits judicial review by reference to the *source* of the power exercised (it must be an enactment). This raises a significant question for any new statutory judicial review jurisdiction in NSW, that is, how to define the scope of decisions that should be subject to any statutory judicial review jurisdiction.

One possibility raised in the discussion paper is the introduction of a jurisdictional test that allows review of exercises of a public power or function. A ‘public function’ test may be one means of developing administrative law in a way that addresses some of the governance challenges in an era of modern government.

On the issue of reform of judicial review, the thoughts of the President of the Administrative Appeals Tribunal, Justice Garry Downes should be on the table for consideration:

‘The New South Wales Attorney General’s Department asks whether an ADJR Act ought to be enacted in New South Wales. Had I addressed you a few years ago I would have said that any such legislation could modify or limit common law judicial review so that while no deserving case could go without a remedy claimants would not have to wrestle with the question of whether to raise two grounds or one. *Kirk* changed all that.’¹⁰

Which brings us to *Kirk*, with all the benefits and challenges for good governance that it presents.

Kirk v Industrial Relations Commission of New South Wales

No discussion about administrative law or good governance can proceed these days without reference to decision in *Kirk v Industrial Relations Commission of New South Wales*.¹¹

⁷ “The Centrality of Jurisdictional Error”, Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010.

⁸ see Creyke, R., and McMillan, J., “Administrative Law Assumptions... Then and Now”, in Creyke, R., and McMillan, J., *The Kerr Vision of Australian Administrative Law*, 1998, Centre for International and Public Law, Australian National University, at 22.

⁹ Sir Anthony Mason (1989), “Administrative Review: The Experience of the First Twelve Years” (1989) 18 *Federal Law Review* 122; See also Robinson, M, *Private Law vs Public Law: Issues in Government Liability*, Paper delivered at a BLEC Conference, 1995: <http://www.wentworthchambers.com.au/marobinson/priv.htm>

¹⁰ Seminar for the College of Law: Government and Administrative Law, Sydney, 24 March 2011: <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/JudicialReviewMarch2011.htm>

¹¹ (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 190 IR 437; (2010) 113 ALD 1.

The majority in *Kirk* held that certain judicial review powers of the Supreme Court of NSW were constitutionally entrenched and thus, cannot be removed by legislation. A privative clause that purports to remove the power of the NSW Supreme Court to review a decision of an inferior court for jurisdictional error will be invalid.

The High Court could not have been more emphatic. The majority judgment stated: 'To deprive a State Supreme court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that court would be to create islands of power immune from supervision and restraint'.

This was the nation's ultimate court of review confirming the role of review courts in maintaining a check on the exercise of executive power.

However, *Kirk* creates something of a dilemma for legislators. On the one hand we know that the legislature cannot prohibit judicial review of decisions that are affected by jurisdictional error. On the other hand, as noted by then Chief Justice Speigelman, 'the concept of what is or is not 'jurisdictional error' eludes definition.'¹² And we know that there are some species of legal error, which are not 'jurisdictional error', for which the legislature can avoid the supervisory jurisdiction of the Supreme Court. Further, the approach of the High Court in *Kirk* was not to hold that the privative provision in that case (called by some the 'mother of all privative clauses') was invalid, but to read it down. As a consequence, many of the existing privative clauses on the statute book will not be invalid, but may well be inoperative in many circumstances. It is a situation that creates significant uncertainty for Governments and potential litigants as to the prospects of success of any particular case.

Kirk thus promotes good governance, in the sense that it entrenches review of decisions and so promotes the rule of law and principles of accountability. But, arguably, *Kirk* also creates problems for governance, to the extent that there is a lack of clarity about the extent to which privative clauses on the statute book will operate in any particular circumstance. What, if any, legislative response is required to remove some measure of that uncertainty, is a complex question, which will be considered by this Government.

Merits Review

While judicial review is a foundational requirement for good governance, the provision of merits review, which because of its less formal and costly settings may be made much more broadly available to individual complainants, may have greater impact at the level of equitable access to administrative justice.

In marked contrast to judicial review, merits review involves 'stepping into the shoes' of the original decision-maker and remaking the decision according to the merits of the individual case. The focus of merits review is to ensure that the decision under consideration is the 'correct and preferable' one, that is, that it has been made according to law and is the best that could have been made on the basis of relevant facts. This assessment considers the interests of the individual applicant alongside the interests of all those affected by a decision.

Generally speaking, merits review is provided through internal review inside the government agencies that make decisions, or by external review in a tribunal setting. Where it is available, merits review is almost always a more accessible and cost-effective means of challenging and administrative decision than judicial review.

Merits review promotes good governance because it:

- *Promotes access to justice by providing a remedy for aggrieved individuals:* Merits review is a powerful remedy for individuals, who are aggrieved by administrative decisions affecting their personal interests. Merits review permits a much wider consideration of the issues than judicial review and at considerably less cost.
- *Promotes the rule of law, by promoting better decisions-making in the first instance:* Effective external merits review can provide oversight over internal agency decision-making (including

¹² "The Centrality of Jurisdictional Error", Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010

internal review) to ensure that decisions are consistent both within the agency and across government and to identify any systemic issues.

- *Encourages executive accountability*: There is evidence from the Commonwealth that administrators see external merits review as particularly effective in encouraging accountability in decision-making.¹³

Merits Review of Administrative Decisions In NSW – The Administrative Decisions Tribunal

In NSW the major external merits review jurisdictions are found in the Administrative Decisions Tribunal and the Land and Environment Court (both of which also exercise a significant original jurisdiction). The Land and Environment Court is a specialist environmental and planning law court, which exercises a merits review jurisdiction in relation to environmental planning and protection appeals, local government, trees and miscellaneous appeals, land tenure, valuation, rating and compensation matters. By contrast, the Administrative Decisions Tribunal is a generalist tribunal. When the Administrative Decisions Tribunal was established by legislation in 1997 it was intended to do two things. One was to rationalise the ‘proliferation of tribunals’ that were empowered to make administrative decisions. The other was to expand the right to external merits review of administrative decisions. As such, it was intended to be the dominant source of external merits review jurisdiction in NSW. To date, it has not achieved this goal.

The Administrative Decisions Tribunal’s merits review jurisdiction is governed by the *Administrative Decisions Tribunal Act 1997*, which establishes the framework for review. However the jurisdiction to review any particular administrative decision has been conferred in an ad hoc way, where conferred by specific provisions in the enactment creating the decision-making power that is to be subject to merits review. Jurisdiction is conferred on the Administrative Decisions Tribunal by over 130 Acts, although only a small proportion of these Acts give rise, in practice, to applications for review.¹⁴ Currently the majority of work in the Administrative Decisions Tribunal’s review jurisdiction stems from review of administrative decisions relating to:

- occupational licences (for example Transport licences, such as taxi cab driver authorities; Commissioner of Police licences, such as security guard licences and firearms licences; and Fair Trading licences such as building licences and property , stock and business agent licences)
- state taxation,
- access to government information or the handling of personal information, and
- decisions of the Public Guardian or the Protective Commissioner.¹⁵

Further, a significant amount of external merits review is exercised outside the Administrative Decisions Tribunal. In 2009 only 1085 applications were filed in the Administrative Decisions Tribunal, of which around half were merits review applications.¹⁶ By comparison, in 2009 the Land and Environment Court finalised around 974 proceedings classed as ‘merits review and other civil proceedings’.¹⁷ External merits review on diverse subject matters also continues to be exercised in a number of small tribunals.¹⁸

When the *Administrative Decisions Tribunal Act 1997* was introduced it was intended that it would have jurisdiction to review an expanding and ultimately much broader range of administrative decisions. The second reading speech indicated an intention to review all administrative decisions under State legislation within 18 months to determine which decisions should be amenable to review. This has not occurred to date.

¹³ Creyke, R., and McMillan, J., (2002), note 6 above, at 168.

¹⁴ In the General Division, the 390 applications received in 2007-08 related to only 31 Acts. Of those, over 80% related to only 8 Acts which broadly address occupational regulation or freedom of information.

¹⁵ Administrative Decisions Tribunal, Annual Report 2008-2009, pp16-17.

¹⁶ Ibid.

¹⁷ Land and Environment Court of NSW, Annual Review 2009.

¹⁸ Ibid.

Subsequently, a Parliamentary Review of the Administrative Decisions Tribunal legislation in 2002¹⁹ recommended expanding the Administrative Decisions Tribunal's jurisdiction through:

- The development of explicit criteria for determining which decisions should fall within the review jurisdiction of the Administrative Decisions Tribunal;
- A comprehensive review of existing legislation to identify existing decisions which meet those criteria and legislation to confer jurisdiction on the Administrative Decisions Tribunal where necessary; and
- A presumption that all administrative decisions under future legislation that meet the criteria should be subject to review by the Administrative Decisions Tribunal.

To assist with the process of implementing these recommendations the 2002 Review also recommended the establishment of an independent advisory body, the 'Administrative Review Advisory Council', which would be similar to the Administrative Research Council established at the Commonwealth level to oversee the development of the Commonwealth administrative law system. These recommendations have never been systematically addressed.

A further review of the Administrative Decisions Tribunal Act was released by the Attorney General's Department in November 2007, which also recommended an extension of the jurisdiction of the Administrative Decisions Tribunal.

A case can be made that good governance requires a more consistent approach to merits review of government decisions in NSW. Expanding merits review of government decision-making on a more coherent and principled basis could extend the benefits of existing review processes to a broader class of individuals. And it could promote good governance by enhancing public perceptions of the transparency and fairness of government decision-making.

I look forward to hearing your thoughts, both tonight and as this debate unfolds.

¹⁹ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Jurisdiction and Operation of the Administrative Decisions Tribunal*, November 2002.