

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

26 JUNE 2008

ADMINISTRATIVE LAW AND STATUTORY INTERPRETATION

Justice John Basten

Identifying the issue

The importance of statutory interpretation to administrative law is indisputable. Much of modern administrative law is a product of statute. The Ombudsman, administrative tribunals and freedom of information all owe their existence to statute. Even if access to government documents can be achieved through discovery in the course of litigation, that is a far cry from modern freedom of information laws.

However, in these areas statutory interpretation does not generally involve any special issues. Although administrative law is concerned with the relationship between government and the citizen, it does not follow that vested rights or fundamental human rights and freedoms are involved. The mere fact that a particular interpretation will impact adversely on the individual and in favour of government (in one sense) does not call into operation any presumption against such a construction: see, in a different context, *Harrison v Melhem*.¹

The area of judicial review falls into a different category. Principles of judicial review were developed by the courts without much assistance from Parliament. And the operation of judicial review does form part of the constitutional compact which defines the relationship between the individual and government and as between the arms of government. As I have discussed on other occasions, there are probably

¹ [2008] NSWCA 67 at [2]-[11] (Spigelman CJ), and [209]-[221] (Basten JA), Beazley JA agreeing at [191].

constitutional limits to the power of the legislature to diminish the scope of judicial review, although they may only operate in extreme cases.²

The legislature can seek to limit the scope of judicial review (or indeed expand it) in three ways. First, it can seek to define the scope of the power being conferred on an officer of the government. The broader the conferral of power, the less the limits on the repository of the power and the less the scope for error correctable by judicial review. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*³, the High Court explained that a privative clause which appeared to interfere with the scope of review under s 75(v) of the Constitution could be given validity by construing it as a provision expanding the legal limits of the power exercised by the decision-maker. As we know, *Hickman*⁴ principles governing the operation of privative clauses are matters of statutory construction.

Secondly, Parliament can seek to define the procedures by which decisions are to be made. Such provisions will affect the operation of general law requirements of procedural fairness, which constitute an important basis for judicial review applications.

Thirdly, the legislature can seek to provide for the consequences of a breach of its own prescriptions.

One can, of course, think of other ways of categorising statutory variations of general law principle. For example, a statute may confer power upon a particular office-holder who might be thought, in accordance with general law principles, not to be impartial. The example involves a qualification of general law principles relating to apprehension of bias.⁵ However, the limited purpose of my categorisation is to place my comments in context. The area on which I want to comment is that involving procedural provisions.

² *Human Rights and the Rule of Law*, 2008 Sir Ninian Stephen Lecture, University of Newcastle; *Judicial Review Under Section 75(v)*, 2004 Constitutional Law Conference, Sydney.

³ (1995) 183 CLR 168.

⁴ *The King v Hickman; Ex parte Fox & Clinton* (1945) 70 CLR 598.

⁵ cf: *NIB Health Care Services Pty Ltd v Dental Board of New South Wales* (1996) 39 NSWLR 362, 365 (Priestley JA).

Statutory procedures

Undoubtedly one of the major developments in the law of judicial review in recent decades has been the expansion of the operation of procedural fairness. The commencement of this process can fairly be located in the decision in *Kioa v West*.⁶ Its effect was to broaden greatly the field of discretionary powers which were said to attract procedural fairness as a condition of their valid exercise, to the extent that they affected the rights, benefits or other interests (not limited to vested legal interests) of individuals. The beneficiary of the procedural right was the individual who might be adversely affected, who could enforce the right, at least by challenging the validity of a decision made without complying with the obligation to accord procedural fairness. This process appears to have given rise to two broad concerns on the part of government.

The first was resistance, in circumstances where the costs of compliance were significant and the steps required were thought to be inappropriate. A second response involved recognition of the need for procedural fairness, but reflected a concern that the requirements developed by courts are not necessarily clear and precise, and can be unpredictable, when developed on a case by case basis. A bureaucracy can only work effectively if its numerous officers are able to apply reasonably precise standards, with a degree of certainty.

Each of these considerations has led government to respond by specifying procedures, though not always the consequences of non-compliance.⁷

Subject to one qualification, the introduction of specific statutory procedures was a novel development for the general law and one which has caused some uncertainty in the courts in recent years. The qualification is, of course, that the scope of procedural fairness has always been acknowledged to be flexible, its content being dependent upon the nature of the power, the circumstances of its exercise and other similar considerations. The involvement of Parliament raises a different issue which can be illustrated by reference to changes in migration law.

⁶ (1985) 159 CLR 550.

⁷ cf: *Migration Act 1958* (Cth), s 69.

The issues can be identified shortly. First, the Commonwealth responded to challenges to decisions made under broad and ill-defined powers, not limited by statutory procedures, by embarking upon a course of legislative prescription. Less than two months before *Kioa v West*, the High Court handed down judgment in *Minister for Immigration and Ethnic Affairs v Mayer*,⁸ which decided that an applicant for a visa under the old s 6A(1)(c) of the *Migration Act* invoked the power of the Minister to determine whether the person had refugee status, a decision which engaged the right to reasons under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The combination of *Mayer* and *Kioa*, together with the attempts to constrain the discretionary grant of other visas, set the preconditions for a rush to claim refugee status, combined with a concomitant increase in applications for review. The bases upon which people could obtain visas to enter the country quickly developed the character of taxation statutes. Further, officers who were required to consider applications were provided with a statutory procedural “code” to guide their decision-making.⁹ The code described itself as providing exclusive guidance in relation to procedure¹⁰, an attempt which was doomed to fail because it did not clearly indicate its area of operation. Thus, a “code of procedural fairness” which did not deal with apprehension of bias was clearly not a code which dealt exclusively with all the procedural requirements. Because of generous provisions for merit review before the Refugee Review Tribunal¹¹, the operation of this provision might not have troubled the courts had it not been for the possibility that strict time limits for review by the Tribunal might not be met¹², so that the validity of the initial decision became a basis for judicial review: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,¹³ see also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*.¹⁴

More importantly, the *Migration Act* also provided a significant level of statutory prescription in relation to the procedures to be followed by the Tribunal.¹⁵ In some

⁸ (1985) 157 CLR 290.

⁹ *Migration Act*, ss 51A-64.

¹⁰ *Ibid*, s 51A(1).

¹¹ *Ibid*, ss 411, 414, 415, 420.

¹² *Ibid*, s 412.

¹³ (2001) 206 CLR 57.

¹⁴ (2006) 228 CLR 152.

¹⁵ *Ibid*, Pt 5, Divs 2 and 3, and Pt 7, Divs 2 and 3.

respects, these procedures could be seen to go beyond that which might have been required under the general law. That gave rise to a question about the effects of non-compliance.

It is well-understood that the content of procedural fairness is not fixed, but can be varied by the legislature. The great importance of procedural fairness is that it provides a precondition to the validity of the decision. If the legislature increases the procedural constraints placed on its decision-makers beyond those which would be implied by the general law, does breach of those additional elements lead to invalidity?

The easy answer to that question is that the consequences of non-compliance must always be determined by a process of statutory construction, even if, as commonly occurs, the legislature has not identified those consequences: see *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁶ However, in relation to the *Migration Act*, it might have been thought that the intended consequences were reasonably clearly revealed by the inclusion of the privative clause seeking to avoid invalidity (by removing the availability of judicial review) in relation to decisions made “under the Act”.¹⁷ Nevertheless, a level of ambiguity remained: was a decision which purported to be made under the Act and in compliance with its procedures, but which failed to conform to the relevant statutory process, a decision “under the Act”? In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁸ the High Court held that it was not and the decision was therefore invalid.

That case revealed a willingness to extend to statutory procedures the consequences which would attach to the minimum procedural requirements implied by the general law.

There were two broad issues in *SAAP*. The first involved the scope of s 424A of the *Migration Act*, which required that the Refugee Review Tribunal give an applicant information that the Tribunal considered would be the reason or part of the reason for affirming an adverse decision, by prescribed methods, which broadly required

¹⁶ (1998) 194 CLR 355.

¹⁷ *Migration Act*, s 474.

¹⁸ (2006) 228 CLR 294.

that the information be provided in writing. The Court divided as to the scope of the obligation, in a temporal sense. The majority (McHugh, Kirby and Hayne JJ) thought that, in the absence of express limitation, the obligation to provide information and an opportunity to comment on it, applied at all stages of the Tribunal's deliberations. The minority (Gleeson CJ and Gummow J) thought that the Act adopted a sequential approach and that the procedural requirement applied only prior to a "hearing". As the Chief Justice explained, the contrary view gave rise to a degree of inflexibility and impracticability which militated against such a construction.¹⁹

The second issue in *SAAP* was whether the section, being expressed in mandatory terms, entailed invalidity as a consequence of non-compliance. The majority (in which Gummow J joined²⁰) held that it did.

As noted by McHugh J²¹ that conclusion had required resolution of the potential inconsistency between the express terms of a procedural requirement and the operation of a privative clause. More specifically, the question raised in *SAAP* was whether non-compliance, in circumstances where there would have been no finding of procedural unfairness under the general law, nevertheless gave rise to invalidity. Because invalidity was an acknowledged consequence of a breach of procedural fairness, there was no necessary reason for the Court to find that invalidity followed from breach of a procedural provision in the absence of general law procedural unfairness.

The result in *SAAP* gave little encouragement to government in seeking to provide statutory procedural regimes. As already noted, legislatures were not necessarily seeking to restrict procedural fairness by such regimes: one purpose of spelling out procedures is simply to ensure that decision-makers have clear guidance in that respect. However, the problem for the government was that, by spelling out a procedure which did not conform to the minimal requirements deemed essential by the general law, they could impose greater risks of failure on their decision-makers; *SAAP* said that if the specific rules exceeded those general requirements, they would impose a greater level of susceptibility to review and risk of resultant invalidity.

¹⁹ Ibid, [16]-[22].

²⁰ Ibid, [136] and [137].

²¹ At [72].

The operation of s 424A arose again in 2007 in a decision handed down two years after *SAAP*, namely *SZBYR v Minister for Immigration and Citizenship*.²² In that case the joint judgment of the majority included the two dissenters in *SAAP* and three members of the Court who did not sit in *SAAP*. The remaining two members of the majority in *SAAP* (Kirby and Hayne JJ, McHugh J having retired) joined in the order dismissing the appeal, but without revisiting (in the case of Hayne J) or identifying inconsistency with (in the case of Kirby J) *SAAP*. One factor which had changed since *SAAP* was the inclusion of new s 422B which stated that the Division,²³ including s 424A, was taken to be “an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with”.

After describing the temporal issue in *SAAP* as “the second point”, the joint judgment in *SZBYR* stated at [14]:

“Had the second point in SAAP been decided differently, the present case would have been simpler to resolve: the scope for the operation of s 424A would have been exhausted once the appellants were invited to appear before the Tribunal Certainly, there was nothing in the conduct of that hearing which was of itself procedurally unfair and, given the presence of s 422B, it might be surprising if s 424A were interpreted to have an operation that went well beyond the requirements of the hearing rule at common law. Unlike SAAP, where the relevant ‘information’ was testimony of the appellants’ daughter which had been given in their absence, the ‘information’ in this case consisted of the appellants’ own prior statutory declaration, to which the Tribunal explicitly drew their attention during the course of the hearing. If the common law rules of procedural fairness applied, one would certainly not criticise the Tribunal’s approach in this regard.”

Their Honours concluded at [21]:

“The short answer to all these points is that, on the facts of this case, s 424A was not engaged at all: the relevant parts of the appellants’ statutory

²² [2007] HCA 26; 81 ALJR 1190.

²³ Part 7, Div 4.

declaration were not ‘information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review’. Section 424A has a more limited operation than the appellants assumed: its effect is not to create a back-door route to a merits review in the federal courts of credibility findings made by the Tribunal.”

The point for present purposes is not the potential inconsistency between the approach in *SAAP* and *SZBYR*, but rather the differing views as to how to deal with a statutory procedural regime which, on one view, extended the general law principles of procedural fairness, rather than restricting them.

We understand that because rules of procedural fairness have a foundational role to play in the rule of law and the protection of individual rights and interests, that which the courts deem to be part of the general law will not readily be diminished by a statutory provision which does not have that effect in clear terms. On the other hand, provisions which appear to expand general law principles are less common. The majority in *SAAP* appeared to equate such rules with an expression of parliamentary intent that minimum standards of procedural fairness extended so far, thus justifying a conclusion that non-compliance constituted jurisdictional error. Perhaps more realistically, the minority view in *SAAP* treated the rules, in their statutory context and having regard to their apparent purpose, as having a limited operation. Nevertheless, if they had the expanded operation, the mandatory terminology in which they were expressed demonstrated invalidity to be the consequence of non-compliance for Gummow J; Gleeson CJ not addressing the issue.

Whilst s 424A has raised a problem which appears to be presently unique or at least unusual, it is likely that legislatures will continue to prescribe procedural requirements, if only to give full guidance to government officers. One may therefore expect similar issues to arise in the future. No special rules of statutory interpretation are required to deal with such cases, but parliamentary counsel may need to be more imaginative in their approaches, if they wish, as they should, to make clear to everyone the intended consequences of non-compliance with prescribed procedures.
