18. Judicial Review

Contents

A common law principle

18.1 Judicial review is about setting the boundaries of government power.[1] It is about ensuring government officials obey the law and act within their prescribed powers.[2]

18.2 This chapter discusses the source and rationale of this common law principle; how the principle is protected from statutory encroachment; and when laws that limit judicial review may be justified.[3] The ALRC calls for submissions on two questions.

> **Question 18–1** What general principles or criteria should be applied to help determine whether a law that restricts access to judicial review is justified?
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> **Question 18–2** Which Commonwealth laws unjustifiably restrict access to judicial review, and why are these laws unjustified?

18.3 In *Church of Scientology v Woodward* (1982), Brennan J said:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from

1 'The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed': *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

2 'The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

3 The Terms of Reference refer to laws that 'restrict access to the courts'. The ALRC understands this to refer to the common law power of judicial review, rather than to the broader but related subject of access to justice.

> exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[4]

18.4 Access to the courts for the purpose of judicial review is an important common law right. In his *Introduction to Australian Public Law*, David Clark gives a brief history of judicial review of administrative action:

> Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts. ... By the late 17th century the writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.
>
> The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824 ... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.[5]

18.5 However, as noted further below, statutes sometimes provide that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial review of administrative decisions. They are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.[6]

18.6 Other means are also sometimes used to limit judicial review, such as placing time limits on when proceedings can be initiated.

Protections from statutory encroachment

Australian Constitution

18.7 The *Australian Constitution* gives important powers of judicial review to the High Court which cannot be taken away by statute. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.[7] Chief Justice Gleeson said that this provision 'secures a basic element of the rule of law':

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4 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

5 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

6 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 277.

7 *Australian Constitution* s 75(v).

> The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the *Constitution*, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.[8]

18.8 In light of this Constitutional power, courts may give privative clauses a much narrower interpretation than the text of the provision suggests. So much narrower, in fact, that such clauses may sometimes be largely or even entirely deprived of effect.

Principle of legality

18.9 The principle of legality provides further protection to judicial review.[9] When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.[10] For example, in *Magrath v Goldsborough Mort & Co Ltd* (1932), Dixon J said:

> The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.[11]

18.10 In *Public Service Association (SA) v Federated Clerks' Union* (1991), Dawson and Gaudron JJ said:

> Privative clauses ... are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.[12]

18.11 Dawson and Gaudron JJ went on to say:

> Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.[13]

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8 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ).

9 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

10 *Momcilovic v The Queen* (2011) 245 CLR 1, 46–47 [43]–[44] (French CJ).

11 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

12 *Public Service Association (SA) v Federated Clerks' Union of Australia (CLR)* (1991) 173 (Unreported, 1991) 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492–493 [30]–[32] (Gleeson CJ). The *Plaintiff S157/2002* case concerned 'privative clause decisions' in the *Migration Act 1958* (Cth). Section 474(1) of that Act provided: 'A privative clause decision: (a) is final and conclusive; and (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'

13 *Public Service Association (SA) v Federated Clerks' Union of Australia (CLR)* (1991) 173 (Unreported, 1991) 132, 160 [18] (Dawson and Gaudron JJ).

18.12 *Hockey v Yelland* (1984) also concerned a privative clause—specifically, a Queensland statute that provided that determinations by a medical board 'shall be final and conclusive' and the claimant 'shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever'.[14] Gibbs CJ said that this provision did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari':

> It is a well recognized principle that the subject's right of recourse to the courts is not to be taken away except by clear words.... The provision that the board's determination shall be final and conclusive is not enough to exclude certiorari... The words of the further provision... are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record. [15]

Justifications for encroachments

18.13 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

> have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.[16]

18.14 These reasons may not, however, justify laws that limit judicial review of jurisdictional errors. Administrative decision makers, no matter how expert, should presumably be required to act within their prescribed powers.

18.15 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[17]

18.16 Some laws that limit judicial review may be justified. The ALRC invites submissions identifying Commonwealth laws that limit judicial review without justification, and explaining why these laws are not justified.

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14 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

15 Ibid.

16 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Groves, above n 6, 277.

17 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.