# ‘A Judicial Perspective on Judicial Review’

**Speech delivered by Chief Justice Terence Higgins**
**7 September 2009**

**AGS Administrative Law Intensive Course**

Good afternoon everyone and thank you for having me. For the next 45 minutes or so I am going to speak as a member of the judiciary on both judicial review and more specifically about reviews of ACT Administrative Appeals Tribunal decisions which I have sat on.

There is what is sometimes referred to as a ‘cultural divide’ between executive decision makers and judicial decision makers. Tribunals fall between the two with their quasi-judicial character. This character can best be understood by reference to the five deficiencies that Sir Anthony Mason identified as distinguishing administrative from judicial decision-making:

“Experience indicates that administrative decision-making falls short of the judicial model - on which the AAT is based - in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he or she is not trained to do so. Finally, he or she is inclined to subordinate the claims of

justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic pressures."[1]

Judicial review is only one element of a larger system, the administrative justice system. Other elements include internal review by superior officers, external review by tribunals and recommendations by Ombudsmen and Parliamentary Commissioners. Other such elements are contained in legislation such as freedom of information legislation, privacy legislation, anti-discrimination legislation and statutory rights to reasons.

So what is judicial review? Judicial review enables a person aggrieved by an administrative decision to seek review by a court of the lawfulness of that decision. I realise you have spent today looking at merits review. Judicial review can be distinguished in that the court will not review a decision to determine whether or not it was the right decision to make, as would be the case in merits review. The court will only review a decision to determine whether it was a lawful decision. As such when a party appeals to the Supreme Court from an AAT decision (now incorporated into what is known as ACAT) they can only do so 'on a question of law' in accordance with s 46 of the *Administrative Appeals Tribunal Act 1989* (ACT). The court generally only has the power to examine or review the legality of an administrator's decision, not its merits. This concept, the distinction between legality and merits is fundamental to administrative law for if courts were to review the merits of decisions and substitute their opinion of the correct result then the court would be breaching the separation of powers doctrine.

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[1] Mason, Sir Anthony. "Administrative Review: The Experience of the first Twelve Years", (1989) 18 Fed.L.Rev.122 at 130

The Constitution not only defines the constitutional limits of judicial review but also underscores the significance of judicial review as an element of the rule of law. As Brennan J stated:

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 exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.[2]

Thus, judicial review of an administrative decision requires that executive action is not unfettered or absolute but is subject to legal constraints.

There are a number of legislative schemes under which review can be sought. Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ (no surprise that Kirby J dissented) in *Allan v Transurban City Link Ltd*[3] made the point that the test for standing to challenge a statutory decision will depend on the subject, scope and purpose of the relevant legislation stating "A particular statute may establish a regime which specifically provides for its own measure of judicial review on the application of persons meeting criteria specified in that statute" and that "What serves to identify a person as one affected by a reviewable decision will vary having regard to the nature of the reviewable decision itself".

I have sat on a number of appeals from the AAT regarding the standing of a party. Under s 25(1) of the AAT Act an applicant seeking review of a decision to make or refuse an order must be a person "whose interests are affected by the decision".

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[2] *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 per Brennan J.
[3] [2001] HCA 58 at [16-17]

Under ss 5 and 6 of the AAT Act, the applicant must be "a person aggrieved" by the decision. To be a person aggrieved, the person must have an interest in the subject matter of the decision that is greater than a member of the public would have. It is not enough that the person feels aggrieved.

One such appeal from a decision of the AAT to the ACT Supreme Court was the case of *Helkban v Commissioner for Land and Planning and Capital Business Park (Holdings) Pty Ltd*[4]. There were two parts to this appeal, the first was in relation to standing and the second in relation to a Notice of Contention. I do not propose to discuss the Notice of Contention issue with you today. The appellant, Helkban had sought to object to a development application proposed by the second respondent, Capital Business Park. Capital had sought the approval of an application from the Commissioner for Land and Planning that the land be sub-divided into two parts. In accordance with the *Land (Planning and Environment) Act 1991* (ACT), notice of the proposal was published and one joint objection was received from a number of Capital's competitors including Helkban. The objection stated that there was no justification for the subdivision, that it was inconsistent with the Territory Plan and that it would be an abuse of the leasehold system. The Commissioner rejected that objection and approved the proposal. Helkban (and another) applied to the Tribunal for a review of the decision, they relied on the same grounds as per their original objection. The Tribunal concluded that neither Helkban's commercial interests in preventing further competition, nor the public interest in holding Capital to its original leasehold obligations, gave rise to a sufficient interest to satisfy the requirement as to standing imposed by the Land Act. It was that decision that Helkban appealed from

[4] [2003] ACTSC 23 (11 April 2003)

on the grounds that the Tribunal erred in law in not finding it had standing. Helkban argued before me in the ACT Supreme Court that it had standing to challenge the Commissioner's decision on two grounds – the public interest in protection of public assets and the private interests of Helkban as a competitor with Capital in the provision of storage services. I held that the fact that legislation confers a right to object to a decision on a person will favour the view that such a person has standing to have the decision reviewed. As I previously stated, the test for standing to challenge a statutory decision will depend on the subject, scope and purpose of the relevant legislation. Therefore to determine if Helkban had standing to challenge the decision in question I was required to consider the relevant legislation. The mere fact that Helkban was an objector in fact to the original decision did not, of itself, grant a right to apply for review to the Tribunal. I found that the Tribunal was not in error in finding that trade rivalry, even if leading to adverse economic effect if the application is granted, is not an interest entitling the appellant to object to the proposed development, that, of course, could be otherwise if the relevant statute required or permitted it. In my view, the Tribunal had correctly rejected the appellant's contention that it had standing as a 'person affected'.

A not dissimilar case was that of *Westfield Limited v Commissioner for Land Planning & Others*[5]. This was an appeal from a decision of the President of the ACT AAT refusing Westfield's, the appellant's, application to be joined as a party to proceedings. The proceedings before the AAT were brought by the second and third respondents who objected to a decision of the Commissioner for Land and Planning,

[5] [2004] ACTSC 49 (23 June 2004)

which had rejected their application to permit construction of an Aldi Supermarket at premises known as The Belconnen Markets.

The original application was notified pursuant to the Land Act. The appellant, Westfield, had lodged an objection to the application pursuant to the notice. Westfield was given notice by letter that the second and third respondents were seeking review of the Commissioner's decision and as such lodged an application to be joined as a party pursuant to s28(3) of the AAT Act. The President considered that Westfield's stated desire to ensure compliance with the Territory Plan and its unhappiness with the visual impact of the proposed development did not provide a sufficient basis to conclude that it 'may be affected by the proposal'. The President concluded (in accordance with authority, including the High Court case of *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493) that a fear of financial detriment by reason of further competition was not sufficient to create a relevant interest, though, of course, other factors, such as geographic proximity, and effect on traffic flows, might be sufficient, alone or in combination, to create such an interest. However, the President concluded that there was no evidentiary basis for such a finding in the instant case and as such rejected the application.

In its submissions before me Westfield contended that it had a right of appeal pursuant to s 46(2) of the AAT Act and further that the decision to refuse joinder was itself in error because the interests of Westfield were relevantly affected. Further Westfield contended, that even if its appeal right was limited to errors of law, its direct involvement and association with Belconnen Mall gave it an interest distinct from an ordinary member of the public. The second and third respondents contended

that the interest of Westfield in preserving the current use of the Belconnen Markets, excluding a large retailer, such as Aldi, was not sufficient to give it standing.

The Land Act provides in s 237 that any person who may be affected by the approval of an application may within the prescribed period object to a grant of approval and, if an application is refused, the Planning and Land Authority must given written notice of the refusal to the applicant and each person who objected under s 237(1). Westfield lodged what purported to be an objection pursuant to s 237 and a notice was sent to Westfield in return, not as an objector, but as a person who had commented on the proposal. If in truth Westfield was a person who objected under s 237, then pursuant to s278, such an objector must be informed that the person 'is entitled, on application to the AAT, to be made a party to the proceedings for the review'. In my view, the question whether Westfield was an objector within s 278 depended on whether Westfield was a person who 'may be affected' by the development. I observed that the effect claimed by Westfield did not rise beyond an economic effect. Its interests in the integrity of the Territory Plan were no more or less than any other person in the Territory. As a result, I held that the decision appealed from was correct and dismissed the appeal.

It is not an uncommon scenario that a person or business likely to suffer economic effects due to a decision will seek a review of that decision. But as these cases demonstrate such an effect does not usually suffice for standing.

Once the standing hurdle is overcome, the next issue is whether the decision is in fact a reviewable decision. In *Commissioner for Housing in the ACT v Y*[6] the Commissioner for Housing made an application in the Supreme Court for leave to appeal from a decision of the ACT AAT. The respondent, for privacy reasons, was referred to as Y. Y was a single mother, with two children under the age of 10, one of whom had a severe medical condition. She could not live with her parents as, not only were the premises overcrowded, but her father was an abusive alcoholic. She required a car to transport her children to school and get to work and as no bank would give her a loan and she had no savings. She was forced to salary sacrifice in order to obtain the vehicle thus reducing her means to obtain private accommodation.

The matter began when a delegate for the Commissioner decided to deny an appeal by Y against a decision to remove her name from the Housing Assistance Register and to cancel her application for housing assistance. On internal review, the original decision was supported. This was due to the fact that her weekly income exceeded the criteria for assistance. The Public Rental Housing Assistance Program 2006 set out the criteria for the allocation of public housing. The threshold, as calculated by the formula contained in clause 7 and applied by the Tribunal, was $720 per week. The applicant's income was $839 and the car lease payments were $229 per week. In addition to clause 7 there was also clause 9, which provided that if the Commissioner was satisfied that an applicant is suffering severe hardship that cannot be alleviated by any other means, the Commissioner may disregard any criteria mentioned in clause 7. On appeal to the AAT, Y's appeal was upheld. The Tribunal accepted that it was impracticable for Y to work longer hours as any additional income would be

[6] [2007] ACTSC 84 (12 October 2007)

consumed by extra child-minding fees. The Tribunal therefore decided that the applicant be allocated three bedroom housing in her area of choice on a priority needs basis.

The Commissioner sought leave to appeal against this decision. Leave was required by virtue of s 46 of the AAT Act. The Commissioner contended that the decision of the Tribunal was affected by several errors of law. He contended, firstly, that the decision not to exercise the discretion under clause 9 of the Program was not reviewable by the Commissioner and hence not reviewable by the Tribunal by reason of clause 30 of the Program. It is this ground I will discuss.

The Program, pursuant to the *Housing Assistance Act 1989* (ACT), makes express provision for some decisions of the Commissioner to be 'reviewable decisions'. That is to say, decisions the Commissioner may review whether personally or after recommendation from the Housing Review Committee.

Clause 27 of the Program defined what were 'reviewable decisions'. It stated that a decision under clause 9A, in other words, the discretionary provision, is not reviewable.

The Commissioner, notwithstanding clause 27, in fact reviewed and confirmed the original decision not to exercise the discretion conferred by clause 9 in favour of the applicant.

Section 24 of the AAT Act confers power upon the AAT to review certain administrative decisions. It could not review a clause 9 decision, but could review a clause 7 decision, in other words, the criteria, including the income criteria. The

applicant's case before the Tribunal primarily relied on clause 9 but also relied on clause 7.

The discretion conferred by clause 9 relates to any of the eligibility criteria not met by an applicant, including, but not limited to, the level of weekly income.

The Tribunal determined that clause 9 should be applied so that clause 7 did not need to be considered.

I was in agreement with the Commissioner's submission that the clause 9 decision was not reviewable by the Tribunal but I was also of the opinion that the Commissioner could have determined to disregard the car lease payments under clause 7 of the Program with the result that the income test would have been met.

I was further of the view that, on the facts found by the Tribunal, such a finding would have been appropriate, if not inevitable, and would certainly have been the preferable decision.

Section 21 of the Human Rights Act 2004 (ACT) confers the right upon all persons to have their rights and obligations decided by a competent, independent and impartial court or tribunal. That, of course, is not conclusive but it does indicate that, if an applicant for assistance needs to have a discretionary decision applied to them to recognise the comparative justice of their claim to secure appropriate shelter and avoid otherwise severe and unavoidable hardship, then a process that attracts a review would be preferable to that of an unexaminable discretion by a single public official.

Therefore, the Tribunal did make an error of law. However, that error was not such as to have prevented it from making the orders it made had it proceeded on a correct view of the law and applied clause 7 of the Program. I refused the application for leave to appeal.

The next step is to look at the grounds for judicial review. As judicial review differs from review on the merits, the grounds for review are limited to particular recognised grounds. Jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 is conferred on the Federal Court. The majority of the common law grounds of review are included in sections of the AD(JR) Act though there are some differences. Similarly under the *Administrative Decisions (Judicial Review) Act 1989* (ACT), an aggrieved person may apply to the Supreme Court for an order of review on any of the following grounds:

- that a breach of the rules of natural justice happened in relation to the making of the decision
- that procedures that were required by law to be observed in relation to the making of the decision were not observed
- that the person who purported to make the decision did not have jurisdiction to make the decision
- that the decision was not authorised by the enactment under which it was purported to be made
- that the making of the decision was an improper exercise of the power given by the enactment under which it was purported to be made
- that the decision involved an error of law, whether or not the error appears on the record of the decision
- that the decision was induced or affected by fraud
- that there was no evidence or other material to justify the making of the decision

- that the decision was otherwise contrary to law

An error of law is one of the most common judicial review grounds relied upon. It occurs when the decision-maker has misunderstood or misapplied a statute, for example, by applying the wrong criteria, or asking the wrong question. In addition, where policy exists, decision-makers can fail to realise its limitations, sometimes believing that the policy empowers them, rather than the law.

The vast majority of AAT appeals I have sat on all relate to an error of law.

One such case is *ACT Construction Occupations Registrar v Tokich*[7]. This was an application for leave to appeal pursuant to s46 of the AAT Act from a decision of the ACT AAT. That decision was itself an appeal from a decision of the ACT Construction Occupations Registrar and a Deputy Registrar exercising the Registrar's powers to take certain remedial construction action. That decision, resulted in the issue of a 'notice of rectification order' sent to the respondent, Mr Tokich, a licensed builder. The background to this was that a block in the Canberra suburb of Charnwood had been subdivided, a development application was lodged proposing the construction of 59 residential dwellings on Block 2. Mr Tokich constructed the 59 units and they were sold by Tokich Homes to various individuals with individual titles being carved out from the area of Block 2. This case arose after one such unit suffered flooding following a storm.

There was no suggestion that the respondent constructed the works on Block 2 otherwise than in accordance with the approved plans and specifications. After

[7] [2006] ACTSC 89 (13 September 2006)

considering the various legislative requirements, the AAT set aside the 'notice of rectification order' issued by the Registrar requiring the respondent to rectify work.

The appellant appealed to the Supreme Court 'on a question of law'. The appeal identified five errors of law. Firstly, the Senior Member erred in law in failing to take into account relevant considerations, secondly the Senior Member erred in law in taking into account irrelevant considerations, thirdly the Senior Member erred in law in finding it was not reasonable in the circumstances to rely on the Building Code of Australia Standard, fourthly, the Senior Member erred in law in finding that the respondent developer not to have had a duty to provide a solution to drainage problems identified before subdivision, and finally the Senior Member erred in law in finding, by inference, that the ACT was responsible for modification of stormwater arrangements before subdivision.

That a decision made took into account irrelevant considerations or failed to take into account relevant considerations is a common ground for review.

However I discovered two difficulties with this matter. The first been that the rectification order had been made under the *Construction Occupations (Licensing) Act* 2004 (ACT) and not the Land Act as should have been the case. Secondly, the claim should have being made against Tokich Homes and not Mr Tokich personally. The AAT had proceeded on the assumption that the rectification order had been made under the correct Act and was directed to the correct party. Neither party had advanced any contrary view. Therefore I considered the matter on the same assumption. Despite the fact that the appellant's case should have failed. I found that

it was open to the Senior Member to have concluded that standing in the place of the decision maker she was not satisfied that there was a contravention empowering the appellant to issue a rectification order. Further it was not, nor could it be, mandatory for the appellant to have issued a rectification order. That order was without validity in any event. Hence I refused leave to appeal.

The third case I wish to take you to regarding an error of law is the decision of *Classic Constructions (Aust) Pty Limited v Conservator of Flora and Fauna*[8]. This case was an appeal from an ACT AAT decision about whether an application to undertake 'tree damaging activity' ought to be refused. The appellant had sought permission from the respondent to undertake what is classified as a 'tree damaging activity', namely the removal f a hideously unaesthetic and dangerous tree situated on a block in Nicholls. The tree was assessed by a number of experts and ultimately found to pose an 'unacceptable risk to public and private safety' and was 'causing or threatening to cause substantial damage' but even so 'failed criteria' for removal. The respondent accepted the advice and notified the appellant who made an application to the AAT to review that decision. The AAT concluded that the requirements of the *Tree Protection (Interim Scheme) Act* 2001 (ACT) are rigorous and aimed to protect significant trees. They found that the criteria that would allow the tree to be removed had not been satisfied.

That decision was appealed to the Supreme Court on six grounds including that the Tribunal failed to determine whether the tree itself constituted an unacceptable risk to public or private safety and that they erred in interpreting the Tree Protection Act.

[8] [2006] ACTSC 3 (30 January 2006)

The Tribunal had noted that the block, though approved for residential development, was currently vacant and thus they could not find a current unacceptable risk posed by the tree, though conceded that it might become unacceptable in the future once the premises were occupied. The respondent contended that the Tribunal was entitled to confine its assessment of risk to the current but not foreseeable circumstances. I disagreed with that. The risk, as it was then, was a real, not fanciful, chance of injury in the foreseeable future. I found that the Tribunal was wrong to confine the concept of 'unacceptable risk' to the end of the construction phase.

The next question was whether there was any alternative to the removal of the tree to avert that risk. Two experts agreed that removal was the only viable option. I characterised the decision of the Tribunal as impracticable and unenforceable, especially given their discussion of solutions that included a large fenced barrier that would have extended into a neighbouring property. I allowed the appeal and granted the appellant's application to set aside the decision of the AAT and granted approval to remove the tree.

You should keep this in mind the next time you feel the urge to remove that big old tree from the front of your house.

The final case I wish to discuss regarding an error of law is that of *JM Blicharz v Minister for Urban Services and L & I Horvarth*[9]. In that case the appellant was a lessee of a residential block of land in O'Malley. The second respondents were the

[9] [2000] ACTSC 45 (2 June 2000)

lessees of an adjoining block (the subject block). The original dwelling on the subject block posed no problem but when a decision to approve a development application to permit the construction of a second dwelling was notified the appellants objected. The AAT reviewed and confirmed the decision to approve development.

Now, the development application was not effective without approval being granted to a variation of the terms of the Crown Lease. The appellant objected that the decision was invalid and the variation null and void. The appellant contended that there was an irregularity in that the terms of the proposed lease variation were not publicly notified and available for inspection (on the other hand the siting and design application was publicly notified, objected to, initially granted and then refused on appeal to the AAT). A third siting and design application was lodged and despite objection from the appellant, the application was finally granted. During the AAT hearing on the third siting and design application, the issues of the decision to vary the Crown Lease were raised. The AAT ruled it had no jurisdiction to review the Minister's decision to vary the Crown Lease. The AAT ruled that the lease variation had been processed correctly despite contrary assertions by the appellant. It was contended before the AAT that the failure to notify the public of the application for lease variation rendered it invalid. Hence the approval to carry out the dual occupancy works was ineffectual until the lease was validly varied. It was also contended that the proposed development was inconsistent with the Territory Plan. The AAT, on review, determined that there was no inconsistency with the Territory Plan. There was no appeal from that decision.

The AAT also found the lease variation valid. Before the AAT, the argument against validity of the lease variation was based on the absence of notification of the lease variation application. The AAT held that the lease was effectively varied upon registration. In relation to the argument that s58 of the *Land Titles Act* was inconsistent with s29 of the *ACT (Planning and Land Management) Act* 1988 (Cth) the President concluded that there was no direct inconsistency. The Notice of Appeal to the Supreme Court contended that the AAT decision was defective and that the AAT erred in five respects. Firstly, the lease was effectively varied upon registration, secondly, s58 of the Land Titles Act was not inconsistent with s29 of the ACT (PALM) Act, third, the functions of the Australian Capital Executive under Section 29 of the ACT (PALM) Act are subject to s 58 of the Land Titles Act, fourth, the Land Titles Act was subject to the Land Act and lastly, in failing to consider and hold that the application to vary the Lease has been refused under Section 230(4) of the Land Act, and the purported approval subsequently given was necessarily invalid.

I found that there was no substance to the contention that the Land Act was in conflict with the ACT (PALM) Act. I also found that the lease variation had been refused and thus the next question became 'is the relevant authority able to approve a lease variation after it is deemed to be refused?' I found that they did have the power but that led me to yet another question, 'was the lease variation effective even absent full compliance with the provisions of the Land Act, namely, lack of notification?' I found that the defects in the process did not vest in the appellant any right to set aside the lease variation, thus the lease was validly varied. The AAT was right.

I therefore dismissed the appeal.

When it comes to judicial review there are judicial limitations. These are areas where the courts have shown themselves unwilling to intervene. Such areas include acts of a high governmental or political nature such as the signing of a treaty, the existence of war and the recognition of foreign governments. Other decisions such as those within the industrial relations area, decisions on personnel matters within public administration and with respect to income tax assessment have also been considered by the courts to be less amenable to judicial review.

In *Attorney General (NSW) v Quin*[10], Brennan J stated: "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government… The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it: but the court has no jurisdiction simply to cure administrative injustice or error".[11]

This statement emphasises the function of the separation of powers; the legislature making the laws, the executive administering and then the judiciary declaring and enforcing them.

That said, there are also legislative limits placed on judicial review. Schedule 1 of the AD(JR) Act contains exceptions to judicial review. Other pieces of legislation may include what is known as a 'privative clause'. A privative clause is one that can be

[10] (1990) 170 CLR 1 at 17
[11] (1990) 170 CLR 1 at 35-36

said to oust the jurisdiction of the court. It provides that a decision should not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court or on any account whatever. On its face, such a clause would appear to be unconstitutional in so far as it seeks to deprive the High Court of its jurisdiction to require officers of the Commonwealth to act within the law. Traditionally though such clauses have been construed by the courts so as to allow review on three apparently narrow grounds – that the decision was not made bona fide, that it did not relate to the subject matter of the relevant statute and that it was not reasonably referrable to the power of the decision-maker.

The AD(JR) Act repealed eight privative clauses in existence at the time it was enacted but four of these categories were included in schedule 1 to the Act and the Act did not preclude future use of privative clauses. In fact they again appeared in the Migration Reform Act 1992. That Act replaced the Federal Court's jurisdiction in relation to migration matters under the AD(JR) Act and s 39B of the Judiciary Act, providing more limited grounds of review.

Chief Justice Gleeson stated in his paper "Courts and the Rule of Law":

"There is an apparent inconsistency between a provision defining and limiting power, and a provision which appears to say that such a limitation may not be invoked as a ground of challenge to a decision made in the exercise of such power".[12]

Speaking of limits, it is also important to note that a person seeking judicial review of a decision, must be very careful to comply with any time limits. Although it is

[12] Gleeson, CJ. "Courts and the Rule of Law", The Rule of Law Series, Melbourne University, 7 November 2001 http://www.highcourt.gov.au/speeches/cj/cj_ruleoflaw.htm

possible to seek an extension of time it can be difficult to persuade a court to do so and a good reason for the delay in seeking the judicial review will need to be shown. Under both the ADJR Act and the Administrative Decisions Review Act an application for review of a decision must be made within 28 days from the day the decision is made.

I recall a case that was before me where the time limit had not been met. In *Jewel Food Store Pty Limited, Olaseat Pty Limited and Kippax Supabarn v Minister of the Environment Land and Planning*[13] the applicants, Kippax Supabarn, applied to the court for an extension of time within which to apply for review of a decision of the respondent, the Minister of the Environment Land and Planning. Essentially, the respondent had made a decision to approve an application by Contis and Dinach Holdings Pty Ltd, trading as The Belconnen Markets, to amend the terms of their Crown Lease. The amendment would result in an increase in 'non-produce' uses on the site. The applicants filed an application for a review of the Minister's decision pursuant to the AD(JR) Act, but did so out of time by 22 days. The grounds upon which the review was sought were errors of law, essentially, that the approval of the amendment to the Crown Lease was contrary to the Territory Plan and thus rendered unlawful by virtue of s8 of the Land (Planning and Environment) Act.
Under s 10(1)(c) of the AD(JR) Act the court is empowered to allow further time within which to make such an application.

It is up to the applicant to satisfy the court that the extension of time should be granted. The fact that the decision-maker remains aware from the outset that the

[13] *Jewel Food Store Pty Limited, Olaseat Pty Limited and P and A Christodoulou Trading As Kippax Supabarn v Bill Wood, Minister of the Environment Land and Planning* [1994] ACTSC 123 (1 December 1994)

decision is to be challenged will favour the extension of time. Prejudice to other parties occasioned by the delay will favour refusal of an extension. Public policy is relevant, particularly if the interests of third parties are affected adversely. The merits of the proposed application are relevant as are the consequences of the pursuit of the application.

In this case in particular the delay was not excessive, the respondent was aware of the intent of the applicant to challenge the decision, no steps had been taken to implement the decision, no third party interests would be adversely affected by consideration of the applicant's case and a definitive ruling for the guidance of the planning process seemed to be in the public interest.

I held that no factor in this case weighed against allowing an appropriate extension of time provided that there was a reasonably arguable case for relief.

The Territory Plan stated that the primary use of the block in question should be for the sale of fresh fruit and vegetables. The applicants contended that the amendment to the crown lease would mean that the primary land use would cease to be 'produce markets for the sale of fresh fruit and vegetables'. However, given the requirements contained in the lease the net result could only ever amount to an increase in 'non-produce' uses from 15.6% to 17.9%. Therefore, granted that the concept of "primary land use" contemplates other uses being concurrently made of the land, it was difficult to see how the amendment would prevent the sale of fresh fruit and vegetables from being regarded as the "primary land use". As such, it was deemed that the proposed

changes did not threaten to alter the primary land use and thus the application enjoyed no reasonable prospects of success. I therefore refused the application to extend time.

For the sake of completeness I feel I should briefly mention judicial remedies. Prior to any such legislation and the introduction of the AD(JR) Act judicial remedies in respect of administrative decisions have existed in Australia and have coexisted with that Act since its introduction. Traditionally, anyone seeking judicial review had to use the common law procedure of seeking the issue of a 'prerogative writ'. A prerogative writ, now known in the High Court as a constitutional writ, is formally an order from the sovereign to an inferior tribunal or court. The three main types of writ relevant to judicial review are mandamus, certiorari and prohibition. Mandamus is an order issued by the court against a tribunal, public body or official requiring the performance of a duty which the body has failed to perform either at all or according to law. Prohibition is an order to a tribunal, public body or official requiring that body to cease consideration of a matter. An order for prohibition should be sought where a body has failed to exercise its jurisdiction properly or failed to provide natural justice and its proceedings are continuing. Certiorari is an order setting aside a decision (technically, the record of the decision-maker is removed to the court and the court then quashes the decision and expunges it from the record). An order for certiorari may be sought where a decision has been made unlawfully and the decision should be set aside. Generally an order for certiorari is sought in combination with an order for mandamus, i.e. an order for certiorari setting aside the decision and an order for mandamus requiring the decision-maker to make the decision again.

In addition to these three writs, courts also have the power to grant an injunction, preventing or requiring certain action and a declaration, declaring the legal position in relation to a particular issue.

Whilst the court has very flexible powers as to the orders it can make it cannot, nonetheless, simply step into the shoes of the decision-maker and remake their decision as it sees fit.

All of these legislative schemes providing for judicial accountability have the purpose and rationale of ensuring that government departments and officials maintain, and are seen to maintain, a just, fair and equitable administration of government, and to thereby ensure justified public confidence. As long as the executive has the ability to affect the lives of our citizens, the judiciary must ensure that it does so in a manner consistent with the law. There is little doubt from the trained legal eye, that judicial review holds an important place in a democratic society.