

## **Administrative Decisions (Judicial Review) Amendment Bill 2013 Exposure Draft Consultation Paper**

### **Background**

In the lead up to the 2012 election the ACT Greens announced a commitment to reform the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act) to create open standing in order to improve access to justice and ensure probity in government decision making.<sup>1</sup> In the Labor – Greens Parliamentary Agreement 2012 both parties committed to delivering the reform. The Agreement provides for:

Revised standing requirements under the *Administrative Decisions (Judicial Review) Act* giving effect to the intentions of the Australian Law Reform Commission Report ‘Beyond the door keeper: Standing to sue for Public Remedies’.<sup>2</sup>

The Administrative Decisions (Judicial Review) Amendment Bill 2013 is intended to give effect to that agreed outcome.

A copy of the ALRC Report is available at <http://www.alrc.gov.au/report-78>

You are invited to make submissions in response to the exposure draft of the Bill and this consultation paper. Submissions from all areas of the community, including those with a special interest in judicial review are greatly appreciated.

You may respond in any format you like to the issues raised in this consultation paper or as you believe they arise in the draft Bill.

Unless a clear indication is given that a submission provided is confidential all submissions will be made public.

Submissions can be made to:

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The closing date for comments is **Friday 29 March 2013**

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<sup>1</sup> See <http://act.greens.org.au/sites/greens.org.au/files/Governance.pdf>.

<sup>2</sup> The Labor - Greens Parliamentary Agreement is available at, <http://act.greens.org.au/content/2012-act-parliamentary-agreement>.

## **Introduction**

Judicial review plays a vital role in ensuring the probity of government decision-making. In the ACT it is the ADJR Act that gives members of the community a statutory right to seek judicial review of government decisions to ensure that they are made according to law. The underlying principle behind the Bill is that the rule of law should always prevail and there should never be a situation where a decision that is unlawful is allowed to stand because there was no one able to seek judicial review of the decision.

The classic annunciation of the principle is the often quoted statement by Lord Diplock when he said:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.<sup>3</sup>

The issue of who should be able to challenge government decisions has been the subject of much debate ever since the Commonwealth Parliament first enacted the ADJR Act (which was essentially replicated as an ACT Act following self government). The first major consideration of the issue was in 1985 in the Australian Law Reform Commission report no. 27, *Standing in public interest litigation*.

The key recommendation of that report was that:

There should be a presumption that the plaintiff has standing unless the court is satisfied that the person is ‘merely meddling’.

Subsequently in 1996 access to judicial review was again considered by the ALRC in report no 78, *Beyond the Door-keeper: Standing to Sue for Public Remedies*. In that report the Commission revised its recommendation, instead recommending that:

Any person should be able to commence and maintain public law proceedings unless:

- the relevant legislation clearly indicates an intention that the decision or conduct sought to be litigated should not be the subject of challenge by a person such as the applicant; or
- in all the circumstances it would not be in the public interest to proceed because to do so would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.

Most recently in 2012 the Administrative Review Counsel considered the issue in Report No. 50, *Federal Judicial Review in Australia* and recommended:

the addition of a provision in the ADJR Act—modelled on s 27(2) of the AAT Act—to allow applications for review ‘if the decision relates to a matter included in the objects or purposes of the organisation or association’.

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<sup>3</sup> *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* (1982) AC 617 at 644

Additionally there have been reviews into the issue of judicial review by state law reform commissions in WA and Victoria.

- In 2002 the WA Law Reform Commission published report no. 95 'Judicial Review of Administrative Decisions'.
- In 2008 the Victoria Law Reform Commission published report no. 14 'Civil Justice Review'.

There have also been a significant number of academic articles considering the issue, particularly in the wake of significant High Court Decisions.<sup>4</sup>

In different jurisdictions there are provisions in a range of Acts that significantly expand the scope of standing provisions to allow for a greater level of review of government decisions. The most commonly referenced example is section 123 of the *Environment Planning and Assessment Act 1979* (NSW).

However no jurisdiction has adopted the ALRC's recommendation to provide open standing for all but specifically excluded decisions.

*Do you think it is important that the availability of judicial review be extended to allow greater review of administrative decisions?*

## **Issues**

### **The 'Floodgates'**

The most common argument against open standing is that the 'floodgates' will open and the courts will be inundated with review applications of varying merits largely for purposes other than a genuine protection of the rule of law or concern about the substance of the matter at issue.

One particular concern that is raised is that additional avenues of judicial review will be utilised by corporations effectively as a means of delaying or frustrating their commercial competitors.

It is now well accepted that this will not be the case and the argument was rejected by the ALRC and has also been rejected by the NSW Law Reform Commission. The NSWLRC described the floodgate argument as "generally discredited".<sup>5</sup>

The reality is that it has simply not been the experience where expanded standing has been provided to date. For example in 2009, the Senate Standing Committee on Environment, Communication and the Arts noted that, according to the federal Environment Department's statistics:

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<sup>4</sup> See for example Margaret Allars, "Standing: the Role and Evolution of the Test" (1991) 20 (1) Federal Law Review 83; Bruce Dyre, "Costs, Standing and Access To Judicial Review" (1999) 23 Australian Institute of Administrative Law Forum 1; Roger Douglas "Uses of standing rules 1980-2006" (2006) 14 Australian Journal of Administrative Law 22; Michael Barker, "Standing to sue in public interest environmental litigation: from ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources" (1996) 13 Environmental and Planning Law Journal 186.

<sup>5</sup> NSW Law Reform Commission Report 92 (1999) - Review of the Anti-Discrimination Act 1977 (NSW) [at 8.15].

there is little litigation initiated under the [EPBC] Act – either by third parties, proponents of actions, or permit applications. In approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits review of decisions. When it is considered that this is Australia’s main national environmental legislation... this appears to be an extremely low level of litigation.<sup>6</sup>

*Do you think that expanding the standing provisions to allow more people to make applications for review of decisions under the ADJR Act will lead to a significant increase in the number of matters (particularly unmeritorious matters and commercial disputes) before the Supreme Court?*

*If so, to which decisions do you think these additional applications will relate?*

#### Balancing who can bring applications for review

Clause 6 of the draft Bill implements the ALRC recommendation in relation to who should be able to make an application for review.

Essentially the clause provides that any person can bring an action unless it would not be in the public interest to allow the person to make the application because it would unreasonably interfere with the ability of someone who has a private interest in the subject matter of the application to deal with it differently or at all.

This is premised on the idea that the public interest in protecting an individuals ability to deal with their private rights will outweigh any other public interest that the administrative decision may give rise to. However, there may well be considerable tension between public and private rights because of administrative decisions and at times it may be difficult to identify where the greater public interest lies.

*Do you think that clause 6 strikes an appropriate balance between what may be competing private and public interests?*

*Should there be a broader determination of the public interest of the matter being heard rather than solely the protection of the public interest in protecting the individual’s right to deal with the matter as they best see fit?*

#### Joining parties and allowing intervenors to participate in review applications

Clauses 11 and 12 of the Bill allow other parties, who would otherwise be able to make the application for review, to be joined in the matter and give the Court a broad discretion to allow other parties to intervene in matters. This issue is discussed in chapter 6 of ALRC report 78.

Allowing other parties to participate in public interest matters improves access to justice and ensures that the Court has the benefit of the full range of arguments when assessing the merits

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<sup>6</sup> Senate Standing Committee on Environment, Communications and the Arts “The operation of the *Environment Protection and Biodiversity Conservation Act 1999*” First Report, 18 March 2009, at 6.43. Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* provides for extended standing for judicial review.

of the claim. It is sometimes argued as a reason against expanding standing provisions is that those directly subject to decisions are best able to argue the issues and to allow other parties to control matters would reduce the quality of information and argument before the Court. Conversely it could be said that in relation to public interest matters at times other public interest litigants, and especially groups, are perhaps *more* likely to present the best possible application to the Court.

*Do you think that the ability to join parties and intervenors proposed in the Bill is appropriate?*

#### Commencement and procedural reform

The Bill proposes that the new standing rules apply from the day after the Act commences, essentially as soon as possible. The ALRC report no 78 notes that there may need to be procedural reforms to assist with the effective operation of the new scheme.

Currently the Court Procedures Rules 2006 govern the conduct of litigation, particularly Part 3.10 governs applications for judicial review. The rules set out the range of procedures available to parties and additionally provide a range of mechanisms to deal with unmeritorious claims.<sup>7</sup> These rules give the court a broad discretion about how matters are to be conducted, when applications can be dismissed and the consequences of unreasonable conduct during proceedings.

The existence of these rules is often also used as an argument that the Court already has sufficient means of ensuring their effective operation without the need for standing rules to prevent access to the Court in the first place. Additionally adverse costs orders are a major disincentive to litigate and also serve to counteract the ‘floodgates’ argument.<sup>8</sup>

Particularly given the new capacity for a greater range of parties to be joined to proceedings and to intervene in proceedings, there may be a need for additional rules to be created.

*What if any court procedures rules or practice directions may need amendment as a result of the change?*

*Do you think that the Court has sufficient power to deal with unmeritorious claims and to fairly apportion the cost of litigation?*

#### Other Comments

*Do you have any other comments about the Bill or more generally about issues related to expanding standing for judicial review?*

<sup>7</sup> See rules 425, 1147, 1754, 3566 and 6720.

<sup>8</sup> The issue of costs is considered in ALRC report no 78 and extensively in Victoria Law Reform Commission report no. 14 ‘Civil Justice Review’.