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**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 2013

EXPLANATORY STATEMENT

Circulated by
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Introduction

This explanatory statement relates to the Administrative Decisions (Judicial Review) Amendment Bill 2013 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

The Australian Law Reform Commission said in the overview to report no 78, *Beyond the Door-keeper: Standing to Sue for Public Remedies* (the ALRC Report):

“The public has an interest in ensuring that government decision-makers are accountable and that their decisions are made in accordance with the law. The public also has an interest in ensuring compliance with legislation that creates public rights and duties. These are interests which must be capable of protection, when necessary, through litigation.”

This is the underlying principle that the Bill gives effect to. Judicial review is an important part of executive accountability. It ensures that decision makers are accountable for the decisions they make and that there is a mechanism in place to test the lawfulness of government decisions.

Currently the ability to make an application for judicial review under the *Administrative Decisions (Judicial Review) Act 1989* (the ADJR Act) is limited to ‘persons aggrieved’. The Bill removes the concept of a ‘person aggrieved’ and significantly reduces the current limitation on who can make an application for judicial review.

The Bill provides that any person may make an application for review subject to two limitations to as recommended by the ALRC report.

A person will not have standing for review if:

- the law under which the decision was made expressly prevents the person from making the application for review; or
- review of the application may prejudicially affect an individual whose interests are affected by the decision and the application does not raise a significant issue of public importance. (This limitation is set out in a four part test in new section 4A(2)(b).)

Providing expanded standing for judicial review is a significant reform and while a number of jurisdictions have enacted expanded standing provisions in different contexts no other Australian jurisdiction has comprehensively tackled the issue of access to judicial review.

The Bill deals with an important principle and is a holistic response to a broad issue rather than to any particular case. The Bill greatly simplifies what has become a complicated area of law. Removing the current test for standing will mean that legal challenges focus on the substantive issues and the administrative decision in question rather than the constructed issue of whether or not the case can be brought by the particular applicant.

The Bill also clarifies the procedural rules for other parties wishing to intervene in applications for review and for refusing to hear a matter where a person does not have standing.

Human Rights

The Bill generally promotes access to justice and the protects the public interest in ensuring the lawfulness of government decision making. The Bill expands rights recognised as being protected by section 21(1) of the *Human Rights Act 2004* which provides:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

In *Capital Property Projects (ACT) Pty Ltd v ACTPLA*,¹ Refshauge J found that the scope of this right extends to public law matters. By expanding the availability of judicial review the Bill is consistent with the protection of this right and provides a greater assurance that those who are aggrieved by a government decision can seek review of the lawfulness of that decision.

The Bill also potentially engages the right to privacy protected by section 12 of the *Human Rights Act 2004*. As the Bill allows a much larger group of people to challenge the legality of government decisions and potentially those decisions may relate to a particular and perhaps competing individual interests it is possible that a limitation on an individual's right to privacy may occur.

The Bill recognises this possibility and criteria to ensure that where there is the potential for the review of a decision to have a detrimental impact on an individual, another person whose interests are not affected will only be able to continue the application if it raises a matter of significant public importance.

The Bill is a reform to facilitate the availability of public law remedies. Doing so will at times cover matters which while they are decisions of a public authority will nevertheless involve largely private interests. Given the enormous range of administrative decisions that may be subject to review, it is difficult to articulate the exact nature of the right being limited. Further, in addition to the nature of the decision any limitation will also vary depending on nature and circumstances of the application itself.

Nevertheless the possibility exists that a particular decision that involves a largely private matter yet raises an issue of significant public importance may be litigated and the process of that litigation may involve a limitation on the privacy of the person who was the subject of the decision.

Any limitation that does arise is demonstrably justifiable under section 28 of the *Human Rights Act 2004*. It comes about out of necessity to give effect to, and is offset by the importance of, the purpose of the Bill; to protect the rule of law and ensure the legality of government decisions. Any limitation that may occur depends very much on the particular decision that is the subject of the review, even if the right is engaged it is unlikely that the

¹ *Capital Property Projects (ACT) Pty Limited v Australian Capital Territory Planning & Land Authority* [2008] ACTCA 9.

extent of the limitation will be significant. There is no alternative means of achieving this and the limitation on the right is limited to the greatest extent possible (see notes on clause 6 re new section 4A(2)(b)).

Notes on Clauses

Clauses 1 to 3 Name of the Act, Commencement and Legislation amended

These are preliminary clauses setting out the name of the amending Act, the Act amended and the commencement date.

Commencement of the new Act is proposed to be the day after notification day. In effect this will mean that any decision made within the 28 days (see section 10(2) of the Act) prior to the notification of the Act will be able to be the subject of an application for review of the decision by any person, subject to the new section 4A (see clause 6).

Clause 4

This clause is required because the current note to section 2 of the Act concerning the application of the dictionary and signpost definitions uses as example of a definition that will no longer exist because of the changes proposed in the Bill. The clause substitutes an alternative example to illustrate the operation of signpost definitions.

Clause 5

The current section 3B defines who is a ‘person aggrieved’. The Bill proposes to remove the concept of ‘aggrieved persons’ and replace it with a new test for standing (see clause 6 below).

Clause 6

This clause inserts a new section 4A that significantly expands who may bring an action for judicial review under the ADJR Act. The Bill removes the concept of a person aggrieved and provides only two limitations on standing under the Act.

The limitations are modelled on the recommendations in the ALRC report. The limitations are:

- when the Act under which the decision was made prevents the person from challenging the decision; or
- when all of the new section 4A(2)(b) criteria apply.

New sub section 4A(2)(a), recognises that there will be times where the legislature wants to restrict the classes of person who can bring an action for review of a particular decision. This section is distinct from the operation of Section 20 and Schedule 1 which provides for the exclusion of ADJR Act review altogether. For example the new section contemplates a situation where the Assembly may wish to proscribe that rather than exempt a particular decision altogether by inclusion in schedule 1 it may be appropriate to instead restrict review to a certain class of person. Alternatively the Assembly may wish to disapply the new expanded standing created by the Bill in relation to a particular decision and instead provide that a person’s interests must be adversely affected by the decision for them to have standing to seek review of the decision.

New subsection 4A(2)(b) recognises that there will at times be a tension between competing interests. Whilst there is always a public interest in protecting the rule of law and ensuring

that government decisions are made according to law there will also be times where the review of a decision by someone whose interests are not affected is not appropriate because of the impact the review may have on the person who is the subject of the decision and the absence of any issue of significant public importance.

All four of the requirements set out in (i) to (iv) must be present to deny the person standing. The requirements are based on existing legal tests used in various contexts and have been put together to achieve an appropriate balance between the rights of individuals, the prevention of essentially meddlesome litigation and the importance of the resolution of significant public interest litigation.

There are effectively two scenarios to which this section applies. The first is the one primarily canvassed by the ALRC in both report 78 and report 27. Where a person who has a private interest in the decision is accepting of the decision and has no desire to pursue the matter any further it is appropriate that the issue be left to them and that others be prevented from essentially litigating matters on their behalf.

The second is where the decision is personal to a person and by itself the decision and review of the decision are of little consequence to the broader community. In such a circumstance it is also appropriate that in the absence of a significant issue of public importance, for example where the review of a decision would be of significant precedent value to other similar decisions, that decision should not be able to be the subject of a review by a third party.

The four criteria distil the important elements for the determination of whether or not a review is appropriate. They recognise that whilst in the majority of cases administrative decisions should be able to be reviewed by anyone who believes that the decision is unlawful, there are circumstances where the risk of an unreasonable and unwarranted intrusion on the rights and interests of particular individuals should be protected against. In such circumstances it is not appropriate for judicial review to be initiated by third parties.

Clauses 7-10

These clauses are consequential amendments necessitated by the clause 6 removal of the requirement that a person be a ‘person aggrieved’ to be able to seek review under the Act.

Clause 11

This clause changes the requirements for other parties to join in applications for review in the Supreme Court. This will mean that any person who was eligible to bring an action (see clause 6) may also be joined as an additional party to the action.

Clause 12

This clause inserts a new section 19A that will allow other persons to intervene in matters before the Court. The Court will have a discretion to allow interventions. In exercising that discretion the Court must have regard to a three specific factors set out in the Bill. Additionally the Court may also have regard to any other matter that the court considers relevant.

In granting leave to intervene in the matter the Court may also impose conditions on which leave is granted.

The clause also provides that there is no review available for the Court's decision on whether or not a person is given leave to intervene. The intention of the Bill is to allow people to participate in public interest matters and ensure the legality of government decisions in an efficient manner. It would be inconsistent with this aim if matters were effectively allowed to be delayed for significant periods while interlocutory decisions were appealed.

Clauses 13

This clause amends the dictionary by adding to the notes that set out important terms that are defined in the Legislation Act. The clause adds a reference to the definitions of 'corporation' and 'individual'.

Clause 14

This clause inserts a new definition of an 'eligible person'. An eligible person is

- (a) an individual; or
- (b) a corporation; or
- (c) an unincorporated organisation or association if the subject matter of the application relates to a matter that forms part of the objects or purposes of the organisation or association.

The reference to corporation in the proposed definition of eligible person covers an incorporated association. The definition of corporation in the Legislation Act 2001 is an inclusive definition that includes all bodies corporate. The *Associations Incorporation Act 1991* section 22 provides that an incorporated association is a body corporate.