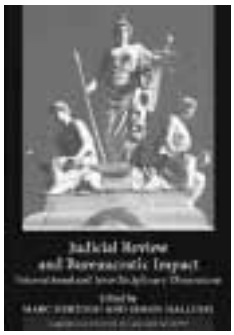
Judicial Review and Bureaucratic Impact

By Marc Hertogh and Simon Halliday (eds),
Cambridge University Press, 2004



Judges and legal practitioners involved in judicial review of administrative action must often wonder what impact judicial review has on the bureaucracy, not only generally but also specifically in relation to individual cases. Where an administrative decision is remitted for reconsideration because of reviewable error, does the fresh decision involve a more favourable outcome for the affected individual? This is one of the primary issues which are explored in this book. It takes as its starting point, 'the awkward position of judicial review set as it is between high expectations and sometimes disappointing reality'.

The book is a collection of papers written primarily by legal academics and political scientists. It draws together international and interdisciplinary perspectives on the impact of judicial review. The relationship between judicial review and bureaucratic decision-making is explored in three separate Parts of the book. Part one deals with conceptual and methodological issues. It contains a stimulating article by Professor Peter Cane from the Australian National University on the topic 'Understanding judicial review and its impact'. By an analysis of models of judicial review of administrative action in England, the United States, India and Australia, Professor Cane highlights how those models differ in terms of the functions and objectives of judicial review. He places particular emphasis on the differences which have emerged between the English and Australian models, which are largely attributable to the fundamental importance in Australia of the constitutional separation of powers (a consideration which has been given particular emphasis in recent High Court decisions such as *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [72]-[77] per McHugh and Gummow JJ and *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59).

Part two will be of particular interest to sceptics who think that judicial review is frequently an exercise in futility even in cases where a reconsideration is ordered by the judicial review court. It contains of a series of case studies set in various countries examining the practical impact of judicial review. The experience in the United Kingdom, Canada, Israel and the United States is covered. Australian readers will also be particularly interested, however, in chapter six, which is entitled 'The operation of judicial review in Australia'. The chapter was written by Professor Robin Creyke and John McMillan (the current Commonwealth ombudsman, and formerly professor of law at the Australian National University). This chapter presents the findings of research conducted by the authors at the ANU. The research covered a 10-year period (1984 – 94) and focused on Commonwealth judicial review litigation which resulted in the Federal Court making a decision favourable to the applicant. Commonwealth agencies who had been involved in such litigation were asked to respond to three basic questions, namely :

a) was the applicant's case reconsidered in accordance with the order of the Federal Court?

b) if so, what was the final outcome?

c) was there any change in the law or in the agency's practice that flowed from the decision?

The survey produced a very high response rate from public agencies and the results are quite revealing. Not only were administrative decisions reconsidered in accordance with judicial rulings in virtually all cases, but those considerations resulted in a favourable outcome for the judicial review applicant in approximately 60 per cent of cases. Those figures certainly call into question any intuitive belief that judicial review frequently involves a pyrrhic victory even in those cases where reviewable error is established.

The survey is also significant in revealing the extent to which judicial review litigation often has an impact on law and government that extends far beyond the circumstances of an individual case. It emerged that individual cases often provide a catalyst for the instigation of specialist training for bureaucratic decision-makers or in the publication of revised instructions or guidelines on how the law is to be applied and decisions are to be made. In other instances, individual cases lead to legislative amendments. The authors conclude:

> Anecdotal belief has long held that successful judicial review action would most likely be followed by an agency remaking the same decision, though taking care to avoid the earlier legal error. That belief has now been disproved, at least in Australian judicial review in the period covered by this research project. If theories are built upon facts, then the value of judicial review in producing a favourable outcome to an applicant has been demonstrated. It was admittedly a minority of cases in which an applicant was successful at trial, yet the alternative interpretation of that fact is that applicants were mistaken in those cases in believing they were the victim of legal error. When their belief was more soundly based, judicial review was a promising mechanism for rectifying both the error and its impact.

Part three of the book deals with the future of judicial review and bureaucratic impact. Emphasis is given to the desirability of continuing and improving judicial impact studies and the importance of such studies being conduct within a broader academic framework than previously.

The book provides a stimulating contribution to an aspect of judicial review which hitherto has received scant attention in Australia and many overseas jurisdictions. The Australian-based material will be of particular interest, but the value of the book extends beyond that. Anyone interested in deeper issues concerning the role, functions and value of judicial review of executive administrative action will find plenty of stimulating and interesting material.

Reviewed by John Griffiths SC