Judicial Review and Queensland Local Government

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Introduction

Of the three levels of government, local government is the most susceptible to having its activities placed under judicial scrutiny. Administrative law texts are dotted with cases where local governments have been respondents to actions for judicial review. This is particularly the case with regard to the legislative acts of local governments which have been traditionally regarded as subordinate legislation and been treated by the courts on review with a paternalistic attitude which may be warranted in some cases.

This article examines the manner in which judicial review has impinged on the activities of local governments in Queensland in recent years. It looks at the issue from the perspective that local governments be treated as genuinely independent law-making entities in the context of the influence of the new administrative law regime. It also considers some of the areas of local government responsibility which have been subject to review by the courts as well as those which may be susceptible to that review.

Increasing Body of Administrative Law

Over the last 20 years in Australia, there has been an exponential growth in legislation, both Commonwealth and State, facilitating the review of administrative acts of government. The rationale for this legislation was 'based upon the premise that accountability in a modern democracy should be secured by the pursuit of fairness and openness'.

The focus and intensity of modern administrative law thereafter has been on the actions of the State and Federal government bureaucracies. Queensland was slow to climb on this bandwagon but following the 1989 Fitzgerald Inquiry and the Electoral and Administrative Review Commission (EARC) reports, a Criminal Justice Commission was

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2 See, for example, Thomas J in Paradise Projects Pty Ltd v Gold Coast City Council [1993] QPLR 377 at 382.


4 EARC was established as a part of the Fitzgerald reforms. It published a large
established and judicial review and freedom of information legislation introduced.\(^5\)

It is therefore against the background of burgeoning administrative law at Commonwealth and State levels and the principles being set in those arenas, as well as the purported growth in autonomy of local governments, that the actions of local governments must be assessed. Developments in areas such as legitimate expectation and procedural fairness generally, a right to reasons for administrative decisions\(^8\) and new developments such as proportionality\(^9\) have an inevitable trickle down effect on the affairs of local governments.

**Greater Recognition of Local Government**

There has been a trend for central governments to recognise the important role local governments play in their local communities. This has been particularly evidenced in the environmental sphere with such catch cries as ‘think globally — act locally’, the Brundtland report\(^10\) and recognition of local government’s role as a signatory to the Intergovernmental Agreement on the Environment.\(^11\) Queensland’s *Environmental Protection Act 1994* devolves many of the responsibilities to oversee environmentally relevant activities to local governments.\(^12\)

This perception of local government’s growth in responsibility and not being solely concerned with ‘roads, rubbish and rates’ was reflected in the changes brought about when the *Local Government Act 1993* (Qld) (LGA) was introduced. In his Second Reading Speech, the Minister for Housing, Local Government and Planning, the Honourable Terry Mackenroth, stated that: ‘A more mature relationship between levels of government has also developed along with a recognition that functions should be devolved to the most appropriate level’.\(^13\) He went on to reinforce this statement by

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12. *Environmental Protection Act 1994* (Qld) s 196.

referring to the new Act providing 'increased autonomy and flexibility for local government' and 'recognition that local governments represent a genuine system of government'.

The former *Local Government Act* 1936 (Qld) provided a general power to local governments but followed this by a long prescriptive list of powers of local governments which then led courts to interpret the general power narrowly. The new LGA provides that: 'Each local government has jurisdiction to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit'.

Local government is limited to making only those laws which the state parliament could make (a very wide mandate) and a State law prevails over a local government law. There is no prescriptive list of powers. The Act also changed the terminology when referring to local government regulations. They are no longer to be known by that term indicative of subordinate legislation, 'by-laws', but are now known as 'Local Laws' and have 'the force of law'. This is all indicative of the increased stature of local government legislative power and, by implication, the executive functions of local government.

**The Judicial Review Act 1991 (Qld)**

As previously mentioned, the JRA is one of the new breed of instruments available in the area of administrative law. It commenced on 1 July 1992. The JRA has primarily three areas of operation: Part 3 deals with review of administrative decisions; Part 4 with the requirement to provide reasons for administrative decisions; and Part 5 modifies and retains the traditional actions and remedies of judicial review.

**Review of administrative decisions: the JRA, Part 3**

This part is closely modelled on the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJRA) and draws on such concepts as 'a person aggrieved' as a test for standing and 'decision to which this Act applies'. It goes to the extent of even referencing the ADJRA as a source of

15 *Local Government Act* 1936 (Qld) s 30.
16 *Lynch v Brisbane City Council* [1961] Qd R 463 at 480 (High Court); *Re Gold Coast City Council By-Laws* [1994] Qd R 130 at 133 (Qld Supreme Court).
17 LGA, s 25.
18 Ibid, s 30.
19 Ibid, s 31.
20 Ibid, s 461.
21 Ibid, s 492.
23 JRA, s 7; ADJRA, s 3(4).
24 JRA, s 4; ADJRA, s 3(1).
interpretation of its provisions. As will be discussed below, the standing provisions have not been interpreted as broadly as may have been expected. The operation of the Act has been comprehensively examined elsewhere but for present purposes, it should be mentioned that reviewable decisions in Part 3 of the JRA include not only decisions of an administrative character under an enactment (which is the ADJRA formulation) but also:

decisions of an administrative character made ... by an officer or employee of ... a local government under a non-statutory scheme or program involving funds that are provided or obtained (in whole or in part) ... from a tax, charge, fee or levy authorised by or under an enactment.

The oft-quoted example of this, which emanates from the original EARC report, is a decision by a local government authority under a scheme operated by the local government funded by rate collection but having no statutory base.

The meaning of ‘scheme or program’ in this provision has received judicial consideration. In Anghel v Minister for Transport (No 1), Derrington J considered that scheme meant a single enterprise whereas program had a more continuous funding character. It has been suggested that this may not have been the intention of the legislation when read in conjunction with the EARC report which indicated that it was intended to apply only to a continuing funding commitment. However, the wider judicial interpretation can only be applauded. Thus, the scope of this part of the Queensland Act has significant ramifications for numerous non-exempt government funded bodies as well as local governments. The full effects of this wider definition have yet to be seen.

Reasons for administrative decisions: the JRA, Part 4

Part 4 of the JRA allows persons aggrieved by decisions to obtain reasons for those decisions. The decisions to which this part applies are the same as those to which Part 3 applies: namely, decisions of an administrative nature under an enactment or under a non-statutory scheme or program. A failure
to make a decision does not give rise to an entitlement to seek or obligation to supply reasons.\(^{34}\)

Again, there are various decisions which are exempted under the Act from an obligation to provide reasons. A number of these are directly relevant to local governments. These are decisions relating to: judgments or orders for the recovery of amounts of money; personnel management; appointing or employing staff; local government budgets; levying rates and other charges; and selecting successful tenderers and awarding contracts.\(^{35}\) While this list appears substantial, there are great numbers of other areas of decisions in a local government context where there is now an obligation under the JRA to supply reasons on request. For example the following would give rise to such an obligation: the decision of a presiding officer not to count a declaration envelope pursuant to s 310(5) of the LGA; a decision to realign a road under s 498 of the same Act; or a decision to declare a dog dangerous under s 23 of Model Local Law No 2 (Keeping and Control of Animals).

The advantage to persons obtaining such reasons is that they can assess the likely possibility of success of further action. The essential nature of this mechanism was graphically demonstrated recently in a matter which came before the Queensland Court of Appeal. In \textit{RP Data Pty Ltd v Brisbane City Council},\(^{36}\) RP Data sought judicial review of the council's use of its enterprise power\(^{37}\) to contract with a competitor of RP Data to supply real property information for re-sale. The application was based on the ground that council's decision failed to take account of a relevant consideration, which was the value of the rights sold, as well as unreasonableness and insufficient evidence for the making of the decision. The appeal failed for lack of evidence. Davies JA, who delivered the leading judgment of the Court, said:

[The applicant] did not, as it was entitled to pursuant to s 32(1) of the JRA seek reasons for the first respondent’s decision and no evidence has been adduced of those reasons or what advice it sought or obtained before making that decision.\(^{38}\)

It should be noted that the statement of Davies JA is underpinned by the presumption that such decisions of local governments are not afforded the exemption from having to give reasons by the operation of s 31 which excludes decisions included in the JRA, Schedule 2. Section 13 of Schedule 2 lists the following types of decisions:

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34 \textit{Reid v Commissioner for Police} (unreported, Qld Supreme Court, 15 March 1994).

35 JRA, s 31 and Schedule 2.

36 (1996) 90 LGERA 42 (Court of Appeal).

37 LGA, ss 410-415.

38 \textit{RP Data Pty Ltd v Brisbane City Council} (1996) 90 LGERA 42 at 46.
Tendering and awarding of contracts

13. Decisions relating to

(a) the selection of a tenderer following the conduct of a competitive tendering process, and

(b) the awarding of contracts.

It could be argued that 'the awarding of contracts' referred to in this schedule is related only to those resulting from the tendering process, but this would require a different reading of this section compared to ss 1, 2 and 8 of the same schedule which also use 'and' instead of 'or' as used in the other sections. While there is no doubt that the 'operative or substantial' source of the council's power were the relevant provisions of the LGA, and that therefore the decision was of an administrative character and reviewable under the JRA, that argument does not address the application of the above mentioned exemption. The relevant EARC report appears to treat the two matters as separate heads of exclusion. It is possible that the Brisbane City Council could have refused a request for reasons based upon this exclusion.

The issue of a request for reasons for a decision not to accept any tenders and to call for more tenders on a different basis came before the court in *KC Park Safe (Brisbane) Pty Ltd v Cairns City Council.* Thomas J decided on the basis of the Schedule 2 exemption that the council was not required to supply reasons.

Leaving that issue aside, there are other issues in relation to the seeking of reasons under the JRA which should be mentioned. The reasons obtained do not have to form the basis of an application under the JRA but can provide evidence for any other avenue of review or appeal. In *Russell v Pine Rivers Shire Council,* the applicants obtained the reasons for the shire's classification of a video store such that it was a Column 3B use under the town planning scheme. The result of this classification was that the use as a video store did not require public notice and hence did not attract the appeal rights which would otherwise arise under the Local Government (Planning and Environment) Act 1990 (Qld). The applicant, after obtaining the reasons, then successfully applied to the Planning and Environment Court under that Act for declaratory and injunctive relief on the basis that the Pine Rivers' classification was incorrect.

The information which constitutes the reasons required to be given is defined in s 3 of the JRA. It is to be the findings on material facts and a reference to the other material or evidence on which those findings are based. It does not have to be the evidence itself. Thus, reasons for a town planning approval did not have to include the town planner's advice to

39 The test approved of by Thomas J in *Blizzard v O'Sullivan* [1994] 1 Qd R 112 and *Concord Data Solutions Pty Ltd v Director General of Education* [1994] 1 Qd R 343.


council, especially when that would be available on discovery in an appeal to the Planning and Environment Court.\textsuperscript{43}

The lesson for local governments and their officers, as well as for public sector decision-makers, is that they must be ‘fully aware of their statutory obligations to provide reasons and to ensure that before making decisions proper decision making processes are followed’.\textsuperscript{44}

**Traditional review: the JRA, Part 5**

The JRA did not supplant but supplemented the traditional common law and equitable relief. Part 5 of the Act abolished the common law prerogative writs\textsuperscript{45} but at the same time replaced them (except for *quo warranto*) with applications for review\textsuperscript{46} which provide the same remedies as the writs.\textsuperscript{47} Applications under Part 3 are referred to as applications for statutory orders for review. Applications under Part 5 are simply for orders for review. The reason for the introduction of orders for review appears to be to make ‘the process for seeking relief much less complicated and technical’.\textsuperscript{48} Similarly, an application for a declaration or injunction may be commenced by an application for review;\textsuperscript{49} even if that is not the appropriate method of instituting such proceedings, the court may allow the matter to proceed.\textsuperscript{50} The Supreme Court rules continue this adaptability.\textsuperscript{51} The procedures now in place for judicial review are characterised by flexibility.\textsuperscript{52}

Section 10 of the JRA and recent decisions of the Supreme Court make it clear that all the pre-existing rights have been preserved and are available together with those now provided under the Act, even if the application is made under an inappropriate part of the Act. While this flexibility is at the court’s discretion, it is submitted that from a reading of these provisions and of the Act as a whole, the purpose of which appears to be the facilitation and expansion of judicial review\textsuperscript{53} and, subject to any prejudice likely to be suffered by the other party, the court ought to generally take advantage of the flexibility offered. In *HA Bachrach Pty Ltd v Minister for Housing*, which was an application to review a decision to change a strategic plan on, *inter alia*, a denial of natural justice, Kiefel J noted:


45 JRA, s 41(1).

46 Ibid, s 43(1).

47 Ibid, s 41(1).


49 JRA, s 43(2).

50 Ibid, s 43(3).

51 *Rules of the Supreme Court* (Qld) o81 r4.

52 Similarly, see: JRA, s 27 (applicant not limited to grounds of application); s 47 (powers of the Court); s 54 (amendment of documents); and s 56 (strict compliance with rules not required).

In any event s 10 [of the JRA] preserves the applicant’s right to review at common law and s 43(3) provides, at least with respect to the declaration sought, that the application for review under the Act might be continued as if it had been brought by writ or originating summons.  

A similar situation was noted in *Concord Data Solutions Pty Ltd v Director-General of Education:*

Furthermore ... actions of the Crown are still reviewable in the limited sense to which the prerogative writs still run.... The jurisdiction in this respect is expressly preserved in s 41(2) of [the JRA].

Thomas J’s reference in the above to ‘the limited sense to which the prerogative writs still run’ is correct if indicating that the procedure for the writs themselves has been replaced; however, the JRA does not constrain an applicant from obtaining the same relief as was previously available on prerogative review. Similarly, the statement by the Court in *Resort Management Services Ltd v Noosa Shire Council* that ‘[t]here is no prerogative writ now available to give the owner the relief which it seeks by way of judicial review’ is also accurate from the point of view of the writ procedure itself but, again, not as far as the availability of an alternative procedure and remedies are concerned. Earlier decisions under the Act appear not to have taken full advantage of the flexibility offered by its provisions and the Rules of Court.

**Legislative or Administrative: Does It Matter?**

The main innovation provided by the JRA was providing a framework for the ease of review of administrative decisions. A number of cases have gone to great length to determine whether the decision under review was legislative or administrative. The leading recent case in Australia is *Minister for Business and Consumer Affairs v Toohey’s Ltd (Toohey’s case)* where the full Federal Court determined that the refusal of the minister to make a determination which would have resulted in a by-law under the *Customs Act 1901* (Cth) was an administrative decision and so reviewable under the ADJR. The court found the difference was that a legislative function is characterised by the creation or formulation of new rules of law having general application and the administrative function is the application of

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57 For example, the decisions in *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311; [1994] QPLR 305 (CA); [1994] QPLR 26 and *Paradise Projects Pty Ltd v Gold Coast City Council* [1993] QPLR 377.
58 (1981) 60 FLR 325.
59 Toohey’s case followed the High Court decision in *Commonwealth v Grunseit* (1943) 67 CLR 58.
those general rules to particular cases. The description of an action as a by-law was not finally determinative of whether the function was legislative or administrative.

In the litigation between Resort Management Services Ltd and the Noosa Shire Council which culminated in a decision of the Court of Appeal, the argument was whether a resolution of the council to proceed with an amendment to the shire’s strategic plan was of an administrative or legislative character. Ultimately, the change would be effected by a decision of the Governor-in-Council notified in the Government Gazette. It was argued, although ultimately unnecessary for the court to decide, that the Order-in-Council would be legislative and that therefore the resolution of council was also legislative. The applicant/respondent in the Court of Appeal had apparently conceded that its application would be dismissed if it were not reviewable under the Act. The appellant contended that the decision of council was of a legislative, policy or perhaps political character. The Court of Appeal decided that the resolution was of an administrative nature since the resolution was only ‘a step in the process’ and not itself legislative in character. However, the court did not have to decide whether, even if legislative, the resolution would still be reviewable under Part 5 of the JRA. The comment of the court, however, tended toward support for that view. ‘In the circumstances, it has not been necessary to refer to Part 5 of [the JRA] which was not relied on in argument but may nonetheless assist the respondent.’

In a more recent decision, HA Bachrach Pty Ltd v Minister for Housing, and following statutory amendments, the Supreme Court decided that such an alteration of the strategic plan by Order-in-Council was reviewable. Kiefel J in this case stated that the JRA preserved the right to review at common law and that the decision of the Governor-in-Council would be reviewable on the basis of a denial of natural justice regardless of its classification as administrative or legislative.

In Kwiksnax Mobile Industrial General Caterers Pty Ltd v Logan City Council the Court had no difficulty dealing with the legislative acts of the

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60 Toobey’s case (1981) 60 FLR 325 at 331–333. This case has been referred to in the Supreme Court in Resort Management Services Ltd v Noosa Shire Council [1994] QPLR 26 and HA Bachrach Pty Ltd v Minister for Housing [1994] 85 LGERA 134.


63 Ibid.

64 [1994] 85 LGERA 134.

65 Subsequent to the original decision in Resort Management[1994] QPLR 26, the legislation was amended to exclude such Orders-in-Council from being classed as subordinate legislation (Local Government (Planning and Environment) Act 1990 (Qld) s 1.5), thereby making them reviewable administrative acts under the JRA.


67 [1993] QPLR 353 at 368.
Council in declaring the by-law in question invalid. Thomas J in that case pointed clearly to the preservation of the Court's prerogative powers in s 41 (2) and the flexibility of the orders which the court had available to grant the appropriate remedy under ss 43 and 47.

It would seem that after some uncertainty about the full application of the JRA, the possibilities for judicial review in Queensland are now wide ranging incorporating the traditional approaches of the common law, new procedures and the administrative scrutiny supplied by the JRA. That is not to say there are no limits to judicial scrutiny. It appears clear on the present state of authority, that a decision of the Governor-in-Council acting legislatively, will be reviewable only on the bases of improper purpose or denial of natural justice. State parliaments remain immune from judicial review, except when acting unconstitutionally. Local government does not traditionally share that immunity and it remains to be seen if the changes brought about by the LGA will have any effect on this attitude.

The present situation with regard to the legislative/administrative distinction is that decisions in both areas remain reviewable under the judicial review system, both common law and JRA, however characterised. Reviews of administrative decisions have been made far more accessible than they were before the introduction of the JRA. Legislative decisions, when that is truly their characterisation, remain reviewable on more narrow grounds. Legislative decisions of local governments, however, have not been restricted to those narrow grounds in the past.

Grounds for Review

We will now look at the particular grounds for review of administrative and legislative decisions of local governments. Part 3 of the JRA provides a convenient compendium of the traditional grounds of judicial review and while those sections specifically relate to administrative review, almost all of those grounds can be relied on both at common law and under Part 5 for review of the legislative functions of local government. It is not proposed to use the precise wording or reproduce the order in which those grounds appear in the Act but rather to use the phrases with which they have traditionally been labelled: for example, procedural ultra vires and unreasonableness. Nor will each ground be considered and the less common ones such as uncertainty and acting under dictation will not be examined.

Similarly, in view of the discussion above, the review of legislative or administrative actions will not be treated separately but dealt with as they arise under a particular ground for review. The discussion of each particular case will take into account the nature of the decision under review. It should also be noted that there is very often an overlap of the grounds relied on for review. For example, a claim of unlawful delegation of power may also

68 R v Toobey; Ex parte Northern Land Council (1981) 151 CLR 170.
69 FAI Insurances Ltd v Winneke (1982) 151 CLR 342.
70 Clayton v Heffron (1960) 105 CLR 214.
71 JRA, ss 20(1), 21(2) and 23.
canvas the unreasonableness of the choice of the delegate or a breach of procedural fairness in failing to heed a submission may also ground a failure to take account of a relevant consideration contained in the submission. Associated with this overlap is the use of the phrase ultra vires. Basically, this means acting unlawfully but this can arise in a number of ways, such as the entity never having the power which it purported to exercise or failing to follow the correct procedures for the exercise of that power. This is referred to by Allars as the ‘narrow sense’ of ultra vires. The ‘broad sense’ of ultra vires includes the invalidity from the improper exercise of the power or through the consideration of irrelevant material or other similar ground. A finding on any of the grounds for review can lead to the action being ultra vires and invalid but for the purposes of the discussion here, the narrow classification, restricted to the entity failing to have the power or failing to follow the proper procedure for the exercise of the power, will be used rather than the all-inclusive, broad approach.

Substantive Ultra vires: the JRA, ss 20(2)(c) and (d)

Put simply, substantive ultra vires means the entity did not have the jurisdiction, power or authority to take the action or make the decision it did. This is the most fundamental of the challenges to legislative or administrative actions. In terms of State or Federal Parliaments, they would be acting unconstitutionally. In terms of local governments or decision-makers at that level, the action will be invalid because the entity did not have the power from the outset.

There are a series of recent cases in Queensland where the courts have found this ground made out when local authorities have attempted to use their law-making powers. The most notable are a succession of attempts by the Gold Coast City Council to prohibit businesses touting for customers on the streets of their city. The rationale behind these attempts were that the actions of these touts offended tourists and local residents alike. This was prima facie a quite reasonable objective.

In the first case, Re Gold Coast City Council By-Laws, the by-laws in question were made under the former Local Government Act 1936 (Qld). The application was brought by way of originating summons and not under the JRA. His Honour Thomas J first looked at the scope of the by-law, then the ‘true nature and purpose of the regulation making power’ to determine if the by-law had a ‘reasonable relation to the purpose for which the power was granted’. The scope of the by-law was found to be extremely wide.

72 M Allars (1990) Introduction to Australian Administrative Law, Butterworths, p 165.
74 Each ground has a corresponding similar ground in s 21(2) which relates to conduct relating to making a decision.
75 [1994] 1 Qd R 130.
76 Applying South Australia v Tanner (1989) 166 CLR 161 at 164.
77 Re Gold Coast City Council By-Laws [1994] 1 Qd R 130 at 134.
'To all practical intents and purposes the by-law prohibits all acts of commerce within the boundaries of the Gold Coast local authority area without first obtaining a permit.'

The source of power was found in ss 30 and 31C of the above mentioned Act. As previously mentioned, s 30 was a general power followed by a prescriptive list. Section 31C was more specific:

**By-laws respecting footpath trading.**

(1) Notwithstanding any provision of any other Act, a Local Authority has power to make by-laws regulating (including prohibiting)

(a) the sale of goods; or

(b) the conduct of any other commercial activities,

on a road under the control of the Local Authority from land or from a building or other structure erected on land abutting the road.

To determine the purpose of this very wide power, Thomas J had regard to the heading of the by-law and also the minister's second reading speech in relation to s 31C, which referred to reducing congestion arising out of the use of devices such as teller machines installed adjacent to roads. Section 30, the general power, was read as conferring 'powers for local government purposes as these are generally understood in the community'.

Following the examination of both sources, the conclusion was that neither gave the unlimited power which the by-law purported to exercise. Consequently, the by-law was declared void.

Four months later, the council was before a similarly constituted court, once again arguing the validity of a similar set of its by-laws. This application was bought under the JRA and, as previously noted, there appears to have been some uncertainty about procedure under the Act, especially Part 5. Ultimately, the question was determined under a construction summons filed by leave. Thomas J used the same approach in examining the by-laws as used on the previous occasion, by considering the source of the power, the scope and legal effect of the laws and whether the laws fell within the ambit of the power. Again it was found that the by-laws were too wide in their application and declared ultra vires, the council having no power to make a law of such wide ranging effect under its empowering statutes: ‘[n]one of the heads of power gives any general power of prohibition of commerce’.

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78 Ibid at 132.
79 Local Government Act 1936 (Qld) s 30.
80 Re Gold Coast City Council By-Laws [1994] 1 Qd R 130 at 135.
81 Paradise Projects Pty Ltd v Gold Coast City Council [1993] QPLR 377.
82 Above n 51 and surrounding text.
83 Paradise Projects Pty Ltd v Gold Coast City Council [1993] QPLR 377 at 380.
84 Ibid at 381. The Traffic Act 1949 (Qld) was also a possible source of power.
These are examples of the traditional approach to the examination of local government law-making. Considering the breadth of the by-laws in question, the results are undoubtedly correct applications of the traditional approach under the previous Act. It was commented in the first matter that the by-law in question was "a graphic example of overkill" and a similar remark was made in the second.

This issue was once again subjected to the judicial blowtorch in *Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law 1994*. It should be noted that the initiating process was by way of originating summons rather than under the JRA, although an application under Part 5 of the JRA ought also to have been available. This time the law making activity had taken place under the current legislation, the LGA. Reference has earlier been made to the greater breadth of law making power under this statute. The legislative instruments examined by the Court under the new regime were the Local Law and the accompanying Local Law Policy. On this occasion there was also an explanatory statement. Moynihan J was quite critical of the legislative framework on the grounds *inter alia* that it was convoluted, lacking clarity and imprecise. However, his Honour found that these "may not be fatal to the validity of the Law".

Attention was then turned to the terms and purpose of the conferral of the power by Parliament, again following the approach previously outlined by Thomas J and based, *inter alia*, on Tanner's case. His Honour noted the different formulation of the power in the new Act which is as follows:

> each local government has jurisdiction (the 'jurisdiction of local government') to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit

and the absence of any list of specific activities following the general power which was the formulation used in the old Act. However, after stating that such power may in some cases extend beyond the regulation of activities within the unit to include prohibition*, he concluded that the purpose of the council in this case was to regulate. The objects of the Local Law, noted earlier in the judgment, were:

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85 *Re Gold Coast City Council By-Laws [1994]* 1 Qd R 130 at 133.
87 LGA, ss 25, 30.
89 *South Australia v Tanner* (1989) 166 CLR 161.
90 LGA, s 25.
92 Ibid.
2.1 The objects of this local law are to regulate, within the territorial unit of Council:
(a) the distribution of hand bills 
(b) touting;
upon land under the control of Council and upon roads.\textsuperscript{93}

His Honour then referred to the provision of the \textit{Traffic Act} 1949 (Qld) s 5(3)(ab), which also confers on the local government a power to regulate advertising and the distribution of handbills and the like.

Following the identification of this source as a power to regulate, the analysis continued on very familiar administrative law territory. The issue was that a power to regulate does not support an uncontrolled power to prohibit.\textsuperscript{94} If the discretion to prohibit was governed by standards by which its exercise could be controlled, then the purported exercise of the power may not be declared \textit{ultra vires}.\textsuperscript{95} The court found that neither the Local Law or Policy, nor the explanatory statement provided ‘precise and objective criteria or explicit statement of relevant criteria’\textsuperscript{96} and consequently found the law invalid.

Leaving aside the lack of specific criteria for the exercise of the power, there appear to be two bases for the Court reaching this conclusion.

1. The Local Law’s stated object was to regulate.
2. The specific power under the \textit{Traffic Act} was also to regulate.

Consequently, the court has read down the wide power of law-making provided by s 25 of the LGA. It is a matter for speculation what the attitude of the court would have been had one or other of the ingredients of the decision not been present. In that case, the issue of the wider scope provided by s 25 would have had to be more fully addressed. One commentator has suggested that the courts are not going to be quick to recognise the apparent legislative intent of s 25.\textsuperscript{97}

It now appears that despite this decision, local governments ought not fall foul of the regulation/prohibition dichotomy, which was the Achilles’ heel of the local law in this instance. The court was apparently unaware of the application of s 27 of the \textit{Statutory Instruments Act} 1992 (Qld), which states:

\begin{itemize}
\item \textsuperscript{93} Ibid at 289 (emphasis added).
\item \textsuperscript{94} \textit{Swan Hill Corporation v Bradbury} (1937) 56 CLR 746; \textit{Foley v Padley} (1984) 154 CLR 349.
\item \textsuperscript{95} \textit{Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law 1994} (1995) 86 LGERA 288 at 298, citing \textit{City of Melbourne v Barry} (1923) 21 CLR 175 and \textit{Lyster v Camberwell City Council} (1989) 68 LGRA 250.
\item \textsuperscript{96} \textit{Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law 1994} (1995) 86 LGERA 288 at 298.
\end{itemize}
If an act or statutory instrument authorises or requires a matter to be regulated by statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter.

A local law is a statutory instrument.98

Although this case will not be authority in relation to the interpretation of regulation and prohibition when they occur in local government laws, it and the two cases which preceded it are indicative of the approach of the courts to narrowing the scope of such law-making powers of local governments when subject to judicial review. It appears at present that s 25 of the LGA will not be interpreted as widely as the State government's 'peace welfare and good government power'.99

One other area of law-making for local governments which had been found to be beyond power under the old Act was an attempted restriction of mobile catering vans of the type which would visit work places such as construction sites.100 Such a measure which was:

prima facie, inimical to trade and commerce and is not ... justified by any reasonable necessity relating to health, building or any of the other of the familiar powers of local government. I do not consider it falls under any of the 'good rule and government' and other general powers contained in the first four paragraphs of s 30 (of the old Act).101

The by-law was also found to be beyond the other specific heads of power and so ultra vires. While again under the old Act, this case is still persuasive of a narrow reading of the general power in the new Act whereby the issue of the encouragement of local enterprises by means of such laws would be held invalid. This is discussed further in connection with the use of such laws for what the court has regarded as improper purposes.

Procedural ultra vires: the JRA, s 20(2)(b)
The activities of local government will also fail to be effective where the set procedure for the making of a decision, whether legislative or administrative, has not been followed. This may arise through failing to follow a step in the procedure or in failing to precisely follow the procedure laid down. A complaint under this head will often lead to an examination by the court of whether the procedure was mandatory or directory and the other issue is whether there has been substantial compliance. Two areas which constantly re-occur in local government matters where complaints of procedural defects arise are in the areas where public notification is concerned or where local governments

98 Statutory Instruments Act 1992 (Qld) s 7.
99 Constitution Act 1867 (Qld) s 2.
100 Kwiksnax Mobile Industrial General Caterers Pty Ltd v Logan City Council [1993] QPLR 353.
101 Ibid at 362.
governments are contracting or calling tenders for suppliers of goods or services.

The leading case in Australia with respect to public notice requirements is *Scurr v Brisbane City Council*\(^\text{102}\) which is also authority for the test of mandatory and directory requirements. This well-known case concerned the completeness of town planning public notice requirements. It adopted the tests set out in *SS Constructions Pty Ltd v Ventura Motors Pty Ltd*\(^\text{103}\) as to whether the public notice requirements were mandatory or directory. To determine whether provisions are mandatory or directory, there is no conclusive test but the following should be taken into account:

- Examine the scope and object of the statute and so determine the significance of the provision in that context.
- Provisions creating public duties are generally regarded as directory and those conferring private rights or powers are generally regarded as mandatory.
- The intention of the legislature should be ascertained by weighing the consequences of holding the statute to be directory or imperative.\(^\text{104}\)

These 'guides' should now also be applied in conjunction with s 32CA of the *Acts Interpretation Act 1954 (Qld)*, which provides that:

- ‘may’ or a similar word or expression used in relation to a power indicates that the power may be exercised or not exercised, at discretion... ‘must’ or a similar word or expression used in relation to a power indicates that the power is required to be exercised.

These provisions apply to Acts passed after 1 January 1992\(^\text{105}\) and refer to powers. The effect of the use of ‘must’ in a statutory provision was mentioned in a 1994 decision of the Queensland Court of Appeal.\(^\text{106}\) A local government had failed to give a notice to an applicant for re-zoning and subdivision within the time prescribed under the *Local Government (Planning and Environment) Act 1990 (Qld)*. Derrington J commented that:

The imperative word ‘must’ ... undoubtedly requires the giving of the notice referred to, but its imperative nature does not characterise it as mandatory or directory, for it may take the same form in either case.\(^\text{107}\)

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102 (1973) 133 CLR 242.  
104 Ibid at 237–238.  
105 *Acts Interpretation Act 1954 (Qld)* s 32CA(3).  
107 Ibid at 577.
The Acts Interpretation Act refers to the exercise of a power, while the giving of a notice may be characterised as something else rather than a power to give a notice. The section of the Acts Interpretation Act was not referred to in the decision and the Court decided on examining 'the legislative intention ... not only at the language in which it [is] ... cast but also on the consequences, upon the scheme of the Act, of one construction rather than another' that the requirement was mandatory. The court thus clearly applied the SS Constructions' approach and the impact of the provision of the Acts Interpretation Act is yet to be determined.

According to Stephen J in Scurr's case, the goals of public notice were twofold: first, to provide Council with the views of those who oppose an application; and secondly, to provide objectors with an opportunity to make their views known and ground a possible appeal. In Scurr, a major shopping centre occupying 12.5 acres with car parking for 1,150 cars and employing 400 people was not adequately described in the public notices as being for the purpose of 'a shop (Target Discount Shopping Centre)' and the requirement to comply properly with those public notice provisions was found to be mandatory.

Councils have fallen foul of procedural requirements when they have introduced measures which have been found to be of a town planning nature and the council has not followed the town planning procedures including public notice. In Kwiksnax Mobile Industrial Caterers Pty Ltd v Logan City Council, the council by-law was so widely framed that it not only covered the mobile catering vans at which it was aimed but also 'all restaurants, shops, snack bars... and the like.' It therefore should have been implemented utilising the town planning procedure including public notice.

In Makucha v Albert Shire Council, the council allowed the use of land (the erection of advertising devices) to obtain town planning consent through compliance with a council by-law not part of the planning regime of the Shire. Pincus JA, who delivered the leading judgment for the majority, posed the question as follows:

[Is it possible to amend a planning scheme so as to escape the stringent requirements of the [Local Government (Planning and Environment) Act] as to town-planning consents, by making a particular use or uses subject to a system of consents outside the Act?]
The answer of the majority was ‘no’, with the Chief Justice dissenting. The change to the planning scheme was *ultra vires*, having purported to provide a mechanism for obtaining planning consent without following the planning procedure.\(^1\)

The public notice requirements of the *Local Government (Planning and Environment) Act 1990 (Qld)* have been removed from the category requiring strict compliance. An application may be considered where the awareness of the public of the nature and existence of the application has not been adversely affected nor has the opportunity to object.\(^2\) Thus, the legislature has provided some criteria for substantial compliance in this area.

The contractual powers of local government are grounded in statute and so their commercial dealings are able to be scrutinised through judicial review. Frequently, the claim will be grounded on failure to follow procedures and will be examined to determine if there has been substantial compliance with procedures and if that is sufficient. The leading case is *Hunter Brothers v Brisbane City Council*.\(^3\) The council’s decision to contract with Waste Management (Qld) Pty Ltd was void, since after calling tenders and obtaining them from five companies, the council could not then invite and accept a tender from only one company based on altered manning levels. Conversely, the Gold Coast City Council was found to have substantially complied with tender procedures when it invited one of two tenderers to submit a further tender based on a progress payment rather than a lump sum basis. The other tenderer had already supplied a progress payment figure in its original tender.\(^4\) Substantial compliance was not found where an application under the *Health Act 1937 (Qld)* for a licence to operate a waste removal business was not made in the correct form. It was found that the use of the correct form was mandatory since ‘some specificity is required so that careful consideration may be given to questions of safety, substance, overall public need and other considerations’.\(^5\)

**Improper purpose: the JRA, s 20(2)(e) and 23(c)**

Using a power for a purpose other than that for which it was conferred will vitiate actions at the highest level of authority as well as those of local governments. The leading case is *R v Toobey; Ex parte Northern Land Council*,\(^6\) where 4000 square kilometres of land around Darwin was declared ‘town land’ for the improper purpose of defeating an Aboriginal land claim. There are a number of cases where local governments in Queensland have attempted to utilise a power to achieve an ulterior purpose, a purpose which at times the courts have conceded is not necessarily an undesirable one. An

1. An earlier decision on the same issue was *Concore Pty Ltd v Mulgrave Shire Council* [1988] 2 Qd R 395; (1985) 62 LGRA 357.
3. [1984] 1 Qd R 328.
5. *JJ Richards & Sons Pty Ltd v Ipswich City Council* [1996] 2 Qd R 258 at 259.
example is *R v Brisbane City Council; Ex parte Read*, where the re-zoning approval of land for a quarry at Ferny Grove by the council would have enabled the termination of unsightly quarrying activities on the Brisbane River’s south bank and the abandonment of a $1.4 million compensation claim. Both the ulterior purpose and the aforementioned considerations, which were found to be irrelevant to the re-zoning application, led to a finding that the decision was invalid. In similar vein was the decision of the Caloundra City Council to refuse to connect water and sewerage services to a seven-unit duplex development by the Queensland Housing Commission (QHC). The units had been constructed in a Residential A zoned area where such development was prohibited. However, the Caloundra City Council’s town plan did not bind the QHC, which was a Crown instrumentality. Despite the council’s obvious annoyance at the QHC action, it could not use its powers under the *Standard Water Supply By-laws* to sabotage the development for the purpose of preserving the integrity of its town plan.122

In *Milne v Rockhampton City Council*, an attempt to legitimise access to a school and church complex by a subdivision and road opening application was found to be the exercise of a legitimate power but for an ulterior purpose. Attempts to achieve the same end through re-zoning had previously been defeated by objectors. The method attempted would have avoided objector rights. In the *Kwiksnax* case discussed above, the council by-law denied persons from outside the shire the opportunity of engaging in a particular type of commercial enterprise. This was found to be a clear case of ‘a legislative step ... taken in the direct implementation of an improper purpose’.123

In contrast to these decisions, the Brisbane City Council did not exercise a power for an improper purpose by its delegate requesting further information from the proposers of the world’s tallest building. This resulted in a delay of the application being lodged until changes to the town plan were gazetted preventing the construction of buildings of that height in the Central Business Zone. The majority of the Full Court found the request for information was reasonable, based on a properly held opinion of the delegate and not as a result of any irrelevant considerations and so there was no improper purpose in requesting the information.124 In dissent, Vasta J did not confine himself to the circumstances of that particular request but found that the council had ‘embarked upon a course which was designed to frustrate and obstruct the appellant’.125 His finding, based on this wider

121 [1986] 2 Qd R 22.
123 (unreported, Qld Supreme Court, 21 February 1990).
124 *Kwiksnax Mobile Industrial General Caterers Pty Ltd v Logan City Council* [1993] QPLR 353 and text surrounding n 100 above.
125 Ibid at 368.
126 *Brisbane City Council v Mainsel Investments Pty Ltd* [1989] 2 Qd R 204 at 220 per Kelly SPJ.
127 Ibid at 225.
view, was that the council was motivated by an improper purpose. However, the High Court refused special leave to appeal.

Councils have also been exonerated from acting for an improper purpose when they have made decisions refusing permits or licences which would have resulted in a private competitor entering a field in which the council was conducting a commercial activity. Amongst others, these include stockyards, a quarry, and refuse management.

The conclusion to be drawn from these decisions is that the courts will first look at the object of the act and then the powers which may lawfully be exercised in the furtherance of those objects. Secondly, from the surrounding circumstances which will overlap with such areas as relevant/irrelevant considerations and bad faith, any other purpose for the exercise of the power will be examined. If this purpose is such as to sufficiently raise the question as to whether the power would have been exercised had it not been for that consideration, then there will be a finding of improper purpose.

Relevant/irrelevant considerations: the JRA, s 23(a) and (b)

The claim of improper purpose and the canvassing of irrelevant considerations frequently occur together. For example, Caloundra City Council’s purpose in denying the QHC water and sewerage to its newly constructed duplex units may have been the improper purpose of an attempt to enforce compliance with its town plan but that equally was an irrelevant consideration in discharging its responsibilities under the Standard Water Supply By-laws. The same situation was applicable to the Rockhampton City Council’s purpose and considerations in attempting to facilitate road access to the church and school complex by way of sub-division and road opening.

Mason J set out the principles applying in Australia to identifying relevant considerations in the leading case, Minister for Aboriginal Affairs v Peko-Wallsend. The principles are briefly stated as follows:

1. The ground will be made out only by failure to take into account a matter to which the decision maker is compelled to take into account.

128 Shire of Gatton v Gelhaar (1966) 20 LGRA 228.
129 Boral Resources (Qld) Pty Ltd v Johnstone Shire Council (1990) 2 Qd R 18.
130 JJ Richards & Sons Pty Ltd v Ipswich City Council (1996) 2 Qd R 258.
131 Boral Resources (Qld) Pty Ltd (1990) 2 Qd R 18 at 23.
132 Milne v Rockhampton City Council (unreported, Qld Supreme Court, 21 February 1990 at 11), applying Thompson v Randwick Corporation (1950) 81 CLR 87.
133 Queensland Housing Commission v Caloundra City Council (1992) 1 Qd R 99.
134 Milne v Rockhampton City Council (unreported, Qld Supreme Court, 21 February 1990).
2. The factors a decision maker is bound to consider are those expressly stated in the empowering instrument and those not expressly stated are determined by implication from the subject matter, scope and purpose of the empowering instrument.

3. Not every consideration will necessarily result in a decision being impugned for failure to take it into account. Factors may be so insignificant they may not materially affect the ultimate decision.

4. The role of the court is not to weigh the merits of considerations and so set aside decisions, but to ensure that the decision maker has had regard to the considerations required. An argument relating to the importance of a consideration vitiating a decision is grounded on the unreasonableness of the decision, not failure to regard a relevant consideration.

5. At ministerial level, some allowance may be made for broader policy considerations in the exercise of a ministerial discretion.

It is suggested that the latitude with respect to broader policy considerations also extends to some degree to local government. One text suggests that the courts do have regard to the representative status of local authorities. An example from Queensland local government where the court separated policy considerations from relevant grounds for judicial review was a matter where the Gold Coast City Council decided to grant a restaurant lease in a mall which would have resulted in an extension of the restaurant. Other shop owners argued grounds such as procedural ultra vires but their basic motivation was that the restaurant extension may have affected the access to their shops. Derrington J noted that the argument was really a matter of policy for the council and not a matter of law for the court. Similarly, Thomas J commented in another situation that ‘[t]he courts do not make value judgments about the wisdom of legislative measures’.

Finally, it can be argue that a relevant consideration for a local government in matters before it, especially those involving considerable expenditure of funds, is that it owes a duty to its rate payers. This has been described elsewhere as a fiduciary duty but this English development has also been described as ‘regrettably’ and ‘not to be imitated in Australia’. More recently, however, the concept of the ‘public trust’ has received renewed support.

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137 Sommerville-Woo v Gold Coast City Council (unreported, Qld Supreme Court, 23 April 1991).

138 Re Gold Coast City Council By-Laws [1994] 1 Qd R 130 at 134.


141 P Finn (1995a) ‘A Sovereign People, A Public Trust’ in P Finn (ed) *Essays on*
Unreasonableness: the JRA, s 23(g)

The starting point for any claim of unreasonableness is the *Wednesbury* test: '[the local Authority has] ... come to a conclusion so unreasonable that no reasonable local authority could ever have come to it'.¹⁴²

This is a narrow test, since it is not what the court itself would consider reasonable but whether a decision-maker could consider the decision reasonable. It is a ground for review which may trespass on an examination of the merits of a decision.¹⁴³ In the local government sphere, it is a ground that is included frequently in applications but is rarely successful.¹⁴⁴

Inflexible application of policy: the JRA, s 23(f) ¹⁴⁵

This is a traditional ground of judicial review but one which needs some re-examination in the light of changes brought about by the LGA. Local governments have in the past been accused of infringing on this ground¹⁴⁶ and may certainly face that accusation in the future. However, the LGA now requires a more careful use of the word ‘policy’. Chapter 8 of the LGA sets out the framework for the making of Local Laws and Local Law Policies by local governments. The Local Law Policies are drawn following a prescriptive process of public notice and submissions.¹⁴⁷ In the original version of the LGA, their effect was to bind the local government and there was some ambiguity about whether other persons were bound by a Local Law Policy.¹⁴⁸ This has now been clarified by a recent amendment so that ‘anyone else’ is bound by a Local Law Policy to the extent provided in the parent Local Law.¹⁴⁹ The aim of these policies is to:

- outline criteria which:
  - (a) are to be considered by local government decision makers; and
  - (b) provide the community with guidelines for compliance with local law requirements.¹⁵⁰

¹⁴² Based on the statement of Lord Green MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234.
¹⁴³ Allars (1990) p 165.
¹⁴⁴ *RP Data Pty Ltd v Brisbane City Council* (1996) 90 LGERA 42 (CA), on appeal from [1995] 1 Qd R 465, and *Hammond Villages Pty Ltd v Gold Coast City Council* (unreported, Qld Supreme Court, 27 March 1996).
¹⁴⁵ Using terminology borrowed from Allars (1990) p 199.
¹⁴⁶ *Paradise Projects Pty Ltd v Gold Coast City Council* [1993] QPLR 377 at 383; *Hammond Villages Pty Ltd v Gold Coast City Council* (unreported, Qld Supreme Court, 27 March 1996).
¹⁴⁷ LGA, ss 483–489.
¹⁴⁸ Ibid, s 493.
¹⁴⁹ *Local Government Legislation Amendment Act 1996* (Qld) s 65.
Thus, these statutory creatures known as Local Law Policies are to provide the detail or performance standards which will be applied by the local government in enforcing its Local Laws. Unlike policies of the old variety, this new breed must be applied by a council. Rather than a decision of a council being invalid because of the application of an inflexible policy without regard to the merits of the particular case, the council which fails to apply its Local Law Policies will be acting unlawfully on the grounds of substantive ultra vires or of failing to take account of a relevant consideration.

The role of these policies has yet to be fully tested in court. However, in Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law 1994, the anti-touting local law was supported by a Local Law Policy. While examining the policy for the purpose of determining the validity of its authorising local law, Moynihan J made the comment that he found it curious that a local policy, which is struck down on the grounds of procedural ultra vires by s 483 of the LGA and is of no effect, thereby 'reliev[es] a Council of any obligation to follow a policy and to deprive all of any assistance it might offer'. In this case, his Honour was critical of the assistance the policy provided in determining the ambit of the law. The matter is illustrative of the uncertainty in the use of the new concept of Local Law Policies by local government as well as the part they will play in the review of local government actions by the courts.

**Procedural fairness: the JRA, s 20(2)(a)**

Procedural fairness or, using the more traditional terminology of the JRA, natural justice has been the rising star of administrative law in the past 15 years. At its vanguard in recent times has been the plea of legitimate expectation. It is settled law that 'there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectation'. This common law duty is reinforced by statutes such as the ADJRA and the JRA. However, the notion of procedural fairness is a 'flexible obligation' depending on the circumstances of each case. Considerations which determine the requirements of the 'flexible obligation' are such things as: the interest involved; the decision-making framework; actions of the decision-maker; and whether procedural fairness is excluded by the clear terms of the empowering instrument. In examining those issues in each case, the

152 Ibid at 296.
154 Kioa v West (1985) 159 CLR 550 at 584 per Mason J.
155 ADJRA, s 5(1)(a), and JRA, s 20(2)(a).
156 Kioa v West (1985) 159 CLR 550 at 585.
question is generally not whether natural justice applies but 'what does the
duty to act fairly require in the circumstances of the particular case'?\textsuperscript{158}

In the context of local government issues, besides the examination of
the interest affected, this has been interpreted as requiring an examination of
three matters to determine if the ground arises.

1. The statutory framework
2. The circumstances of the case, and
3. The subject matter of the decision.\textsuperscript{159}

Kiefel J applied these criteria to an application that a business
competitor's submission on a change to Caboolture Shire's strategic plan
ought to be taken into account by the chief executive officer of the
Department of Housing Local Government and Planning. Her Honour
found that while there was a sufficient interest of the applicant to attract the
principles of natural justice, the other matters did not provide a basis for the
ground of natural justice in that instance. While the applicant had made
submissions and conferred with officers of the department, the applicant was
also told that those representations would not be regarded. However, a
more solid ground for the finding seems to be that the statutory framework
had already provided for public submissions at the level of consideration by
the Caboolture Shire Council. There was no provision for submissions to
be made at the CEO level, although this opportunity had been afforded the
applicant in this instance.

A similar situation arose in \textit{Rayjon Properties Pty Ltd v Director General
Department of Housing, Local Government and Planning}.\textsuperscript{160} A business
competitor sought to be heard by the Director-General as to the need to
obtain an Environmental Impact Assessment for a major shopping centre at
Burleigh Heads. This decision was preliminary to an application for town
planning approval on which the business competitor would be entitled to
object, appeal if necessary and lead its own environmental evidence. Thomas
J found a potential objector in this situation was not the possessor of a
legitimate expectation 'that he has a right to be heard in the preliminary
process of a determination of whether an EIS should be required'.\textsuperscript{161}

Tenderers for local government contracts, despite expending money on
preparing a tender, do not have a legitimate expectation that they be heard
or have the opportunity of providing further information before their
tender is rejected. This is the case even where the local government enters
into lengthy negotiations with a tenderer.

\textsuperscript{158} \textit{Kiao v West} (1985) 159 CLR 550 at 585.
\textsuperscript{159} \textit{HA Bachrach Pty Ltd v Minister for Housing} [1994] 85 LGERA 134 at 139
applying \textit{Kiao v West}.
\textsuperscript{160} [1995] 2 Qd R 559.
\textsuperscript{161} Ibid at 561.
Every tender involves the tenderer in a degree of expense.... That is not to say that tenderers are not entitled to fair play, but the rules of the game are fairly basic ones. From the tenderer's point of view it is something of a gamble...

In this case, the tender was to build and maintain a car park in Cairns. The council had rejected the other tenders and entered into negotiations requiring further information from the applicant for approximately seven months before calling fresh tenders on a different basis. Thomas J found that the extent of the legitimate expectation which the applicant may have had was that the information supplied be taken into account by the council before terminating negotiations.

These instances show the lack of success of this ground to date in the field under examination but procedural fairness has been applied in the Court of Appeal in the related field of compulsory acquisition of land. It would also be foolish to discount its effect in the day to day application of local laws by local government. The Department of Local Government and Planning guidelines for the drawing of local laws suggest that a failure to respect the principles of natural justice would result in the rejection of a local law on the basis it did not have regard to an essential state interest. The state interest in question is compliance with Fundamental Legislative Principles (FLPs) as contained in the Queensland Legislative Standards Act 1992 s 4(3). It is curious that these FLPs were not set out in the LGA or cross-referenced in the Act itself rather than using such a circuitous method of enforcing standards.

**Two illustrations from local laws**

The manner in which procedural fairness issues may arise at the ground roots level may be illustrated by two examples taken from the Model Local Laws which have been drawn up by the Department of Local Government and adopted generally by local governments throughout the state.

Model Local Law No 11 is directed at the control of advertisements in the local government area. Section 11 of the local law provides that an approval for an advertisement may be renewed for a further term. The refusal of an application for renewal of an advertising permit would ground an application to have the refusal reviewed on the grounds of a legitimate expectation that the approval would be renewed.

Under Model Local Law No 10, a person may hold a permit to occupy a temporary home. A failure to comply with a compliance notice may lead to

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162 KC Park Safe (Brisbane) Pty Ltd v Cairns City Council [1997] 1 Qd R 497 at 505.
163 Ibid.
164 Little v Minister for Land Management (1993) 79 LGERA 374.
166 LGA, s 475.
a notice to remove the temporary home. Such a drastic step would ground a case to be at least heard at the time of the issue of the removal notice.168

In both instances, there are provisions for the local government to enter the land and remove the sign or the temporary home. There are no remedies provided in the local laws for review or appeal procedures. The only recourse in both instances would be under s 20(2)(a) of the JRA on the grounds at least of a denial of natural justice.

Other Issues
The foregoing discussion has centred around the grounds on which the legislative and administrative activities of local governments may be challenged. The instances discussed were drawn from a variety of areas of local government activity. It is instructive to isolate some particular areas as well as to discuss a few other topics relating to judicial review which will affect local government.

Contracts
There appears to be an increasing trend to have the contractual activities of local governments subjected to judicial scrutiny.169 All contractual activities of local government are carried out pursuant to statutory authority.170 Local governments do not have the prerogative power to contract enjoyed by government departments;171 hence, at least at the stage of the initiation of the contract, the JRA is available if any grounds present themselves for the use of a disgruntled tenderer or dissatisfied contractor. It seems logical that once the contractual relations are established, barring allegations of substantive or procedural ultra vires or any of the other heads of invalidity, and a dispute arises with respect to the operation of the contract, then the ‘operative and substantial source of power’ would emanate from that contract rather than the empowering statute172 and proceedings under the JRA would be futile.

The tension between the review of a contract pursuant to the JRA and co-existing rights and obligations under the contract was the subject of obiter dicta by McPherson JA in the Court of Appeal in the case RP Data Pty Ltd v Brisbane City Council. In that case, his Honour stated ‘it does not automatically follow that, if the decision itself is vitiated, the contract is also nullified ... [and] there is nothing in [the JRA] which expressly or by necessary implication renders contracts void’.173

169 Brambles Australia Ltd v Pine Rivers Shire Council (unreported, Qld Supreme Court, 26 April 1996); JJ Richards & Sons Pty Ltd v Ipswich City Council [1996] 2 Qd R 258; and RP Data Pty Ltd v Brisbane City Council (1996) 90 LGERA 42 (CA), on appeal from [1995] 1 Qd R 465
170 LGA ss 395-415; Health Act 1937 (Qld).
171 Concord Data Solutions Pty Ltd v Director General of Education [1994] 1 Qd R 343.
173 (1996) 90 LGERA 42 at 46.
His Honour listed a range of considerations, such as: the vitiating factor’s relevance for or impact on contractual capacity; the knowledge of the other contracting party of the irregularity; and whether the provision is mandatory or directory. A situation where a council invited only one tenderer to submit another tender on a substantially different basis and accepted that tender denying the other four tenderers the same opportunity is clearly a case where the contract was nullified. Other cases, however, have tested the margins of where the administrative failure will affect the validity of the contract with a local government.

Elections

The LGA simplifies and widens the scope for challenges to the validity of elections and appointment of councillors. Section 172 of that Act allows these matters to be dealt with under the JRA. Challenges under the previous Act had required an application by five electors, whereas any elector has standing to mount a challenge under the new procedure. In a matter concerning alleged publication of misleading material before the mayoral elections for the Cairns City Council in March 1994, the court declined to take any action under the summons. The summons, which was apparently taken out relying on the Supreme Court’s inherent jurisdiction, sought the disqualification of candidates. The court indicated that the election having taken place, the appropriate action was under s 172 of the LGA 1993. The Supreme Court’s inherent jurisdiction to grant declaratory or injunctive relief before an election takes place appears to remain, although this case indicates some procedural difficulties which may be faced. The Court of Appeal in a matter concerning the same applicant supported the Supreme Court’s common law and statutory authority to set aside an election.

Standing

The conservative stance of the Queensland Supreme Court on standing under the JRA has been well canvassed in recent times by a number of writers. After the expectation of a more liberal approach encouraged by

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174 Hunter Brothers v Brisbane City Council [1984] 1 Qd R 328.
175 Maxwell Contracting Pty Ltd v Gold Coast City Council [1983] 2 Qd R 533; Boral Resources (Qld) v Johnstone Shire Council [1990] 2 Qd R 18; Sommerville-Woo v Gold Coast City Council (unreported, Qld Supreme Court, 23 April 1991); JJ Richards & Sons Pty Ltd v Ipswich City Council [1996] 2 Qd R 258; RP Data Pty Ltd v Brisbane City Council (1996) 90 LGERA 42 (CA); and Brambles Australia Ltd v Pine Rivers Shire Council (unreported, Qld Supreme Court, 26 April 1996).
176 See, for example, Re Forrest [1993] 1 Qd R 478.
some decisions in the federal sphere and at least one Supreme Court decision, the court continues to apply the more narrow common law approach of *Australian Conservation Foundation v Commonwealth* of requiring a ‘special interest’ over and above the interests of the public generally. In the local government sphere, this has meant that business competitors, persons liable to be prosecuted by the local government and land owners in the vicinity have standing. The standing provisions under the planning legislation are extremely wide (‘any person’ may object) and so appeals in this sphere are in accordance with the statute and do not usually go by way of judicial review.

However, citizens groups opposing particular measures by a local authority, such as dog control, or a ratepayer objecting to the expenditure of money on a particular local authority scheme or programme who cannot demonstrate more than a mere emotional or intellectual interest may be denied a hearing. The strength of alternative arguments based on the financial interest of ratepayers in local authority affairs, the relatively small number of constituents of the local authority area grounding an interest above that of the wider public or a public trust, has yet to be tested.

**Costs**

The provisions of the JRA relating to costs are a recognition that if the traditional principle that costs follow the event ‘is applied without qualification, the result will be to discourage applications for review’. The underlying principle of this broader approach is that the Act provides a mechanism for holding government accountable for its actions and in doing so, there may be a greater public interest than merely the personal interest of

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180 *Australian Institute of Marine and Power Engineers v Secretary Department of Transport* (1986) 71 ALR 73; *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200.

181 *Boe v Criminal Justice Commission* (unreported, Qld Supreme Court, 10 June 1993).


184 *Maxwell Contracting Pty Ltd v Gold Coast City Council* [1983] 2 Qd R 533; *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328; *RP Data Pty Ltd v Brisbane City Council* (1996) 90 LGRA 42 (CA); and *HA Bachrach Pty Ltd v Minister for Housing* [1994] 85 LGERA 134.

185 *Paradise Projects Pty Ltd v Gold Coast City Council* [1993] QPLR 377.


187 *Local Government (Planning and Environment) Act* 1990 (Qld) s 3.3(7), for example.

an applicant. This principle is given statutory force in the Act.\textsuperscript{189} The innovative provisions of the JRA allow the court at an early stage to determine, albeit not necessarily finally, that an applicant will bear only their own costs regardless of the outcome or even receive an indemnity from the other party for their costs.\textsuperscript{190} On an application to the court arising out of a decision-maker’s failure to supply reasons, an award of costs may only be made against an applicant on quite limited grounds.\textsuperscript{191}

These innovative costs provisions, designed to increase access to judicial review,\textsuperscript{192} are directed at the situation where citizens find themselves opposed to parties at no personal financial ‘risk as to costs and have available to them almost unlimited public funds’.\textsuperscript{193} The provisions are designed to assist citizens in a confrontation with ‘big’ government or government owned corporations. They are not designed to assist respondent local governments who are also caught by the provisions and who would vehemently deny that they have anything approaching ‘unlimited public funds’ available to meet any costs orders against them. Local government respondents to applications under the JRA will need to be wary of the costs implications for them. This situation has not gone completely without some recognition. Shepardson J commented in the Court of Appeal decision in \textit{Anghel v Minister for Transport (No 2)}:

\begin{quote}
Subsection 49(2) appears to assume that any respondent to a review application will always be able to withstand an order for costs made against him or it by a successful applicant. What of an impecunious local authority whose ratepayers are hard hit by drought and/or recession and are unable to pay the rates on which the local authority relies for financial survival...?\textsuperscript{194}
\end{quote}

The lowest level of government may perhaps receive different treatment from that meted out to the more financially secure levels of government when such applications come before the courts.

\textbf{Conclusion}

The new advances in administrative law have had as their basis the need for open and accountable government. The changes have been generally directed at keeping Commonwealth and State bureaucracies mindful of their responsibilities to the public whom they ostensibly serve. The changes have touched also the lowest stratum of governments, local governments in their varied forms from small under-resourced rural shires to the mega local

\textsuperscript{189} JRA, s 49(2)(b).

\textsuperscript{190} Ibid, s 49(1)(d) and (e).

\textsuperscript{191} Ibid, s 50.


\textsuperscript{193} Bayne (1994) at 817.

\textsuperscript{194} [1995] 2 Qd R 454 at 461.
authorities of Brisbane and the Gold Coast. While this level of government has always been closest to their client base (the electors of each shire, town or city), the changes have introduced a new formalised structure of accountability: access to information; a requirement to provide reasons; and judicial review of decisions. In reviewing legislation, the recent expansion of the role of the courts in adjudicating on laws, even emanating at the highest levels,\textsuperscript{195} is well known. The courts have always been very ready to review the legislative exploits of the lowest level of government. Local government in Queensland has been given, in the terms of the Minister at the time, ‘an extraordinarily wide charter for local government and represents the most autonomy and the broadest general competence power granted to any local government system in Australia’.\textsuperscript{196}

In view of the traditional attitude of the courts to ‘the accepted notions of local government’,\textsuperscript{197} it would be surprising if this new authority is quickly recognised as shown by decisions such as \textit{Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law}.\textsuperscript{198}

The other effect of the new administrative framework for local government is that greater scope is now available for many of the day to day decisions of these bodies to be scrutinised. Not that many are of great import or monetary significance, such as the deportation of aliens or the reduction of sales tax on a multi-million dollar machine. Many of the issues, such as advertising sign permits, water restrictions or temporary home licences, would not warrant a Supreme Court action. Nevertheless, when the principles of a residents’ group or individual are strong enough, or the amount of money at stake to a would-be contractor large enough, local authorities find their decision making processes under detailed scrutiny.

It must always be borne in mind that judicial reviews of the type discussed herein are never concerned with the merits of a decision. The court may undertake only a limited examination of the facts of the case and cannot put itself in the position of the decision maker to right any perceived wrong. In 1993, EARC published a report running to four volumes.\textsuperscript{199} The centrepiece of the report was the recommendation that the final plank of administrative reform in Queensland be an independent merits review tribunal, the Queensland Independent Commission for Administrative Review. This has not eventuated and in view of the current trend in government towards fiscal restraint and the passing of three years since the recommendation was made, it is unlikely to come about in the foreseeable future. Nevertheless, putting aside the arguments relating to accountability

\textsuperscript{195} \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1; \textit{Australian Capital Television Pty Ltd v Commonwealth (No 2)} (1992) 177 CLR 106.

\textsuperscript{196} Queensland Parliament 1993, Hansard No 16, 18 November, p 5986, Hon TM Mackenroth, Minister for Housing, Local Government and Planning.

\textsuperscript{197} \textit{Lynch v Brisbane City Council} [1961] Qd R 463.

\textsuperscript{198} \textit{Re Gold Coast City Council (Touting and Distribution of Printed Matter) Law} 1994 (1995) 86 LGERA 288.

\textsuperscript{199} EARC (1993) \textit{Report on Review of Appeals from Administrative Decisions}, EARC.
at the state level and considering the nature of matters which often concern local government decision-making and the financial resources of the parties involved, the suggestion has obvious merit.

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