Judicial review of public consultation processes: A safeguard against tokenism?

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Concerns are commonly expressed that public consultation processes are administered in a tokenistic manner. This article examines Australian judicial review cases for whether the courts can adequately deal with such concerns. It does so by examining the scope of judicial review for the different elements of public consultation processes. Its primary findings are that Australian courts have relatively broad scope of review with regard to enforcing public notice requirements but relatively narrow scope of review with regard to supervising an administrator's consideration of submissions lodged by members of the public. It is then argued that the limitations in relation to supervising an administrator's consideration of submissions restrict courts from providing an effective safeguard against tokenistic consultation practices.

PART 1: INTRODUCTION

While public consultation provisions are commonly included in legislation, the administration of such provisions is often regarded as being problematic. This article examines what Australian courts can do to hold administrators accountable for poor consultation practices. While the possibilities and difficulties of developing procedural fairness[1] to deal with public consultation have been examined and discussed in the Australian administrative law literature,[2] there is relatively little focus on judicial review of the administration of statutory public consultation requirements.[3] My purpose is to draw attention to this corner of Australian administrative law.

Why does it matter whether Australian courts can adequately supervise public consultation processes? It matters because decision-making powers in which public interests are relevant are commonly granted to administrators (usually Ministers, local councils and agencies) with public consultation processes attached. Administrative decisions can be regarded as having a public interest dimension when they involve making or amending regulations or standards that affect the public generally, or when licensing and approval decisions affect persons other than the particular applicant. Most importantly, there are numerous reports of the administration of consultation processes being problematic.[4]

Examination of the case law regarding public consultation processes can assist in understanding the courts' role in supervising democratic participation in administrative decision-making. This case law is complex and ranges over numerous areas of administrative law – breach of statutory

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[1] Procedural fairness involves the courts using a combination of common law and statutory interpretation to imply procedural requirements into statutory powers: *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]. The public consultation processes examined in this article are sourced in legislation.

[2] See Aronson M and Groves M, *Judicial Review of Administrative Action* (5th ed, Lawbook Co, Sydney, 2013) pp 446-452; Mason A, "Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation" (2005) 12 AJ Admin L 103 at 105.

[3] See Creyke R, "The Tobacco Institute Case: Implications for the NH&MRC, for Public Inquiries and for Judicial Review" (1997) 14 AIAL Forum 1; Preston BJ, "Consultation: One Aspect of Procedural Propriety in Administrative Decision-Making" (2008) 15 AJ Admin L 185.

[4] For example, Productivity Commission, *Regulatory Impact Analysis: Benchmarking* (Research Report, Canberra, 2012) pp 222, 235; Australian Senate Regulations and Ordinances Committee, *Consultation under the Legislative Instruments Act 2003: Interim Report* (Report No 113, 2007) pp 5-6.

procedures, jurisdictional facts, and the failure to consider relevant matters ground of review. Underlying it is the perennial concern for courts not to intervene in the merits of administrative decisions. In this context, the merits of decisions have political significance due to the public interest characteristics of decisions that are made according to public consultation processes.

One of my intentions is to highlight what may be regarded as the beginnings of a public consultation jurisprudence that has developed in Australia. This jurisprudence is largely based on purposive interpretations of legislation that provides for public consultation processes. The courts draw on the purposes of consultation provisions to ensure that administrators have complied with their substance as well as their form – that is, to ensure that members of the public are given a fair opportunity to participate in the decision-making process.

I will also argue that while the cases reveal this kind of interpretation and enforcement of public consultation provisions, there are nevertheless important limits on what Australian courts will do to supervise consultation processes. The more limited form of review occurs towards the end of the process for an administrator's consideration of submissions made by members of the public. In general, Australian courts require proof that submissions are available for consideration by the decision-maker but they do not require the administrator to respond to issues and arguments in those submissions. We will see that limitations at this stage reflect restrictions based generally on the law/merits distinction.

The article is structured in the following manner. Part 2 introduces the primary elements of public consultation processes, the forms of participation that they enable, and the common complaints made about their administration. Part 3 examines the Australian case law regarding the elements of public consultation processes. Part 4 evaluates the Australian case law by examining the problems that are avoided by its restraints and the benefits that are missed.

The article does not address standing as a potential obstacle to an applicant seeking to challenge public consultation processes. Individuals or groups may participate in a public consultation process along with other members of the public but not have a "special interest"[5] in the decision as they are not sufficiently singled out. The cases examined in this article involve applicants who have standing due to statutory extensions of the general rules or because they have private rights and interests that are affected by the particular decision. This article focuses on a narrower question – how Australian courts have interpreted and enforced statutory public consultation provisions.

PART 2: PUBLIC CONSULTATION REQUIREMENTS AND THEIR ADMINISTRATION

We can now turn to the sources of public consultation obligations. It is convenient to start by noting that while the High Court in recent years has established a strong presumption that administrators exercise their powers according to procedural fairness,[6] procedural fairness has limited operation in relation to public participation in administrative decisions. This is due to the threshold requirement for procedural fairness that a person's "rights and interests" are adversely affected by an administrative decision. This protects individual rights and interests rather than interests shared with the rest of the public. Mason J stated in his influential judgment in *Kioa v West* (1985) 159 CLR 550 that "rights and interests" relate to "personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests".[7] Decisions that affect persons in this way were contrasted with "'policy' or 'political'" decisions that affect a person "as a member of the public or a class of the public",[8] such decisions not attracting the requirements of procedural fairness.

This threshold requirement reflects the purpose of procedural fairness being to protect individual rights and interests from undue encroachment by government[9] rather than enabling members of the

[5] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 527.

[6] See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 352 [74]; *Annetts v McCann* (1990) 170 CLR 596 at 598.

[7] *Kioa v West* (1985) 159 CLR 550 at 582.

[8] *Kioa v West* (1985) 159 CLR 550 at 584.

[9] Cane P, "Participation and Constitutionalism" (2010) 38 FL Rev 319 at 327.

public to contribute to public interest-related decision-making. For this reason, courts have generally not extended procedural fairness to the making of delegated legislation.[10] It may be that in particular public consultation processes, a person's rights or interests are affected and that procedural fairness should be granted to them. However, if the process is carried out according to statutory requirements, the court may determine that the usual range of procedural fairness entitlements does not have to be provided to that person and that the administrator's compliance with the statutory consultation provisions exhausts their participation rights.[11]

The restriction on procedural fairness for matters that affect the public generally has meant that the public consultation case law has instead developed by the courts interpreting and enforcing the provisions of legislation that impose such procedural requirements. There are two types of legislation that provide for public consultation – general legislation such as the various subordinate legislation statutes[12] and sector-specific legislation. The sector-specific legislation that commonly includes public consultation obligations are statutes relating to the environment,[13] broadcasting,[14] health,[15] and liquor licensing.[16] The public consultation case law has developed nearly exclusively in the context of challenges to consultation under sector-specific legislation.[17]

There are four primary elements of public consultation processes.[18] The first relates to the threshold requirements that establish when public consultation is required or if there can be an exemption. The second is that the administrator is required to issue a public notice of the proposed rule or decision in a newspaper or on the internet. The third is that "any person" may make a submission on the proposed rule or decision. The fourth is that the submissions are to be considered. The legislative provisions setting out these four requirements have traditionally been brief. They leave much to officials to put them into operation and for debate as to whether they have been complied with or not.

Public consultation processes offer members of the public a number of ways of contributing to the decision-making process. They give them the opportunity to provide a different perspective on the problem being addressed and offer alternative solutions.[19] They also give them the opportunity to influence the weighing of considerations and options that are available to the decision-maker.[20] Moreover, consultation processes are also thought to enhance compliance with the rule or decision when it comes into operation.[21]

There are some well-recognised problems that occur in public consultation processes which tend to affect adversely the opportunities given to the public to participate in the decision-making process. The terminology that is used for such complaints is that public consultation processes can be an

[10] Pearce D and Argument S, *Delegated Legislation in Australia* (4th ed, LexisNexis Butterworths, 2012) pp 185-187.

[11] For example, *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at 113 [182], 115 [190]; *Chapman v Tickner* (1995) 133 ALR 74 at 122.

[12] See *Legislative Instruments Act 2003* (Cth), s 17; *Subordinate Legislation Act 1989* (NSW), s 5; *Subordinate Legislation Act 1992* (Tas), s 5(2); *Subordinate Legislation Act 1994* (Vic), s 11.

[13] For example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 74(3), 75(1A), 98.

[14] For example, *Broadcasting Services Act 1992* (Cth), s 126.

[15] For example, *National Health and Medical Research Council Act 1992* (Cth), s 12; *Food Standards Australia New Zealand Act 1991* (Cth), ss 31, 61.

[16] *Liquor Act 2007* (NSW), s 44; *Liquor Act 1992* (Qld), s 118A; *Liquor Licensing Act 1997* (SA), s 77; *Liquor Control Reform Act 1998* (Vic), s 38.

[17] It should be noted that the Australian case law that is examined in Part 3 of this article is exclusively from sector-specific legislation.

[18] These characteristics can be modified, for example, by including a panel or commissioner to hold an inquiry.

[19] Office of Regulation Review, *A Guide to Regulation* (2nd ed, 1998) p D13.

[20] Catt H and Murphy M, "What Voice for the People? Categorising Methods of Public Consultation" (2003) 38 *Australian Journal of Political Science* 407 at 408.

[21] Office of Regulation Review, n 19, p D13.

"empty ritual"[22] or "tokenistic".[23] This occurs when the decision has effectively been made prior to the consultation process,[24] where the decision-maker "cherry-picks" acceptable responses,[25] or the public comments are merely ignored.[26] There is also a common concern that powerful and highly resourced business groups have greater influence in public consultation processes than other persons and groups who participate.[27] Administrators may also seek to avoid public consultation processes by exaggerating and over-using legislative provisions that allow for exceptions by which such processes do not need to be employed.[28]

These problems raise the primary question to be addressed in this article – what can courts do to supervise public consultation processes to remedy such practices? As will be explained in Part 3, the cases highlight that for some aspects of public consultation processes, Australian courts have a relatively broad supervisory role and for others a relatively narrow role.

PART 3: PUBLIC CONSULTATION AND AUSTRALIAN COURTS

Breach of public consultation provisions – Invalidity?

We can now turn to the Australian cases. The examination of these cases is divided into sub-parts dealing with the following elements of consultation processes – the threshold requirements, public notice and exhibition of information, the time period for making submissions, and consideration of submissions. However, before we examine those elements, it is worthwhile addressing a potential restriction on enforcing these provisions. This is that it is possible for courts to accept that there has been a breach of consultation provisions but nevertheless determine that the breach does not require any resulting rule or decision to be invalid. Such provisions may be regarded as a mere procedural step for which breach does not lead to invalidity.[29] As we will see, however, this risk does not usually eventuate. In this sub-part, I will examine cases in which the courts have explained why public consultation requirements are important and that non-compliance should generally lead to the rule or decision being invalid. I will also examine some of the factors that could lead to courts regarding a rule or decision as being valid despite an administrator's non-compliance with public consultation provisions.

Whether non-compliance with a statutory provision requires the related rule or decision to be invalid is determined according to the test expressed by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. The majority judgment in that case stated that invalidity is dependent on the legislative purpose that can be discerned from the Act – determined by reference to the language, subject matter and objects of the Act and the consequences for the parties of such a finding.[30] The judges recognised that such a legislative purpose will often be difficult

[22] Arnstein S, "A Ladder of Citizen Participation" (1969) 35 *Journal of the American Institute of Planners* 216 at 216.

[23] Bell S and Hindmoor A, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, Port Melbourne, 2009) p 139; Carson L and Lubensky R, "Raising Expectations of Democratic Participation: An Analysis of the National Human Rights Consultation" (2010) 33 UNSWLJ 34 at 41; Kane J and Bishop P, "Consultation and Contest: The Danger of Mixing Modes" (2002) 61 AJPA 87 at 88.

[24] Holland I, "Consultation, Constraints and Norms: The Case of Nuclear Waste" (2002) 61 AJPA 76 at 81-84.

[25] Althaus C, Bridgman P and Davis G, *The Australian Policy Handbook* (4th ed, Allen and Unwin, Sydney, 2007) p 105.

[26] Preston, n 3 at 192.

[27] Holley C, "Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes" (2010) 27 EPLJ 360 at 363, 387-388; Mulgan R, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, New York, 2003) p 64.

[28] Australian Senate Regulations and Ordinances Committee, n 4, pp 7-9.

[29] For example, *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 640 [36]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [92]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 504 [69]; Aronson and Groves, n 2, pp 345-346.

[30] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91].

to discern – in their words, it will commonly be a "contestable judgment".[31] While acknowledging that courts have utilised many different factors to discern the legislative intention in this respect, the majority judges in *Project Blue Sky* considered three factors that led to its conclusion that breach of the particular provision did not make the relevant standard invalid. They were whether the provision that had been breached was an "essential preliminary" or "regulates the exercise of functions already conferred on the [decision-maker]", the nature of the obligations imposed by the particular provision, and whether there would be any "public inconvenience" if the court were to determine that the standard was invalid.[32]

The reasoning in *Project Blue Sky* raises questions regarding how courts tend to regard public consultation processes. Do they usually see them as essential preliminaries which must be enforced? Will invalidity commonly lead to "public inconvenience"? Of course, the answers to these questions will depend on interpretation of particular statutes and the inconvenience that arises in particular cases.[33] However, the public consultation cases indicate that it is common for such provisions to be regarded as enforceable "essential preliminaries" or "preconditions" and fairly rare for there to be public inconvenience sufficient to disable their enforcement.

The High Court's decision in *Scurr v Brisbane City Council* (1973) 133 CLR 242 has been highly influential for the enforcement of public consultation provisions in planning legislation. In *Scurr*, the High Court determined that a local council breached a statutory requirement to give public notice of a development application. Stephen J, with whom all other judges agreed, determined that the failure to include the location of the proposed building on the site, the proponent's identity, and the intensity of the development meant that it had not complied with the notice requirement.[34] He went on to conclude that the notice requirement was mandatory due to the use of the word "must" in the legislation, the notice requirement's significance in the decision-making process as a "condition precedent", and the important part that public consultation played in the decision-making process.[35]

In many cases since *Scurr*, public consultation requirements of planning legislation have been recognised as important procedural requirements so that breach of the relevant provisions requires the relevant rule or decision to be invalid.[36] Thus Basten JA in *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 184 LGERA 104 at 113 [27] stated that "*Scurr* remains authority for the proper approach to planning legislation requiring public notification. Such requirements will generally be a precondition to the exercise of power." This is consistent with the approach that courts have taken to the procedural requirements for making delegated legislation, which Pearce and Argument state as generally being that they "must be complied with exactly".[37]

There is an aspect of Stephen J's reasoning in *Scurr* that has significance beyond planning laws and to public consultation provisions more generally. This is his focus on the purpose of the public consultation provision. He interpreted the provision from the perspective of the participants – members of the public and the decision-maker. He stated that adequate information is required in the notice for members of the public to decide whether they should object, to provide sufficient

[31] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91].

[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 391-392 [94]-[99].

[33] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91]; *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 at 189 [29].

[34] *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 252-254.

[35] *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 255. The *Scurr* case may be known for its support for the now discredited principle of "substantive compliance" with a legislative requirement: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 and fn 69; Aronson and Groves, n 2, p 348. It should be noted that this was a secondary point in *Scurr* and is not relevant to the matters discussed here.

[36] For example, *Helman v Byron Shire Council* (1995) 87 LGERA 349 at 358; *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at 90 [37]; *Brighton Council v Compost Tasmania Pty Ltd* (2000) 109 LGERA 190 at 201 [42]; *Goulburn-Murray Rural Water Authority v Rawalpindi Nominees Pty Ltd* [2010] VSC 166 at [251]. See also *Tickner v Chapman* (1995) 57 FCR 451 at 456-457, 491-492.

[37] Pearce and Argument, n 10, p 187.

information for the content of their objection to be meaningful, and to provide the decision-maker with an opposing view regarding the particular decision to be made.[38] This purposive reasoning elucidates the inherent characteristics of public consultation procedures. They are intended to enable participants to provide the decision-maker with opposing or critical views of the proposal thus assisting the decision-maker to make a decision that is informed by possible objections.

If *Scurr* indicates why public consultation provisions should be recognised as being essential preliminaries that have great significance for the decision to be made, the question that arises is what may make such provisions not require invalidity if breached? There are a number of possibilities. The first is that the relevant Act may indicate that breach does not lead to invalidity. Such an intention can be directly expressed through the inclusion of a "no invalidity" clause – a provision that states that failure to comply with identified provisions of the relevant Act does not affect the validity of a particular rule or decision. These provisions provide a direct answer to the test in *Project Blue Sky* that invalidity is dependent on the legislative purpose that can be discerned from the Act. There is a well-known example of such a provision in the *Legislative Instruments Act 2003* (Cth). The consultation procedures for making legislative instruments in s 17 of this Act are subject to a "no invalidity" clause in s 19.

This is not the place for a developed examination of no invalidity clauses[39] but some brief comments should be made regarding their effectiveness. There are cases in which the High Court has determined that breach of a statutory requirement is not invalid due, at least in part, to an applicable "no invalidity" clause.[40] On the other hand, the "no invalidity" clause in the *Legislative Instruments Act* referred to above and the equivalent provisions of other rule-making legislation[41] do not seem to have been tested in the courts.[42] Yet there are methods that would seemingly outflank such provisions. For example, in *Project Blue Sky*, the High Court determined that the challenged standard was not invalid but was "unlawful". A declaration in such terms was ordered and the court indicated that interested persons could obtain an injunction restraining further action based on the unlawful standard.[43] A conclusion of unlawfulness would seemingly outflank a "no invalidity" clause and provide the basis for remedies supporting the applicant's interests.

It would also be expected that legislation that includes a public consultation requirement that is accepted to be an "essential preliminary" and that also includes a "no invalidity" clause would present a court in judicial review proceedings with a contradiction between the conditions and limitations that an administrator is to observe and an apparent exclusion of the court's function of enforcing such conditions.[44] This kind of contradiction is usually reconciled by courts giving determinative weight to their constitutional role of supervising an administrator's compliance with the conditions of their powers.[45] Therefore, while there seems to be no case that deals directly with public consultation provisions and no invalidity clauses, there are, in any case, a number of reasons to think that no invalidity clauses may not entirely constrain their enforcement.

Public inconvenience can also be a reason for a court to decide that breach of a public consultation provision does not make the rule or decision invalid. It was relied on by the High Court in *Project Blue Sky* as a reason for determining that breach of the legislation that was relevant in that

[38] *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 251-252.

[39] See McDonald L, "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" (2010) 21 PLR 14.

[40] *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 156-157 [22]-[24]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 225 [44]-[46].

[41] See *Subordinate Legislation Act 1989* (NSW), s 9(1).

[42] This conclusion was reached following reference to Pearce and Argument, n 10, and doing searches for "Legislative Instruments Act" and "Subordinate Legislation Act 1989" on Westlaw, LexisNexis Casebase, and AUSTLII.

[43] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392-393 [99]-[101].

[44] *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 616.

[45] See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 500-501 [58], 504-507 [71]-[78]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 579 [94].

case did not make the particular standard invalid.[46] The question of inconvenience arises because public consultation requirements are typically added to decisions that have significance for numerous stakeholders with different interests – an industry that is being regulated, public interest organisations, individual members of the public, and government agencies. Invalidation of rules and decisions can have harsh consequences on licensees and permit holders. For example, in *Project Blue Sky* the High Court was concerned about the inconvenience to licence holders who were required to comply with the challenged standard.[47] The majority judgment stated that if the particular standard was determined to be invalid for breach of a provision of the relevant Act, the licence holders would be at risk of "expense, inconvenience and loss of investor confidence".[48]

Similar reasoning has been applied in cases in which there was non-compliance with public consultation requirements of planning laws. In *Yallingup Residents Assn (Inc) v State Administrative Tribunal* (2006) 148 LGERA 132, the Supreme Court of Western Australia determined that non-compliance with a public consultation provision did not make the relevant local planning rule invalid due to the injustice that would arise for landholders who had already been granted consent under the particular rule – the legal authority for their consents would be undermined.[49]

The question raised by these cases is whether public consultation provisions will commonly not be enforced due to concerns regarding inconvenience to licence or permit holders. There are a number of reasons for thinking that this is unlikely. The first is due to the reasoning of the Full Court of the Federal Court in *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177. Rares and Katzmann JJ explained in this case that when a consultation requirement[50] is recognised by the court to be an "essential preliminary", its enforcement cannot by displaced by public inconvenience.[51] The reasoning suggests that the requirements of the relevant Act must override any potential inconvenience. In a separate judgment, Flick J stated that public inconvenience would only be relevant when there is uncertainty regarding the legislative intention as to whether breach of a statutory provision requires any resulting rule or decision to be invalid.[52] If public consultation requirements are recognised to be "essential preliminaries" due to the terminology used in the particular Act and its importance to the decision-making process, the judges' reasoning in *Kutlu* indicates that there will be little or no room for public inconvenience to be considered.

Secondly, even if public inconvenience is regarded as being a relevant factor, there are ways for the courts to fashion a remedy to enforce the relevant provision and minimise the particular inconvenience. For example, in *Smith v Wyong Shire Council* (2003) 132 LGERA 148, the New South Wales Court of Appeal determined that severing the invalid part of a planning rule made in breach of a public consultation provision would mitigate the inconvenience to third parties.[53]

The result is that while the test in *Project Blue Sky* raises questions about the enforcement of public consultation provisions, it does not necessarily render judicial review ineffective. Stephens J in *Scurr* gave the classical statement of why such provisions can be regarded as important conditions attached to public interest decision-making and, if the text of an Act permits, be regarded as "essential preliminaries" that when breached lead to the rule or decision being regarded as invalid. Moreover, while public inconvenience is an accepted factor for the courts to consider in this context, there are

[46] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392 [97]-[99].

[47] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 378 [54], 392 [98].

[48] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392 [98].

[49] *Yallingup Residents Assn (Inc) v State Administrative Tribunal* (2006) 148 LGERA 132 at 180 [175]-[176]. See also *Attorney-General v JN Perry Constructions Pty Ltd* (1961) 6 LGRA 385 at 392.

[50] Note that *Kutlu* involved breach of a requirement to consult with a professional organisation rather than breach of a *public* consultation provision. The reasoning remains relevant to the question of whether breach of statutory procedures requires the related decision to be invalid.

[51] *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 at 188 [27].

[52] *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177 at 206-207 [94].

[53] *Smith v Wyong Shire Council* (2003) 132 LGERA 148 at 159 [62] (Spigelman CJ), 185 [183] (Tobias JA, Sheller JA agreeing).

reasons to think that it would either be displaced by a finding that consultation provisions are essential preliminaries or it can be managed by carefully framed orders.

Triggering public consultation requirements

Applicants may bring proceedings claiming that public consultation processes should have been employed but were not. Such cases relate to public consultation triggers or thresholds. There are different kinds of triggers for subordinate legislation and for sector-specific consultation requirements. The primary trigger for subordinate legislation is commonly that the "rule" meets the criteria for a "statutory rule"[54] or a "legislative instrument".[55] There will also often be a second decision regarding whether the proposed rule may be exempted from the otherwise applicable public consultation processes because, for example, it is of a "machinery" nature.[56] For environmental laws, as an example of sector-specific consultation requirements, public consultation processes may be triggered by proposed developments that present risks of particular types of environmental impact.[57]

The relevant question is whether Australian courts have broad or narrow review powers in regard to the administration of triggering provisions. The answer depends on whether courts determine that such triggers are objective jurisdictional facts. The High Court has defined a jurisdictional fact as being a "criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion".[58] If a public consultation provision is interpreted to be an objective jurisdictional fact, the court will decide for itself whether the threshold requirement is satisfied according to evidence adduced by the parties to the judicial review proceedings. The court therefore carries out an unusually broad form of judicial review[59] – a form that extends to determining facts and deciding whether the jurisdictional criterion is established or not. If the trigger is determined to be a subjective jurisdictional fact (one that requires the administrator to be satisfied that the relevant fact exists) or is determined not to be a jurisdictional fact, the court will resort to more commonly applied grounds of review, such as for example whether relevant factors were not considered by the administrator, in their review of the administrator's decision relating to the trigger.

The question as to whether a triggering provision is an objective jurisdictional fact is therefore crucial to the scope of the court's review. It is also often highly uncertain – a matter of statutory interpretation involving a multi-factor, contextual analysis of the particular legislation.[60] The most interesting aspect of the case law on this point is the high importance given to public consultation for decision-making processes. Public consultation is accepted as a reason to treat a statutory provision as being a jurisdictional fact. This is established by one of the most important cases signalling the recent "resurgence"[61] of the jurisdictional fact principle, *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55. In that case, the New South Wales Court of Appeal examined a provision that triggered a public consultation process and a requirement to provide a species impact statement. These additional requirements were triggered for land use developments that were "likely to significantly affect threatened species".[62] The Court of Appeal determined that this provision was a jurisdictional fact to be determined by the Land and Environment Court in judicial review

[54] For example, *Subordinate Legislation Act 1989* (NSW), ss 3, 5.

[55] *Legislative Instruments Act 2003* (Cth), s 5.

[56] For example, *Legislative Instruments Act 2003* (Cth), s 18; *Subordinate Legislation Act 1989* (NSW), s 6, Sch 3; *Subordinate Legislation Act 1994* (Vic), ss 8, 12F.

[57] For example, *Environmental Planning and Assessment Act 1979* (NSW), ss 78A(8)(b), 79A; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 5(1)(c).

[58] *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 107 [194].

[59] Aronson and Groves, n 2, pp 235-236.

[60] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63-73 [37]-[94].

[61] Aronson M, "The Resurgence of Jurisdictional Facts" (2001) 12 PLR 17 at 31-37.

[62] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 61 [22].

proceedings.[63] The significant aspect of the case was Spigelman CJ's explanation that the provision's operation as a trigger for a public consultation process supported recognising it as a jurisdictional fact. This was because it played an important role in the decision-making process "by ensuring that detailed information is available to primary decision-makers in a systematic and ordered way".[64]

The *Timbarra* case indicates that courts can closely monitor decisions as to whether public consultation processes are triggered. However, this is dependent on the drafting of the legislation. Parliaments can easily prevent such provisions being regarded as jurisdictional facts by making clear that the decision as to whether the trigger is satisfied or not is for an administrator rather than a court. This can be done by inserting a subjective element into the triggering provision, such as in "the opinion of" or "to the satisfaction of", in which case the trigger will be regarded as a subjective jurisdictional fact, thereby narrowing the scope of the reviewing court's function. Legislation can achieve the same goal by expressly stating that the triggering requirement is to be determined by an identified administrator.[65] When these kinds of drafting measures are employed, the courts review administration of triggering provisions on unreasonableness[66] or irrationality grounds.[67]

The significant aspect of the jurisdictional fact cases is Spigelman CJ's recognition in the *Timbarra* case of public consultation being an indication that the legislative provision is a jurisdictional fact. If that is the case, a court will review the administrator's determination of whether the jurisdictional fact is established or not on a relatively broad basis. As we have seen, however, this is easily avoided by drafting measures that ensure that such provisions are not regarded as jurisdictional facts by the courts. When this occurs, the courts may still review an administrator's decision not to hold a public consultation process but there will be a much narrower scope of review.

Public notice and exhibition of information

We can now turn to judicial review of public notices and exhibition of relevant information. Questions can arise regarding what is required for compliance with notice provisions and whether changes to the proposed decision or rule require the consultation process to start again. The answers provided by the courts indicate willingness to support public participation. This willingness seems to not be a new development. In *R v Arkwright* (1848) 12 QB 960, the Queen's Bench resolved the vagueness in the particular legislation as to precisely when a public notice was to be issued by determining that the notice was to be made public prior to the relevant decision rather than after. This was to ensure that the decision-maker was "informed of all conflicting interests and desires before they proceed to the exercise of their large and final jurisdiction over the subject matter".[68]

What then do courts require when determining whether a public notice is compliant with legislative requirements? There is a line of cases developed by the New South Wales courts that requires notices not to be "misleading"[69] – determined by reference to the "reasonable"[70] or "interested"[71] reader. Like Stephen J's reasoning in *Scurr* that was examined above, the test is based

[63] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 73 [94], 77 [123]-[124].

[64] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 69 [73]-[76].

[65] *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54 at 60 [26].

[66] *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430-432.

[67] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 625 [40]-[42], 628 [57], 638-639 [101]-[105].

[68] *R v Arkwright* (1848) 12 QB 960 at 970.

[69] Compare *Gene Ethics Pty Ltd v Food Standards Australia New Zealand* (2012) 207 FCR 563 at 590-591 [130]-[136] where Kenny J determined that a public notice was misleading but not in breach of the relevant public consultation provisions.

[70] *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* (2006) 69 NSWLR 156 at 178 [110]; *El Cheikh v Hurstville City Council* (2002) 121 LGERA 293 at 301 [30]; *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91 at 112; *Canterbury District Residents & Ratepayers Association Inc v Canterbury Municipal Council* (1991) 73 LGRA 317 at 319-320.

[71] *Homeworld Ballina Pty Ltd v Ballina Shire Council* (2010) 172 LGERA 211 at 223-224 [47]-[50].

on a purposive interpretation of the notice requirements of public consultation provisions:[72] misleading or otherwise inadequate notices will adversely affect the ability of members of the public to participate in the decision-making process.[73] Such notices may suggest that a person's particular interests are not affected so that it is not necessary for them to examine the draft proposal. In other words, the misleading notice may have the effect of "lulling them into a false sense of security".[74] There is also a concern that if a member of the public acts on inaccurate or incomplete information in the notice, they may be diverted into making misconceived or incomplete objections.[75]

The significance of this line of cases is that it is expressly designed to protect the effectiveness of public participation and it does so by testing the notice from a member of the public's perspective. It therefore goes some way to protecting against one of the ways by which public consultation can be a tokenistic exercise – the provision of inadequate information for the public to read and respond to in their submissions.

The second question that arises regarding public notices relates to what is to occur when changes have been made to the proposed rule or decision after the public notice has been published. In these cases, the rule or decision is challenged on the ground that it is different to the one that was subject to the notice. The courts have determined that, depending on the extent of the change that has occurred, such changes can mean that the consultation process has to start again. The primary case is the New South Wales Court of Appeal's decision in *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78 at 88-89, which established a test requiring that the final rule or decision not be "substantially different" to the rule or decision that was notified and exhibited.[76] A similar test has been applied and referred to by other courts.[77]

The rationale for this limitation on changes to proposed rules and decisions is again based on upholding the purpose of the public consultation process. Priestley JA, who gave the judgment for the majority in *Leichhardt (No 2)*, agreed with the applicant's argument that if a final rule could be substantially different to the publicly exhibited rule, then the public consultation process "would be emptied of any substance".[78] Members of the public will have made submissions for a rule that *was not* made rather than the rule that *was* made. Their participation will have been a pointless exercise. Therefore for this question, like the question regarding the adequacy of public notices and exhibition, the courts have provided an answer designed to protect the effectiveness of public participation.

We can therefore see that Australian courts have interpreted public notice provisions in ways that support public participation. These cases indicate that challenging the notice of a proposed rule or decision can be a relatively effective form of judicial review of public consultation processes.

Consultation period

The next step in the process is the consultation period. The required amount of time for members of the public to lodge submissions will vary depending on the particular area of regulation and the kind of decision. From a member of the public's perspective, the consultation period should be sufficient for them to access relevant information, analyse it, and prepare a submission. There are a number of different ways that legislation regulates consultation periods. Some legislation provides a discretion as

[72] It should be noted that there has been some criticism of the "misleading" principle being an applicable, or enforceable, principle: *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91 at 95-96.

[73] See *Tickner v Chapman* (1995) 57 FCR 451 at 459, 481, 492.

[74] *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91 at 102. See also *El Cheikh v Hurstville City Council* (2002) 121 LGERA 293 at 302 [35].

[75] *Canterbury District Residents & Ratepayers Association Inc v Canterbury Municipal Council* (1991) 73 LGRA 317 at 320.

[76] See also *Friends of Turramurra Inc v Minister for Planning* [2011] NSWLEC 128 at [155]-[158]; *Bryan v Lane Cove Council* (2007) 158 LGERA 390; *John Brown Lenton & Co Pty Ltd v Minister for Urban Affairs and Planning* (1999) 106 LGERA 150 at 160 [38]-[39].

[77] *R v City of Salisbury; Ex parte Burns Philp Trustee Co Ltd* (1986) 42 SASR 557 at 563; *Tickner v Chapman* (1995) 57 FCR 451 at 459-460; *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265 at 281.

[78] *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78 at 84, 88.

to the amount of time for the consultation period,[79] while other legislation sets a minimum period. When such periods are set by legislation, they tend to range between 21 and 30 days.[80] The scope of a court's review function for the administration of these provisions will depend on the characteristics of the particular provision. While a specified time period was determined to be a mandatory requirement in *Re Local Government Act 1874; Ex parte Taylor* (1885) 6 ALT 170, discretionary consultation periods are likely to mean that the courts have a much narrower supervisory role.

The latter can be seen by the Full Court of the Federal Court's decision in *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154. This case related to the Gunns pulp mill in Northern Tasmania – a development that attracted substantial controversy. One of the issues in the case concerned the consultation process. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) required the Minister to determine a consultation timeframe and he decided on a 20-day period for the public to make comments. The applicant argued that it was denied procedural fairness: the 20-day period did not give them a reasonable opportunity to comment[81] since there was a large volume of materials and they wanted to verify information and obtain reports.[82] The applicant's framing of its argument according to procedural fairness was forcefully rejected by Branson and Finn JJ who stated that the consultation provisions could not have "procedural fairness notions engrafted upon them".[83] The test established by the judges was that the opportunity to comment is "not illusory or wholly unreasonable, and is not otherwise tainted with illegality"[84] – a seemingly much more difficult test for an applicant to meet than the test that applies for procedural fairness. The applicant failed on this ground and on the other grounds it argued.

The *Wilderness Society* case indicates the more restricted role for the courts in supervising the consultation period when the particular period is to be determined by administrative discretion. It highlights that when the relevant legislation makes elements of the public consultation process discretionary, the courts may be restricted to a restrained form of unreasonableness test.

Considering submissions

Legislative provisions that establish public consultation procedures nearly always expressly confirm that submissions are to be considered.[85] When this occurs, the legislation makes sufficiently clear that the decision-maker is "bound" to consider submissions as required by Mason J's classical statement of the failure to consider relevant matters ground of review in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39.

The public consultation cases tend to focus on a different element of the failure to consider relevant matters ground – *how* submissions are to be considered. The principle developed in *Peko-Wallsend* is that courts should generally not review the weight given by the administrator to considerations unless the Act provides an indication of the weight that is to be given to them or if the challenge is brought on the ground of *Wednesbury* unreasonableness.[86] Aronson and Groves refer to this aspect of Mason J's judgment in *Peko-Wallsend* as being a "thin" ground of review – it generally

[79] See, eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 95(2).

[80] See, eg *Subordinate Legislation Act 1989* (NSW), s 5(2)(a)(iv) (minimum 21 days); *Environmental Planning and Assessment Act 1979* (NSW), s 79(1)(a) (30 days); *Subordinate Legislation Act 1992* (Tas), s 5(2)(a)(iv) (minimum 21 days); *Subordinate Legislation Act 1994* (Vic), s 11(2)(d) (minimum 28 days); *Planning and Environment Act 1987* (Vic), s 19(4)(b) (minimum one month). The period required for the Murray-Darling Basin Plan is an interesting exception as it requires a minimum 16-week period: *Water Act 2007* (Cth), s 43(4)(b).

[81] *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154 at 167 [55].

[82] *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154 at 174 [73].

[83] *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154 at 176 [82].

[84] *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154 at 177 [86].

[85] For example, *Environmental Planning and Assessment Act 1979* (NSW), s 79C(1)(d); *Planning and Environment Act 1987* (Vic), s 60(1)(c); *Subordinate Legislation Act 1989* (NSW) s 5(2)(c); *Subordinate Legislation Act 1992* (Tas), s 5(2)(c); *Subordinate Legislation Act 1994* (Vic), s 11(3). Compare *Legislative Instruments Act 2003* (Cth), s 17.

[86] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41.

requires some consideration of a relevant matter but not "adequate consideration".[87] Mason J was concerned to guard against the failure to consider relevant matters ground of review being used by courts to intrude into the merits of the administrator's decision.[88] The Australian public consultation cases that are brought on this ground of review reflect this wariness of intruding on the merits of the decision.

Before examining the Australian cases, it is worthwhile briefly setting out the United States case law principles for comparative purposes. The relevant principles relate to the "notice and comment" process for rule-making in the *Administrative Procedure Act 1946*, 5 USC § 500 and in particular the requirement in § 553(c) that the agency includes in the rules a "concise general statement of their basis and purpose". This has been interpreted by the courts as requiring agencies to respond in the statement to the issues raised in submissions lodged by members of the public. The leading case is *Automotive Parts and Accessories Association v Boyd* 407 F 2d 330 (1968) in which the Court of Appeals said that the statement of basis and purpose prepared by the agency "will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did".[89] This principle is understood to provide a safeguard against arbitrary decision-making.[90] It has been developed by courts to require that an agency's statement of basis and purpose responds to comments that have been submitted,[91] sets out objections and the agency's reaction to them,[92] and provides an explanation for why alternatives suggested in submitted comments have been rejected.[93] In these ways, the courts in the United States have developed what I will refer to as a "responsiveness" requirement.

How then have Australian courts approached administrators' consideration of submissions? The answer is complex. While Australian courts do not go as far as their counterparts in the United States, their application of general judicial review principles, in particular the failure to consider relevant matters ground of judicial review, go some way towards supervising an administrator's consideration of submissions. Application of the relevant considerations ground of review has established two primary principles regarding submissions lodged in public consultation processes. The first is that when legislation refers to the decision-maker having to consider submissions, there must be evidence that that person has been provided with, or has access to, the submissions.[94] The second is that decision-makers may rely on the assistance of their staff to collate, organise, and accurately summarise submissions,[95] but if the legislation refers to the decision-maker considering submissions, they will have to personally consider them rather than rely on an official's consideration of them.[96] These principles may be regarded as procedural – they concern how the submissions have passed through the bureaucratic channels to the actual decision-maker. They do not extend to the decision-maker's reasoning process or that they have responded to issues raised in the submissions.

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[87] Aronson and Groves, n 2, p 283.

[88] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-42.

[89] *Automotive Parts & Accessories Association v Boyd* 407 F 2d 330 at 338 (1968).

[90] *United States v Nova Scotia Food Products Corp* 568 F 2d 240 at 253 (1977).

[91] *United States v Nova Scotia Food Products Corp* 568 F 2d 240 at 252-253 (1977); *Walter O Boswell Memorial Hospital v Heckler* 749 F 2d 788 at 794, 803 (1984); *International Fabricare Institute v US Environment Protection Authority* 972 F 2d 384 at 389, 398 (1992); Pierce RJ, *Administrative Law Treatise* (5th ed, Wolters Kluwer Law and Business, Austin, Texas, 2010) p 594.

[92] *Lloyd Noland Hospital & Clinic v Heckler* 762 F 2d 1561 at 1566-1567 (1985).

[93] *International Ladies' Garment Workers' Union v Donovan* 722 F 2d 795 at 815-818 (1983).

[94] *Minister for Aboriginal And Torres Strait Islander Affairs v Western Australia* (1996) 66 FCR 40 at 63; *South East Forest Rescue Inc v Bega Valley Shire Council* [2011] NSWLEC 250 at [127]-[150]. See also *Nambucca Valley Conservation Association v Nambucca Shire Council* [2010] NSWLEC 38 at [183]-[191].

[95] *Tickner v Chapman* (1995) 57 FCR 451 at 464; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 426 [211]. See also *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 30-31.

[96] *Tickner v Chapman* (1995) 57 FCR 451 at 464.

The important question is whether Australian courts will go further than these principles and require some form of proper or genuine consideration, particularly by requiring the decision-maker to prove that they have responded to the issues raised in the submissions. Australian courts have used language that suggests that they will review administration of public consultation processes on such bases. Finn J, for example, in *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265 at 281, 284 required that submissions be given "genuine consideration", and Black CJ in *Tickner v Chapman* (1995) 57 FCR 451 at 464 stated that "consideration" requires "an active intellectual process directed at [the] representation or submission". This language suggests that Australian courts may review for more than mere formal consideration of submissions.

However, in these cases the Federal Court did not impose any responsiveness requirement – the issues related to the way in which information was managed rather than the decision-makers' thought processes. In *Tickner v Chapman* (1995) 57 FCR 451 at 463-464, the process that was found to be problematic was that the Minister relied entirely on officials to read the submissions – the Minister could not therefore have personally engaged with the submissions. In *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265 at 281, the agency employed a process of excluding from consideration submissions that included material from non-peer reviewed sources. The Federal Court in both cases reviewed the manner in which the submissions were managed by officials. The courts in the United States go a step further, requiring the agency to show in a published statement that they have responded to the submissions.

There are reasons to think that the approach in the United States is unlikely to develop in Australia. The most general reason is the concern that responsiveness requirements take the courts too close to the merits of the decision[97] – the choices that the administrator is to make in the exercise of their discretion. There are also a number of specific issues.

The first relates to the requirement for administrators to provide reasons for their decisions. The provision of reasons is a prerequisite for any responsiveness requirement as it is the only way of showing how the decision-maker has responded to the submissions made by members of the public. However, reasons are not universally required for administrative decisions in Australia. It may be the case that the legislation that establishes the decision-making or regulation-making power imposes a requirement to provide reasons.[98] However, if there is no requirement to provide reasons according to these statutes, it is doubtful that decisions or rules made according to public consultation processes will be subject to any such requirement. Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its equivalents[99] may enable reasons to be provided for some decisions but does not apply to decisions of a "legislative" character,[100] such as subordinate legislation and similar kinds of rules and standards. The general rule otherwise is that administrators have no duty to provide reasons.[101] The limitations in Australian law of the duties to provide reasons for decision are therefore likely to be a significant restriction on the development of any responsiveness requirement.

The second reason for a responsiveness requirement being unlikely in Australia is that even if reasons are required for decisions involving public consultation, there is no indication that courts in the past have imposed a responsiveness requirement in this context and there is reason to doubt that they would in the future. To see why this is the case, it is necessary to examine the decision-making contexts in which Australian courts have imposed responsiveness requirements. The primary case is the High Court's decision in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24] in which Gummow and Callinan JJ stated that "[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice". This was an apparent endorsement of responsiveness by

[97] See Aronson and Groves, n 2, pp 400-402.

[98] For example, *Legislative Instruments Act 2003* (Cth), s 26.

[99] *Judicial Review Act 1991* (Qld), s 32; *Judicial Review Act 2000* (Tas), s 29.

[100] *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 3, 13(1), 3(11); *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185.

[101] See *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; Aronson and Groves, n 2, pp 598, 601-603.

these judges of the High Court – an endorsement that has been confirmed by the High Court in later cases.[102] However, responsiveness was accepted in *Dranichnikov* in a very different context to decision-making utilising public consultation processes. The *Dranichnikov* case involved review of a decision of the Refugee Review Tribunal and its failure to respond to the applicant's specific claims for refugee status. It was therefore a decision relating to a single individual[103] rather than a public interest decision in which consultation processes are utilised. Moreover in *Dranichnikov*, Gummow and Callinan JJ expressly connected responsiveness to procedural fairness. Requiring responsiveness in decision-making contexts in which procedural fairness applies means that it is subject to a threshold of there being an adverse impact on a person's individual rights and interests. This would exclude many who participate in public consultation processes.

The third reason to think it is unlikely that Australian courts would develop a form of responsiveness review relates to the case law in which courts have implied responsiveness requirements into statutory obligations for administrators to provide reasons for decision. In these cases, the courts require the decision-maker to address in their reasons the issues raised by the parties.[104] However, it is commonly stated in this context that this responsiveness requirement is limited to decisions made according to adversarial adjudicative processes.[105] In other decision-making contexts, the High Court has confirmed that the findings that are to be included in the reasons are those that the decision-maker considers necessary.[106] This means that the responsiveness requirements that are implied by courts into obligations to provide reasons for decision are limited to decisions made according to adversarial processes – a very different process to public consultation.

The result is that Australian courts will go some way to ensuring that submissions lodged in public consultation processes are considered but not so far as the United States courts which require that the decision-maker shows how they have responded to the issues raised in the submissions. This reflects the limits of the relevant considerations ground of review in Australian law, which generally requires that some consideration is given to a relevant consideration, here a submission, but how much thought that is given to it is largely beyond the scope of review. This is a significant limitation on the ability of the courts to ensure that public consultation processes are administered in more than a tokenistic manner.

PART 4: PROBLEMS AVOIDED – BENEFITS MISSED

We can therefore conclude that the scope of judicial review varies for the different elements of the public consultation process. While judicial review of the elements towards the beginning of the process can be relatively broad (albeit depending on the public consultation provisions of the particular Act), the restraints on review of the consideration of submissions touch on fundamental restraints of Australian judicial review. The latter restraints raise an interesting question – what are the difficulties that are avoided by the Australian approach to judicial review of the consideration of submissions and what are the benefits that are missed? The primary difficulty that is avoided relates to delays and resource issues that can occur with extended review by the courts of reasoning processes. On the other hand, the benefit that is missed is that some of the tokenistic practices regarding administration of public consultation processes are unlikely to be redressed by the courts.

[102] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at 356 [90]; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 177 [35].

[103] See also *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at 295-296 [56]-[57].

[104] For example, *Segal v Waverley Council* (2005) 64 NSWLR 177 at 189 [43]-[44]; *Dimatos v Coombe* [2011] VSC 619 at [20], [22].

[105] *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 540-541 [71]; *L&B Linings Pty Ltd v WorkCover Authority (NSW)* [2012] NSWCA 15 at [58]; *Segal v Waverley Council* (2005) 64 NSWLR 177 at 188-189 [38]-[43].

[106] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [68]-[69].

The primary problem identified in the United States literature regarding responsiveness is the so-called "ossification" of rule-making[107] – that review mechanisms for rule-making according to notice and comment procedures are so onerous that they create disincentives to using rules as a means of regulating a particular problem.[108] The responsiveness requirement is regarded as a substantial contributor to this problem[109] as it effectively requires the rule-making agency to prepare a highly elaborate and detailed statement of reasons for the rule. Since officials cannot predict which issues will be raised in judicial review proceedings, they end up trying to address all possible issues in order to protect the rule from judicial intervention.[110] This contributes to the ossification problem by requiring agencies to spend substantial time and resources on their statements of reasons.[111]

Would regulatory decision-making in Australia be at risk of ossification if a responsiveness requirement was enforced by our courts? The American experience indicates that there are substantial risks. Yet the concerns that are commonly raised in Australia go the other way – relating primarily to the inadequacy of consultation[112] and accountability processes.[113] This means that any desire to address tokenistic consultation practices by extending judicial review to include responsiveness requirements should be very carefully thought through.

The literature in the United States regarding review of notice and comment processes also raises questions as to how the expansion of judicial review to include responsiveness can affect the politicisation of judicial decision-making. Empirical studies have found that the political allegiance of judges of the federal courts (determined by reference to the President who appointed them) has a substantial influence on the results of cases in which courts review the statement of basis and purpose of a particular rule for its responsiveness to the issues raised and the arguments made in submissions.[114] Pierce adds that judges frequently apply the responsiveness requirement in a selective manner by finding flaws and gaps in the agency's reasoning when they disagree with the particular regulation on political or ideological grounds and by ignoring this form of review when they agree with the regulation.[115] While this highly politicised situation may seem to be an unlikely development in the Australian context, it should in any case be recognised that there is an additional risk of inconsistent judicial decision-making due to the particular vagueness of the responsiveness principle.[116]

If the narrower approach to the considerations grounds that has developed in Australia enables us to avoid these problems, it must also be pointed out that it results in the benefits of the responsiveness requirement being missed. The responsiveness requirement of United States judicial review is a form

[107] McGarity TO, "Some Thoughts on 'Deossifying' the Rulemaking Process" (1992) 41 Duke LJ 1385; Pierce RJ, "Seven Ways to Deossify Agency Rulemaking" (1995) 47 Admin L Rev 59.

[108] Yackee JW and Yackee SW, "Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990" (2012) 80 Geo Wash L Rev 1414 at 1439-1440.

[109] It should be noted that developments established by Congress and the President have also contributed to the ossification problem: McGarity, n 107 at 1403, 1405. See also Strauss PL, "From Expertise to Politics: The Transformation of American Rulemaking" (1996) 31 Wake Forest L Rev 745.

[110] McGarity, n 107 at 1412.

[111] Pierce, n 91, pp 600-601.

[112] Productivity Commission, n 4, pp 222, 235; Australian Senate Regulations and Ordinances Committee, n 4, pp 5-6.

[113] Aronson M, "Subordinate Legislation: Lively Scrutiny or Politics in Seclusion" (2011) 26 APR 4; Pearce D, "Legislative Scrutiny: Are the Anzacs Still the Leaders?" (Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference: "Scrutiny and Accountability in the 21st Century", Parliament House, Canberra, Australia, 6-8 July 2009), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=sl_conference/papers/pearce.htm&print=1; Productivity Commission, n 4, pp 272-274.

[114] Revesz RL, "Environmental Regulation, Ideology, and the DC Circuit" (1997) 83 Va L Rev 1717 at 1718-1719, 1769-1771. See also Miles TJ and Sunstein CR, "The Real World of Arbitrariness Review" (2008) 75 U Chi L Rev 761.

[115] Pierce, n 91, pp 595-596.

[116] For example, Forbes has said of judicial review of tribunal decisions in Australia that "the criteria for 'adequate reasons' are imprecise enough to suit judicial interventionists and non-interventionists alike" and that review in such cases "range from easy-going to hypercritical": Forbes JRS, *Justice in Tribunals* (2nd ed, Federation Press, Sydney, 2006) pp 247, 249.

of review that directly addresses a key aspect of tokenistic public consultation. It facilitates review by the courts as to whether the submissions influence the decision or rule. Administrators in the United States have courts "over their shoulder"[117] wanting to see how they have responded to the main issues raised in the submissions – issues that administrators may be tempted to ignore.[118]

By not carrying out this form of judicial review, Australian courts are limited in their ability to provide redress for tokenistic consultation practices. While Australian courts will ensure that the submissions are before the decision-maker, they are not able to ensure the decision-maker provides a response to objections and why alternatives suggested by members of the public have been rejected. The particular forms of tokenistic consultation processes (decisions that are effectively made prior to the consultation process, cherry-picking acceptable submissions, and ignoring submissions) will not be remedied by court action. If they are, it will be indirectly by way of review on other bases.

The result is that while responsiveness review would provide an effective redress for tokenistic consultation practices, any expectation that it would be developed by courts in Australia is unrealistic. It would be dependent on there being an obligation to provide a statement of reasons for the rule or decision, which is now far from universally required, and the courts to extend the scope of their review. Both developments are unlikely. This conclusion, of course, raises the question of whether there are institutions and accountability mechanisms other than courts that currently undertake such review or should be developed in order to do so. Answers to this question are likely to be complex and require research far beyond that which has been carried out for this article. Most importantly, there is likely to be very different issues in different regulatory contexts. For example, there is very different oversight of regulation-making processes by governmental[119] and parliamentary institutions[120] than there are for licensing and approval decisions by agencies and local councils that are made according to public consultation processes. It would be necessary to research such issues in these different contexts.

CONCLUSIONS

The conclusions that can be drawn are that the broadest scope for Australian courts to supervise public consultation processes are generally at the early stages of the process, whether public consultation processes are triggered and the adequacy of public notices. However, at the end of the process, when the submissions are to be considered, the scope of judicial review is relatively restricted in a manner that disables courts from supervising whether submissions actually influence the rule or decision. Some would regard this as a beneficial restriction on the courts getting too close to the merits of decisions in a context that necessarily entails public interest, policy considerations. However, this benefit comes with some costs. It restricts the courts' ability to provide an adequate safeguard against tokenistic consultation practices.

[117] McGarity, n 107 at 1412, 1452-1453. See also Strauss PL, "Overseers or 'The Deciders' – The Courts in Administrative Law" (2008) 75 U Chi L Rev 815 at 829.

[118] Pierce, n 107 at 68.

[119] Such as the Commonwealth Office of Best Practice Regulation.

[120] Such as the Senate Standing Committee on Regulations and Ordinances.