

RESTORING THE ADJR ACT IN FEDERAL JUDICIAL REVIEW

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The Administrative Review Council report on *Federal Judicial Review in Australia* was the Council's fiftieth report, and its seventh on judicial review.¹ The topic has self-evident importance. Judicial review, plainly stated, embodies a fundamental principle of the Australian legal system, that an independent court system must have the jurisdiction finally and conclusively to determine whether government action is undertaken according to law. That principle is enshrined in the *Constitution*, notably s 75(v), which confers upon the High Court an original jurisdiction to issue three remedies, now described as constitutional writs,² to restrain unlawful action and compel lawful action by officers of the Commonwealth.

If judicial review is to operate as a practical mechanism for resolving disputes between citizen and government, there must be a court option and a mechanism that is more accessible to the community than the High Court applying s 75(v). That explains why the *Administrative Decisions (Judicial Review) Act* (Cth) (*ADJR Act*) was enacted in 1977, and why the Federal Court and later the Federal Magistrates Court were given jurisdiction under that Act to entertain proceedings.

The *ADJR Act* has served the Australian community and Australian jurisprudence well. Legal proceedings touching a great many areas of government administration have been commenced under the Act, including taxation, broadcasting, migration, customs, health services, aboriginal heritage protection, pharmaceutical regulation, and personnel decision making.

ADJR actions have been commenced by individuals, corporations, other governments and public interest groups. Many leading cases in Australian administrative law were decided under the *ADJR Act* – including *Kioa*³ on natural justice, *Sean Investments*⁴ and *Peko-Wallsend*⁵ on the obligation to consider relevant matters, *Schlieske*⁶ on unauthorised purpose, *Tickner*⁷ on Ministerial decision making, *Curragh Mining*⁸ on the no evidence principle, *Mudginberrri*⁹ on the statutory duty to provide a service, *Wattmaster Alco*¹⁰ on judicial review remedies and *North Coast Environment*¹¹ on standing.

The principles enunciated in those cases were tied to the provisions of the *ADJR Act*, and have shaped the development of administrative law and public administration in Australia.

The reason the *ADJR Act* has had a marked and positive influence on law and administration is that it provides a clear and coherent structure for judicial review:

- the Act specifies who can commence proceedings (s 3(4)), how the proceeding are to be commenced (s 11) and when a third party can join an ADJR proceeding (s 12);

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- it defines the range of Commonwealth decisions and actions that are reviewable under the Act (s 3), and the decisions excluded from review (s 3(1), Schedule 1);
- it lists 18 grounds on which decisions and conduct can be set aside by a court (ss 5, 6);
- it sets out the relief that can be granted by a court when a breach of a ground of review is established (s 16); and
- it assists a person to obtain a written statement of reasons for a decision prior to commencing proceedings (s 13).

For many years the *ADJR Act* operated as the principal template for federal judicial review but there was always a latent weakness in the ADJR design. The Act placed limitations on the right to commence judicial review proceedings, both by excluding some Commonwealth decisions from review under the Act (Schedule 1) and by placing time limitations on when proceedings must be commenced (s 11). A person could circumvent those restrictions by instead commencing proceedings in the original jurisdiction of the High Court under s 75(v). That section provides more opaquely that the High Court can issue *mandamus*, prohibition or an injunction against an officer of the Commonwealth.

An early measure to plug that gap was the enactment in 1983 of s 39B of the *Judiciary Act 1903* (Cth). That section gave the Federal Court a supplementary jurisdiction expressed in similar terms to the High Court's s 75(v) jurisdiction. This lessened the risk that the High Court, which is primarily an appellate court, would receive an unworthy batch of judicial review cases in its original jurisdiction. Section 75(v), after all, is meant only as a constitutional safeguard of the rule of law lest no other court or mechanism has jurisdiction to restrain unlawful government action.

In its early years s 39B did not detract from the role of the *ADJR Act* as the principal template for federal judicial review. What changed – and, in truth, muddied – the picture was the removal, after 1992, of migration decision making from the *ADJR Act*. The Parliament took that step in reaction to a dual trend: what it saw to be a pattern of judicial overreach in review of migration decisions that was at odds with a newly-established system for merit review of adverse migration decisions; and a steady and dramatic increase in the migration caseload in the Federal Court under the *ADJR Act*.¹²

The removal of migration decisions occurred in two stages. In the first stage (in 1992) the Parliament enacted a new Part 8 in the Migration Act to replace both the *ADJR Act* and s 39B. Part 8 set out new and different rules for migration review. The grounds on which a migration decision could be challenged were narrower than those in the *ADJR Act*; and the Federal Court could not extend a tight 28 day time limit for commencing proceedings. Put simply, this measure did not stem either the increasing volume of migration review cases, nor judicial adventurism in extending the limited grounds further than the Parliament might have expected. A consequence, illustrated by *Aala*¹³ in 2000 and *Miah*¹⁴ in 2001, was that proceedings that would not succeed in the Federal Court were instead commenced in the High Court.

The second and more dramatic stage in curtailing migration review occurred in 2001 in the wake of the Tampa incident. A privative clause was enacted which declared expansively that a migration visa decision 'is final and conclusive' and 'must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'.¹⁵

There was no genuine expectation that the courts would entirely discontinue judicial review of migration decisions. Indeed, another section of the Migration Act acknowledged that an application could be made in the High Court under s 75(v), but that the application must be made within 35 days of the actual decision and the High Court could not extend that period.¹⁶ It was not entirely clear how the courts would react to the privative clause, but a predictable outcome that has now become embedded in Australian jurisprudence is that the privative clause does not prevent a court from granting a constitutional remedy and setting aside a decision if there was a jurisdictional error.¹⁷

At the risk of oversimplification, the current position can be summarised in the following three points:

- Migration review constitutes the major portion of federal judicial review, as it has for nearly two decades. For example, in the period 2003-11, 1,744 migration applications were filed in the Federal Magistrates Court, compared to 56 administrative law applications under the *ADJR Act* and s 39B.
- In other areas of government administration, a growing trend is that actions are commenced under s 39B, either jointly with or instead of an ADJR application. For example, ten years ago the ratio of s 39B to ADJR matters was approximately 1 to 15, but is now roughly equal.
- The legal concepts of jurisdictional error and the constitutional writs, which have dominated migration review, now permeate other areas of federal judicial review, as well as State judicial review.¹⁸ In practice, the concept of jurisdictional error is steadily replacing the ADJR grounds of review as the context for defining legality.

That is the major dilemma that faced the Administrative Review Council (ARC) in its examination of federal judicial review. We were concerned that the *ADJR Act* is being overtaken by s 39B and the constitutional review jurisdiction. The majority of the Council believed that the *ADJR Act* is the preferable template for federal judicial review, with simple procedures, defined remedies, and listed grounds.¹⁹

Beyond the courtroom, the ADJR principles and grounds have a wider value of elucidating the principle of legality and instilling administrative law values in government administration. There is wide recognition throughout the public service of core ADJR grounds, such as natural justice, relevant and irrelevant considerations, unauthorised purpose, inflexible application of policy, good faith, unreasonableness, evidence based decision making, and reasons for decision.

This growing divergence between constitutional judicial review and statutory judicial review is undesirable. There is a risk of confusion and incoherence in administrative law jurisprudence. At the beginning of any decisional task a public servant should be able to make the straightforward inquiry 'what is expected of me to act lawfully?' It has become far more difficult to answer that question applying concepts that stem from jurisdictional error and the prerogative and constitutional writs.

What can be done? The Council considered five options for a new framework for federal judicial review.²⁰

1. Repeal both s 39B and the *ADJR Act* and develop a new judicial review framework, based perhaps on a new concept that the role of the courts is to control the exercise of public power or the discharge of public functions. This was an option

favoured in some of the submissions the Council received, from academics in particular. However, the Council did not believe that the Parliament would embrace this option. It would open the door to a new era of judicial innovation, perhaps judicial adventurism, and would remove that element of certainty and predictability that administrative decision makers crave in judicial guidance. Pragmatically, there is unlikely to be any appetite within government or parliament for an untested and uncertain model of judicial oversight. The direction of public policy for the last couple of decades has been in the opposite direction.

2. Repeal s 39B only. This is not feasible as s 39B enables the Federal Court to exercise the High Court's constitutional review jurisdiction. Repeal of s 39B could result in an undesirable upswing in federal judicial review proceedings being commenced in the High Court's original jurisdiction.

3. Repeal the ADJR Act only. This was the preferred option in a minority report written by the Secretary of the Attorney-General's Department. However, the remainder of the Council did not support this option, for a number of reasons. One concern is that repeal of the *ADJR Act* would deprive Commonwealth administrative law of a great many benefits that the ADJR brings to administrative decision making and judicial oversight. We risk abandoning a comprehensive body of jurisprudence that has been developed and settled over thirty years. Another risk is that repeal of the *ADJR Act* may be read (or misread) as a legislative invitation to courts to develop a new set of principles about the scope of judicial review and the principles for lawful decision making.

4. Extend the ADJR Act to include the s 39B and constitutional review jurisdiction. The simple way of doing this would be to remove all limitations from the *ADJR Act* and provide that proceedings can be commenced against any decision, action or conduct by a Commonwealth agency or officer. The ADJR procedures, remedies and grounds of review would apply to any such proceeding.

This approach, while attractive on the surface, would be unworkable. Many of the ADJR grounds of review presuppose a decision made under an enactment.²¹ To revise the ADJR grounds to extend to all decisions made by an officer of the Commonwealth under statutory or executive power would rewrite the current principles for lawful decision making in a way that might open the door to uncertainty, creativity and adventurism in judicial review.

Equally, to provide explicitly that judicial review can apply to any action, decision or conduct of an officer of the Commonwealth might undermine decades of jurisprudence stemming from the *Bond*²² decision. It confines judicial review to final and determinative administrative actions, and does not extend to all preparatory and interim administrative actions.

5. Amend the ADJR Act to host two, separate sources of jurisdiction. This was the preferred option of the majority of the Council. One source of jurisdiction would be the existing ADJR jurisdiction; the other would reflect the s 75(v)/s 39B jurisdiction. Both jurisdictions would be administered by the Federal Court and the Federal Magistrates Court.²³

As to the ADJR jurisdiction, there would be little change. In scope the jurisdiction would embrace decisions of an administrative character made under an enactment, though some categories of decision would be excluded, as noted below. There would be little change to the *ADJR Act* grounds of review, the definition of standing, the way that proceedings are commenced and the remedial powers of the courts.

As to the s 75(v)/s 39B jurisdiction, the *ADJR Act* would provide that a person who could otherwise initiate a proceeding under Constitution s 75(v) could instead do so under the

ADJR Act, seeking relief on the ground of jurisdictional error. The action would be commenced using the simple procedure in s 11, and the courts could grant the remedies listed in s 16. That is, a party would not apply as at present for *mandamus*, prohibition or an injunction. The ADJR grounds would not apply, as some of those grounds presuppose a decision of an administrative character made under an enactment, rather than action taken by an officer of the Commonwealth. In addition, the concept of jurisdictional error is so immutably tied to the s 75(v)/s 39B jurisdiction that it cannot be removed by a simple stroke of the legislative pen.

The principal attraction for litigants to commence a s 39B-type action under the *ADJR Act* would be the simpler ADJR procedures and remedial options. A party could instead apply to the Federal Court under s 39B, but there would be no apparent advantage in doing so.

Procedural simplicity is not, however, the main objective in housing the statutory (ADJR) and constitutional review (s 75(v)/s 39B) jurisdictions under the one ADJR roof. The Council's objective is to draw attention back to the original ADJR framework, and to remind prospective litigants (or their counsel) that it provides a suitable framework for general judicial review. To the extent that actions are still commenced jointly under the statutory and constitutional review jurisdictions, there would hopefully be a closer integration and alignment over time of substantive jurisprudence on the ADJR grounds of review and the doctrine of jurisdictional error. The benefit from that trend would be a more coherent and integrated body of legal principle to guide decision makers on the requirements for lawful decision making. A greater alignment of statutory and constitutional judicial review would arrest the present trend that they are steadily growing apart.

Would this new scheme work? The Council acknowledges that it is an unconventional approach that is not free of doubt. Yet we saw it as the only viable option for retaining the primacy of the *ADJR Act* and accepting the reality that there must be a jurisdiction in the Federal Court and Federal Magistrates Court to match the High Court's s 75(v) jurisdiction. The Council's hope is that reliance on s 39B would become less common and the *ADJR Act*, hosting two sources of jurisdiction, could serve once again as the main template for federal judicial review.

One drawback of the Council's preferred approach is the need for special arrangements to maintain the exclusion of selected areas of decision making from ADJR review. Alongside the *ADJR Act* there are three other active statutory schemes for judicial review:²⁴

- appeals from the Administrative Appeals Tribunal to the Federal Court on a question of law under the *Administrative Appeals Tribunal Act 1975* (Cth) s 44 (*AAT Act*);
- review of tax assessment and some other tax decisions by the AAT and the Federal Court under Part IVC of the *Taxation Administration Act 1953* (Cth); a party can apply directly to the Federal Court for review of a taxation decision, or apply to the AAT and possibly thereafter to the Federal Court under s 44 of the *AAT Act*; and
- review of migration decisions under Part 8 of the *Migration Act 1958* (Cth), essentially by applying to the Federal Magistrates Court for review under s 39B of the *Judiciary Act 1903* (Cth) on the ground of jurisdictional error.

The schemes for AAT appeals and taxation review have operated separately and successfully for decades and the Council saw little advantage in abolishing those arrangements and substituting ADJR review. As to migration review, the Council's preference is to repeal Part 8 and make migration decisions reviewable under the *ADJR Act*, as they were prior to 1992. However, migration review is a high profile, volatile and intensive

area of judicial review, and it is more pragmatic to deal separately with this issue following the more general reform of federal judicial review outlined earlier.

The Council took a similarly pragmatic approach in relation to other features of the *ADJR Act* by which decisions are excluded from ADJR review.

One feature is that the Act applies only to decisions made under an enactment. Two contentious areas of non-statutory decision making that are accordingly outside the ADJR scope are decisions made under the scheme for Compensation for Detriment Caused by Defective Administration (CDDA) and contracting and procurement decisions.²⁵

Decisions in those areas can at present be challenged under s 39B, but this is uncommon and would come up against doctrinal uncertainty about the justiciability of decisions that involve the exercise of executive power. Those decisions are guided by executive guidelines rather than defined legal standards, which makes judicial scrutiny of a non-statutory decision a problematic venture. Flexibility is meant to be the hallmark of executive schemes, concerning their creation, funding, administration and revision in response to changing circumstances. In most areas of non-statutory decision making, separate effective arrangements have been developed for administrative oversight and review.²⁶

The Council preferred to retain that ADJR limitation on decisions made under an enactment. Non-statutory decision making would, in theory at least, still be reviewable under s 39B, and under the parallel jurisdiction with simpler procedures that would be housed under the ADJR roof. There may over time be a gradual development in judicial review activity that would provide a pointer to the viability of establishing a new judicial review scheme that applied re-fashioned grounds of review to all administrative decision making both under legislation and the executive power.

Even here, however, the Council opted to place a brake on judicial review of CDDA decision making. In principle, a person who is denied administrative compensation should have the option of judicial review, but the Council's concern was that an outbreak of litigation in that area would threaten the continuation of this valuable compensation scheme. As an executive scheme it can be limited or dismantled as quickly as it was created. Consequently, CDDA decisions should be excluded altogether from the *ADJR Act* with its simpler procedures; the only option for judicial review should be under *Constitution* s 75(v) or the *Judiciary Act* s 39B.

Another limiting feature is that the *ADJR Act* applies only to decisions of an administrative character. It is not therefore possible under the *ADJR Act* directly to challenge the validity of subordinate legislation.²⁷ This can be done indirectly under the *ADJR Act*, by asserting that an administrative decision is invalid by reason that it was made under an invalid subordinate legislative instrument. A direct challenge could also be brought under s 39B of the *Judiciary Act*, though there is great uncertainty as to how the constitutional writs and the doctrine of jurisdictional error would apply to the making of subordinate legislation.

The Council chose not to disturb that arrangement, although a direct challenge could henceforth be brought under the simpler procedures applying to the s 75(v)/s 39B component of an enlarged *ADJR Act*. A strong reason for not removing the ADJR reference to decisions of an administrative character is that it is unclear how many of the current ADJR grounds of review could apply to decisions of a legislative character. Grounds that are difficult to apply include breach of natural justice, failure to consider relevant matters, not considering a relevant matter, and inflexibly applying a policy rule. Another consideration is that there is a robust accountability scheme for subordinate legislative activity based in the *Legislative Instruments Act 2003*, that includes parliamentary scrutiny and disallowance.

A few other important recommendations in the ARC report can be briefly noted. The Council recommended that decisions of the Governor-General should fall under the *ADJR Act*, except for decisions relating to the administration of the Department of Defence, the calling out of the military forces and statutory appointments and terminations.²⁸ Some of the excluded areas of decision making listed in Schedule 1 to the *ADJR Act* should be removed, whereas some others should be retained (for example, the exclusion for the commencement of criminal justice and civil penalty proceedings).²⁹ The Council proposed simpler principles for extending review to government reports and recommendations.³⁰ The rules on standing should be clarified to assist public interest organisations to bring actions under the *ADJR Act*.³¹ The no evidence ground of review should be clarified, but other ADJR grounds of review should be unchanged.³² The Act should provide that parties to an ADJR proceeding will bear their own costs, unless a court orders otherwise.³³ There is also a recommendation to encourage the recording of reasons at the time a decision is made, rather than upon request.³⁴ Failure by an agency to prepare adequate reasons should be a factor taken into account by a court in making a costs order.

The ARC report on federal judicial review provides a timely and comprehensive analysis of a large and important area of the legal system. The recommendation that is likely to attract the most attention and debate is the Council's majority recommendation on aligning statutory and constitutional review. In that and in other areas the guiding thread of the report is that the right to judicial review, enshrined in the Constitution, should be an accessible mechanism that enhances administrative justice and the rule of law, but must operate alongside other exigencies of government.

Endnotes

- 1 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012). Earlier ARC reports covered *The Scope of Judicial Review*, Report No 47 (2006); three reports on *Review of the Administrative Decisions (Judicial Review) Act*, Report No 33 (1991), Report No 32 (1989) and Report No 26 (1986); and two reports on *ADJR Act* amendments (Report No 9 (1980) and Report No 1 (1978)). Many other reports have discussed judicial review in relation to matters such as migration decisions, customs decisions, appeals, notification of review rights, contracting out and business regulation.
- 2 *Re Refugee Review Tribunal; Ex parte Aala* (200) 204 CLR 82.
- 3 *Kioa v West* (1985) 159 CLR 550.
- 4 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363.
- 5 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
- 6 *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719.
- 7 *Tickner v Chapman* (1995) 133 ALR 226.
- 8 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR.
- 9 *Mudginberri Station Pty Ltd v Langhorne* (1985) 68 ALR 613.
- 10 *Wattmaster Alco Pty Ltd v Button* (1986) 70 ALR 330.
- 11 *North Coast Environment Council Inc v Minister for Resources* (1994) 127 617.
- 12 See R Creyke & J McMillan, *Control of Government Action: Text, Cases and Commentary* (3rd ed, 2012) at 47-48; and J McMillan, 'Regulating Migration Litigation after Plaintiff M61', Report to the Minister for Immigration and Citizenship (Nov 2011).
- 13 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 57.
- 14 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
- 15 *Migration Act 1958* (Cth) s 474.
- 16 *Migration Act 1958* (Cth) s 486A. The removal of the Court's power to extend a time limit was declared invalid in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
- 17 Eg *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
- 18 *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.
- 19 The view of the majority of Council is outlined in Chapter 4 of the Report. A dissenting approach, called a 'Jurisdictional Limits Model', supported by the Secretary of the Attorney-General's Department, Mr Roger Wilkins AO, is explained in Appendix A to the report.
- 20 See Chapters 4 and 7 of the Report.
- 21 Eg 'procedures that were required by law to be observed' (s 5(1)(b)), 'the decision was not authorised by the enactment in pursuance of which it was purported to be made' (s 5(1)(d)), 'an improper exercise of the power conferred by the enactment' (s 5(1)(e)) (which is then spelt out in nine other grounds in s 5(2)), and 'the person who made the decision was required by law to reach that decision only if a particular matter was established' (s 5(3)(a)).

- 22 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. See Creyke & McMillan, note 12 above at 77-93.
- 23 In May 2012 the Attorney-General announced that the name of the Court would be changed, following public consultation: Attorney-General N Roxon, Media Release, 'New Title to Reflect Importance of Federal Magistrates Court', 29 May 2013.
- 24 Report, Chapter 6.
- 25 Report at 78-91.
- 26 Eg as to CDDA decision making see Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Report No 11 (2009), and *Executive Schemes*, Report No 12 (2009).
- 27 Report at 98-103.
- 28 Report at 108-11.
- 29 Report, Chapter 5 and Appendix B.
- 30 Report at 92-98.
- 31 Report, Chapter 8.
- 32 Report, Chapter 7.
- 33 Report at 190-191.
- 34 Report, Chapter 9.