ADJR AT 40: IN ITS PRIME OR A DISAPPOINTMENT TO ITS PARENTS?

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The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) received royal assent on 16 June 1977, although it did not commence operation until 1 October 1980. Therefore, a commemorative function held in April 2017 was somewhat premature on either count. We know now that the ADJR Act did indeed survive to reach the first of its possible 40th birthdays, and we can be relatively certain that it will reach the second, if that is when it should properly be marked. Our confidence on the latter score is well placed, if for no other reason than that nobody has yet mustered the energy to repeal the ADJR Act. If that seems unduly negative, consider the lack of legislative enthusiasm that greeted the final report of the Administrative Review Council (ARC) in 2012: rather than legislate the ARC's minimal suggested changes to the ADJR Act, the government simply defunded the ARC.[1]

The ADJR Act cannot be properly understood without recognising the role of its slightly older legislative twin, the *Federal Court of Australia Act 1976* (Cth). After all, it was 'part of the reason for the Federal Court being created'.[2] The jurisdiction to make decisions under the ADJR Act is reserved by s 8(1) to the Federal Court, and, since 1999, by s 8(2), first to the Federal Magistrates Court and then to the Federal Circuit Court of Australia. Celebrations were held in Sydney in September 2017 to celebrate the Federal Court's 40th anniversary,[3] so I will not trespass further on that topic now.

There are many issues which arise under the ADJR Act and are worth examining in the context of an anniversary celebration. Compelled to be selective, I will therefore make a few comments about the influence of ADJR at state level after I first look at what many have seen as ADJR's most enduring reform: the right to obtain reasons for a decision. Finally, I will briefly give some reasons why, like most 40-year-olds, the ADJR Act has both achieved a level of maturity and also been tainted with disappointment on the basis that it could have done more.

Reasons

There was no common law right to obtain reasons when the *Commonwealth Administrative Review Committee: Report*[4] (the Kerr Committee report) was making its deliberations and none has arisen since.[5] The Kerr Committee report characterised the absence of a statutory provision providing a right to obtain reasons as 'inhibit[ing] the exercise of jurisdiction by courts to correct an improper exercise of power by administrators and erroneous decisions of law made by administrative tribunals'.[6]

These comments were expanded upon in the recommendations of the *Prerogative Writ Procedures: Report of Committee of Review*[7] (the Ellicott Committee report), which also

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presaged the limitations on the statutory right to reasons subsequently enacted in ss 13A and 14 of the ADJR Act.[8] Neither report came close to reflecting the depth of detail that today characterises, and restricts, the right to reasons under the ADJR Act.[9]

When giving the second reading speech in the House of Representatives for the Administrative Decisions (Judicial Review) Bill, the Attorney-General (RJ Ellicott QC), who had previously been a member of both the Kerr and Ellicott committee, said:

> [A] person who is aggrieved by a decision usually has no means of compelling the decision-maker to give his reasons for the decision or to set out the facts on which the decision is based. Lack of knowledge on these matters will often make it difficult to mount an effective challenge to an administrative decision even though there may be grounds on which that decision can be challenged in law. Accordingly, one of the principal elements of the present Bill is a provision that will require a decision-maker to give to a person who is adversely affected by his decision the reasons for that decision and a statement of findings on material questions of fact, including the evidence or other material on which those findings were based. There is already a like provision[10] in the *Administrative Appeals Tribunal Act*[11] in respect of decisions from which an appeal lies to the Tribunal.[12]

He went on to say: 'No longer will it be possible for the decision maker to hide behind silence'.[13]

With respect, silence was not itself the issue, as the High Court's decision in *Minister for Immigration and Citizenship v Li*[14] later made clear. There is precedent,[15] going back at least as far as *Sharp v Wakefield*,[16] via decisions of Sir Owen Dixon in *House v R*,[17] *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[18] and *Klein v Domus Pty Ltd*,[19] which leads to the conclusion that the failure of a decision-maker to give reasons for his or her decision allows a court which cannot itself see a good reason for that decision to invalidate it on the ground of *Wednesbury* unreasonableness.[20]

The capacity of a court to interpret a decision-maker's silence as demonstrating the lack of a good reason for making a decision (and therefore the invalidity of that decision) is a common law work-around.[21] It has a certain remedial potency but falls short of empowering a person by statute[22] to obtain reasons for a decision affecting him or her before commencing judicial review proceedings. One of the reasons why the ADJR Act's flaws and shortcomings have been overlooked over the last 40 years is that the right conferred by s 13 to obtain reasons stands in contrast to the lack of any such right at common law. This provision has been described as 'probably [ADJR's] most enduring reform' but might arguably serve the same purpose within, say, a new division of the *Freedom of Information Act 1982* (Cth).[23] It is, alone, a tenuous basis on which to claim that the ADJR Act has been even a qualified success.

The influence of ADJR in state jurisdictions

The High Court has told us more than once that there is a single common law of Australia which it has the responsibility for setting.[24] However, the states and territories of Australia are entitled, subject to staying clear of areas of exclusive Commonwealth legislative competence, to have their own statutory arrangements. The benefits of the ADJR Act's model were initially generally accepted with regard to:

(a) simplifying the procedures for accessing the courts and applying for judicial review;
(b) codifying the common law grounds for review; and
(c) providing for a right to written reasons in respect of certain administrative decisions.

However, it is noteworthy that only three[25] other jurisdictions (the ACT,[26] Queensland[27] and Tasmania[28]) have created legislation based on the Commonwealth ADJR Act. It is also

peculiar that those which did so chose to do so at a point when the limitations of the Commonwealth's statutory judicial review scheme were becoming apparent.

New South Wales, the Northern Territory, South Australia and Western Australia have no statutory judicial review scheme. It seems increasingly apparent that these jurisdictions might not feel the need to supplement common law judicial review with a statutory scheme, especially since *Kirk v Industrial Court*[29] (*Kirk*) removed the capacity of privative clauses to protect jurisdictional errors from judicial review in state Supreme Courts. Statutory schemes, by contrast, are still subject to being rendered ineffective by subsequent legislation. The removal of decisions under the *Migration Act 1958* (Cth) from the jurisdiction of the ADJR Act, where they had once almost exclusively been reviewed, is a case in point.[30]

The Law Reform Commission of Western Australia conducted an inquiry into judicial review, which reported in 2002.[31] Among other things, the Commission recommended the 'enactment of legislation substantially similar' to the ADJR Act. Nothing came of this.

In 2011, the Legislation, Policy and Criminal Review Division of the New South Wales Department of Attorney-General and Justice released a discussion paper on reform of judicial review in New South Wales and invited submissions.[32] The discussion paper suggested the possibility of adopting a range of statutory schemes, including legislation modelled on the Commonwealth ADJR Act (either closely, as in the ACT, Queensland and Tasmania, or a modified version) or using a 'natural justice' test of jurisdiction (as under the Victorian *Administrative Law Act 1978*). For reasons which were never made public but which we can speculate were at least somewhat connected to the change of government in a landslide election win in the same month as the release of the discussion paper, nothing more was said about this reform proposal and no legislation was drafted, whether modelled on the ADJR Act or otherwise.

Whether this was unfortunate for the State of New South Wales (and for Western Australia before it) is open to discussion, but in some ways it was unfortunate for all of us on the basis that a direct comparison of statutory and common law methods of review was never carried through. Such an exercise might have placed further focus on important issues which have not been fully addressed with regard to the ADJR Act. These might have included whether a jurisdictional scope based on the presence of a 'decision … made under an enactment' is unduly narrow; whether the benefits of judicial review legislation are unacceptably limited by the capacity of the operation of such legislation to be excluded; whether a statutory scheme or a common law scheme[33] would be better placed to extend judicial review's coverage to the performance of public functions by private bodies; whether codification retards the development of judicial review (to the extent that the statute is not amended to take account of common law developments or to make its own advances); and the desirability or otherwise of allowing a statutory scheme to offer different standards of review to the common law. These are just examples, and I do not argue that the last chance to discuss them has passed. However, the decisions of Western Australia and, particularly, New South Wales not to proceed with statutory reform of judicial review did amount to a lost chance to debate the value of statutory judicial review at a time when legislative minds were focused by the promise of impending statutory developments on the subject.

The ADJR Act at 40: report card

I have been privileged in recent years to have been asked to speak at a number of 40th birthday celebrations. I count myself fortunate that this is the first time I have ever found it necessary to consider aloud whether 40 years marks the point at which the experiment must be said to have failed and should be followed by immediate 'repeal'. The fact that I do so now is excused somewhat by the fact that I am far from the first to speculate that all[34] or

most[35] of the ADJR Act might be repealed. Furthermore, since I have never been asked to celebrate the 40th birthday of a former child star or racehorse, this is the first time I have been in a position to repeat the speculation of others[36] that the honoree peaked in its first decade and has been in decline since.

It is often supposed that the ADJR Act offers significant advantages over common law procedures, as it was of course intended to do. I say with genuine respect to both parties that the ADJR Act has had no fonder admirer, judicial or otherwise, than Justice Michael Kirby, who described the Act's effects as being 'overwhelmingly beneficial'[37] and endorsed the description of the Act (used by the Attorney-General in his second reading speech) as 'one of the most important Australian legal reforms of the last century'.[38] The results, from which Kirby J dissented in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[39] and *Griffith University v Tang*[40] are examples of the shortcomings of statutory schemes generally and demonstrate at the very least the fragility of the benefits and reforms so lauded by his Honour.

Professor John McMillan credited the ADJR Act's 'marked and positive influence on law and administration' to the fact that 'it provides a clear and coherent structure for judicial review'.[41] This is true, although I generally beg leave to doubt the related and frequently made claim that the grounds of review enumerated in ss 5, 6 and 7 have any significant 'educative effect'.[42] As a list, the grounds of judicial review mean little at best (before his elevation to the High Court, Stephen Gageler SC referred to 'the now almost forgotten list of grounds in the ADJR Act'[43]) and, at worst, are actively misleading. After all, they include terms of art such as 'natural justice', which must be a mystery to the uninitiated, and various terms that do not share the meaning which they carry in English as it is usually understood. These include references to 'an *improper* exercise of … power' (meaning 'unauthorised' and having nothing to do with propriety) and to '*irrelevant*' and '*relevant*' considerations (meaning 'forbidden' and 'mandatory' respectively and having nothing to do with relevance). Perhaps most notoriously, judicial review refers to exercises of power 'so *unreasonable* that no reasonable person could have so exercised the power'. What this actually means is a never-ending source of impassioned debate in administrative law circles. Gageler thought this common law formula, repeated in the ADJR Act, to be 'well-understood and frequently repeated'.[44] While the latter claim is beyond dispute, it is perhaps only the effect of the language which is 'well-understood'.[45] In any case, there is consensus that *unreasonableness* in the administrative law sense has nothing to do with reasonableness in the usual fashion). At least the common law 'no evidence' ground does what it says on the tin — something which the equivalent ground in the ADJR Act cannot claim.[46]

The advantages of the ADJR Act are supposed to be particularly apparent in regard to accessibility, remedial flexibility and the right to obtain reasons. I have already considered the last of these benefits at length. Additionally, I will not now consider in any detail the belief that ADJR is a more accessible judicial review mechanism than its constitutional or common law equivalents.[47] The least that can be said of such a claim is that it was certainly the intention of those who drafted the Act that it should be so. Any doubts about the veracity of such a claim spring from the restricted jurisdictional formulation which sees review under the ADJR Act limited to 'decisions … made under an enactment'. A judicial review scheme can, after all, only be considered accessible to the extent that it allows people to bring claims. The ADJR Act, for all its benefits, is drafted more narrowly than the common law mechanism.

The 'flexible and expanded remedial framework'[48] which is apparent on the face of the ADJR Act is often assumed to operate in its intended fashion, but that effect has not fully been borne out in fact. For example, s 16(1)(a) provides a court which hears an application under the Act with the discretion to make 'an order quashing or setting aside the decision, or a part

of the decision, with *effect from the date of the order or from such earlier or later date as the court specifies*'.[49]

In *Wattmaster Alco Pty Ltd v Button*,[50] Pincus J held that an anti-dumping duty had been paid under an invalid customs declaration but elected to set aside that declaration under s 16(1)(a) from the date of the Court's decision rather than from the earlier date of the declaration itself. His Honour noted the difference between the 'apparently unfettered discretion' to fix the date from which an order becomes operative under the Act and the substantively different situation under the general law, and held that:

> prima facie the setting aside should be operative from the date of the court's decision; a party desiring the specification of a different date must demonstrate the propriety of that course.[51]

There are difficulties with reading s 16(1)(a) in that fashion, and these were pointed out on appeal.[52] Sheppard and Wilcox JJ (with whom Fox J agreed on this point) held that the drafting of s 16(1)(a) was 'intended to do no more than to indicate that the Court has a choice from all the available possibilities: the date of the order, an earlier date or a later date'.[53] With respect, that is the preferable view. Furthermore, their Honours noted that there is no particular difficulty with making an administrative act or decision a nullity from a date other than that on which the act or decision first demonstrated jurisdictional error,[54] although to do so would be unusual in a general law order.[55]

Sheppard and Wilcox JJ agreed with Pincus J's initial observation that setting the date from which an order under s 16(1)(a) takes effect is left 'entirely' to the Court's discretion but denied that the Act imposes any presumption as to the exercise of that discretion or that either party bears an onus to demonstrate why a particular date is appropriate.[56] The Court's choice of a date should be guided only by the justice of the individual case. The Full Court therefore set aside the decision of Pincus J to nullify the relevant unlawful declaration only from the date of his decision rather than from the date of the declaration itself.[57] Its reasoning was guided heavily by general law considerations and had the practical effect of keeping the ADJR remedial scheme closer to that which would have been available under s 39B of the *Judiciary Act 1903* (Cth).[58]

Notwithstanding this apparent reluctance to apply a remedial discretion which does not exist at common law, retrospective nullification is occasionally withheld from applicants under the ADJR Act. In *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*,[59] the Full Federal Court held that a nursing home's status as an 'approved provider' was able to be restored but that, since it had never alleged the presence of a jurisdictional error or sought to have the cancellation of its status declared a nullity, any such restoration could be prospective only. Again, this is a case which might be seen to hobble the ADJR Act to a significant extent, since the general law application of judicial review remedies essentially overrules a statutory regime whose whole point, successfully realised for 'the first decade or so' of its operation,[60] was to operate beyond the limitations of jurisdictional error.[61]

Still later, the Full Federal Court in *Grass v Minister for Immigration and Border Protection*[62] suggested in obiter dicta that, had it been asked to consider the scope of ADJR s 16(1)(a), it would have considered it arguable that:

> in empowering the Court to fix a date which is earlier, or later, than the date of the Court's judgment, s 16(1)(a) does not authorise the Court to fix a date which preserves a decision it has found to be unlawful, especially where the error identified is of a jurisdictional kind. We do not consider *Wattmaster* or *Jadwan* are determinative on this point.[63]

The logic of their Honours' suggested approach is clear, with respect. It does, however, indicate the continuation of the slide of ADJR's remedial provisions towards those of the

common law. The virtual omnipresence of jurisdictional error as a driving concept in judicial review[64] appears now to extend to the ADJR Act, with which it once, by design, had nothing to do.

The flexibility of the ADJR Act remains considerable but falls prey to the same problems as any other codified legislative scheme: it is still a scheme realised through a legislative instrument which is interpreted by the courts in the same way as any other legislative instrument. The years of confusion created by the words 'under an enactment' — before the High Court imposed a solution[65] which was perhaps only marginally less confusing but had the clear benefit of at least being definitive — is an example. The result in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[66] is another. The judgement of Gleeson CJ made clear that AWBI, which was the beneficiary of a legislative scheme which allowed it to succeed in the case before him, nonetheless held a 'virtual or at least potential statutory monopoly in the bulk export of wheat … which is seen as being not only in the interests of wheat growers generally, but also in the national interest'.[67] That fact was insufficient to bring AWBI within the scope of the ADJR Act.

Conclusions

The ADJR Act is far from perfect. I would argue that for every benefit, such as the capacity to obtain statements of reasons, there is the much larger disbenefit that the ADJR Act is drafted in such narrow terms that it excludes a significant proportion of otherwise deserving claims. Rather than expanding upon the common law judicial review regime, it has taken on many of its more difficult features (such as the prominence of jurisdictional error) within a narrower scope.

To return to the beginning of this article, one could hardly say that the ADJR Act is in its prime but neither do its parents have any right to feel disappointed in it. It is neglect which bears a large share of the blame for putting the ADJR Act in its current state. It has been infrequently amended in substance, with the result that, over 35 years since common law courts were first able to review vice-regal decisions,[68] the same still cannot be done under the ADJR Act.[69]

The indifference of successive governments to reforming the ADJR Act, compounded by the current government's effective (but non-legislative) disbanding of the ARC, has resulted in the ADJR Act becoming stale. It has gone from being the preferred method of seeking judicial review in Commonwealth matters to being something of an afterthought. A colleague once told me that, having just published a book on judicial review in the mid-1980s, he was upbraided by a judge who asked why my colleague had bothered to spend so many pages talking about s 75(v) of the *Constitution* and the Federal Court's jurisdiction under s 39B of the Judiciary Act when it was clear to the meanest intelligence that only the ADJR Act mattered now. Such a statement seems today like the bizarre relic of a lost world.

The ADJR Act is an experiment worth persevering with, but we cannot expect more of a statute into which no effort towards reform is placed. Its 40th birthday need not be another stage in inevitable further decline. However, legislative energy is going to have to be spent if we are truly to be able to say of the ADJR Act that 'life begins (again) at 40'.

Endnotes

1 Administrative Review Council, *Federal Judicial Review in Australia* (2012).
2 Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 94.
3 See Australian National University, '40th Anniversary of the Federal Court of Australia', 8 and 9 September 2017, <https://law.anu.edu.au/sites/all/files/media/documents/events/2017_federal_court_web.pdf>.

4 Parliamentary Paper No 144 (1971).
5 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; cf Justice Michael Kirby, 'Accountability and the Right to Reasons', and Michael Taggart, 'Osmond in the High Court of Australia: Missed Opportunity' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 36 and 53 respectively.
6 Justice JR Kerr et al, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971 (Kerr Committee Report) (1971), [94]. See also ibid [266] and [390] (Recommendation 8).
7 Parliamentary Paper No 56 (1973).
8 RJ Ellicott, FJ Mahoney and LJ McAuley, *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973 (Ellicott Committee Report) (1973), [34]–[38].
9 See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 13, 13A and 14, and sch 2.
10 Another like provision appears in the *Ombudsman Act 1976* (Cth) s 15(2)(e), which states: 'Where the Ombudsman is of the opinion … that reasons should have been, but were not, given for a decision to which this section applies … the Ombudsman shall report accordingly to the Department or prescribed authority concerned'.
11 *Administrative Appeals Tribunal Act 1975* (Cth) s 28. Where an applicant is able to obtain a statement of reasons under this section of the Administrative Appeals Tribunal Act, the relevant decision is not one to which ADJR s 13 applies: *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(11).
12 Commonwealth, *Parliamentary Debates*, House of Representatives, 1395 (RJ Ellicott QC).
13 Ibid 1396.
14 (2013) 249 CLR 332.
15 See *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [75] (McHugh and Gummow JJ).
16 [1891] AC 173.
17 (1936) 55 CLR 499.
18 (1949) 78 CLR 353.
19 (1963) 109 CLR 467.
20 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
21 A related example is where rules of court enable a court in proceedings commenced against a public authority to compel that authority to provide reasons for the challenged decision; see, for example, *Uniform Civil Procedure Rules 2005* (NSW), r 59.9.
22 There are in fact many statutes beyond the ADJR Act which entitle people to obtain reasons from decision-makers. The *Acts Interpretation Act 1901* (Cth) s 25D ties the interpretation of such provisions to s 13 of the ADJR Act.
23 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 213.
24 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135]; and *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, [99].
25 The *Administrative Law Act 1978* (Vic) operates on a completely different model to the ADJR Act: see Matthew Groves, 'Should the Administrative Law Act 1978 (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451.
26 *Administrative Decisions (Judicial Review) Act 1989* (ACT).
27 *Judicial Review Act 1991* (Qld).
28 *Judicial Review Act 2000* (Tas). Tasmania is conducting a review of its legislation.
29 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531.
30 See Gageler, above n 2, 95.
31 Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions*, Final Report — Project No 95 (2002).
32 NSW Government Department of Justice and Attorney-General, *Discussion Paper: Reform of Judicial Review in NSW* (March 2011) <www.justice.nsw.gov.au/justicepolicy/Documents/reform_of_judicial_review_in_nsw_discussion_paper.pdf>.
33 As to the Commonwealth, see Janina Boughey and Greg Weeks, '"Officers of the Commonwealth" in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316.
34 Indeed, there was a statement of dissenting views from the ARC's report, above n 1, by Roger Wilkins AO (recorded in 'Appendix A: Jurisdictional Limits Model — Directions to Decision') which argued strongly that the ADJR Act should be repealed. See Kathleen Foley and Kateena O'Gorman, 'Constitutional Writ Review and the ADJR Act: Ships in the Night?' in Debra Mortimer (ed), *Administrative Justice and its Availability* (Federation Press, 2015) 172, 175. That sole dissent accurately represents the push to repeal ADJR: present and visible, but very much in the minority.
35 See Aronson, above n 23, 213–14.
36 Peter Billings and Anthony Cassimatis, 'Australia's Codification of Judicial Review: Has the Legislative Effort Been Worth It?' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 180, 183.
37 *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [94]. His Honour simultaneously alleged that the ADJR Act had to some extent 'retarded' the development of

the common law of judicial review in Australia, something that Professor Aronson has denied: Aronson, above n 23.

38 *Griffith University v Tang* (2005) 221 CLR 99 [133].
39 (2003) 216 CLR 277.
40 (2005) 221 CLR 99.
41 John McMillan, 'Restoring the ADJR Act in Federal Judicial Review' (2012) 71 *AIAL Forum* 12, 12.
42 Aronson, above n 23, 214.
43 Gageler, above n 2, 105.
44 Ibid 94.
45 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [377–78] (Gageler J).
46 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(h) and 5(3). There was no shortage of submissions suggesting that this demonstrably confusing ground be amended: Administrative Review Council, above n 1, [7.68]–[7.79]. The ARC recommended changes in Recommendation 8, ultimately to no effect.
47 McMillan, above n 41, 12.
48 Administrative Review Council, above n 1, [4.19]. The areas in which s 16 exceeds the 'amplitude of [the remedial] … power' held by general law courts are set out in Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 4th ed, 2015), [17.8.2].
49 (1986) 8 FCR 471.
50 Emphasis added.
51 *Wattmaster Alco Pty Ltd v Button* (1986) 8 FCR 471 at 480.
52 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, [255]–[256] (Sheppard and Wilcox JJ).
53 Ibid [256].
54 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017), [10.20]–[10.30].
55 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253 [256].
56 If the order does not stipulate a date, it is assumed under s 16(1)(a) that the operative date is the date of the order itself.
57 See, however, criticism of the Full Court's lack of clarity in this regard: *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 [18] (Gray and Downes JJ).
58 (2003) 145 FCR 1.
59 There were also some practical issues around the fact that the appellant had already paid substantial sums of import duty, under protest, on the authority of the invalid order: Aronson, Groves and Weeks, above n 54, [10.365].
60 Gageler, above n 2, 96.
61 (2015) 231 FCR 128 (Perram, Yates and Mortimer JJ).
62 However, there is an argument that the same reasoning will come into effect whenever an applicant seeks an order that the decision under challenge was not 'made under' the enactment in question: *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 [17]; and Aronson, Groves and Weeks, above n 54, [2.410].
63 *Grass v Minister for Immigration and Border Protection* (2015) 231 FCR 128, 146–47.
64 See, for example, JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.
65 (2003) 216 CLR 277.
66 *Griffith University v Tang* (2005) 221 CLR 99 [130–31] (Gummow, Callinan and Heydon JJ).
67 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 27 [290].
68 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
69 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3 ('decision to which this Act applies').