
F O C U S

The AD(JR) Act: a decade later

'Ideally, an efficiently functioning administrative review system can help to oil the wheels of an economy. It can do this by providing forums for the equitable resolution of disputes and protection of rights, at a reasonable cost and expeditiously. And, of course, an efficiently functioning system can protect civil liberties.'

Senator Peter Walsh,
Minister for Finance,
May 1987.

The Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act) was the third major piece of legislation in the innovative administrative review package introduced by the Commonwealth in the 1970s. The first two components of the package - the Administrative Appeals Tribunal Act 1975 and the Ombudsman Act 1976 - were in operation by mid 1977; but the AD(JR) Act did not commence until late 1980.

In April 1977 the then Attorney-General, Mr Robert Ellicott, speaking on the AD(JR) Bill, outlined the government's intentions for the new Bill to the House of Representatives:

'What the present Bill seeks to do is to establish a single simple form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions as an alternative to the present cumbersome and technical procedures for review by way of prerogative writ, or the present actions for a declaration or injunction...Judicial review by the Federal Court of Australia will not be concerned at all with the merits of the decision or action under review. The only question for the Court will be whether the action is lawful, in the sense that it is within the power conferred on the relevant Minister or official or body, that prescribed procedures have been followed and that general rules of law, such as conformity to the principles of natural justice, have been observed. The court will not be able to substitute its own decision for that of the person or body whose action is being challenged in the court. It will be empowered to enjoin action or to quash a decision it finds unlawful and to direct action to be taken in accordance with the law. It will also be able to compel action by a person or body who has not acted, but who ought to have done so.' (Hansard, 28 April 1977, pp.1394-5)

The reforms had bipartisan political support but provoked a mixed reaction among the bureaucracy. Many government agencies sought exemption from the operation of the AD(JR) Act. As a

result, though the Act was assented to in June 1977 its commencement was delayed for 3 years while claims for exemptions were decided. The outcome was Schedules 1 and 2 to the Act (added by the Administrative Decisions (Judicial Review) Amendment Act 1980), which listed classes of decisions which were not reviewable under the AD(JR) Act and those which were exempt from the requirement under section 13 of that Act to give statements of reasons for decisions.

The requirement under section 13 for decision-makers to give reasons, on request, for their decisions (Admin Review 16:22-24) was one of the most wide-ranging reforms introduced by the AD(JR) Act. Other significant features were the Act's comprehensive codification of the grounds for review (sections 5-7) and its introduction of a relatively simple procedure whereby aggrieved persons could obtain review. The Act also broke new ground in giving the Federal Court sole jurisdiction and in removing the previous jurisdiction of State courts to review Commonwealth decisions or action. Overall, the AD(JR) Act has operated effectively and use of it has steadily increased. This has been the case in particular where alternative avenues of review, such as the Administrative Appeals Tribunal, are not available.

In June 1983 the Council, at the request of the Attorney-General, commenced a major examination of the operation of the AD(JR) Act. The report of stage 1 of this project, which dealt with alleged abuses of the Act, was tabled in the Parliament in November 1986. The Council on several occasions also reported to the Attorney-General on proposals to exempt certain decisions from all or part of the AD(JR) Act.

The Council's most recent study, a draft report entitled 'Review of the AD(JR) Act: redefining the Act's ambit', was released on 30 June 1988 and is currently under discussion with interested parties. As its title indicates, it examines the general scope of the Act. The paper is not a Council report. It has been prepared by the Council's Secretariat in consultation with a Council committee, for discussion purposes only. The Council will be seeking to provide a report to the government following receipt of submissions on the draft report.

Though the AD(JR) Act provides an accessible procedure for challenging administrative decisions which have the capacity to affect a person's rights or interests, significant areas of administrative action remain to which the Act does not extend. These are areas which do not fall within the present definition of a decision to which the Act applies. Decisions outside the Act's ambit include decisions not taken under an enactment and decisions excluded from the Act by Schedule 1. To obtain review of such decisions the applicant must approach either the High Court or the Federal Court in its prerogative writ jurisdiction under section 39B of the Judiciary Act 1903. Decisions of the Governor-General are also excluded from the ambit of the Act, which was enacted at a time when it was not clear whether such decisions could be reviewed by the courts. It is now established that decisions of the Governor-General are reviewable on the same basis as those of Ministers.

The draft report questions whether the continuation of two separate avenues of review to the same court can be justified in either logic or principle. It suggests that it might be preferable to broaden the scope of the AD(JR) Act to include decisions which at present are subject to review only by the complex and costly means that the AD(JR) Act was designed to overcome. Specifically, it recommends that the Act be extended to include decisions of the Governor-General and non-statutory decisions, and that the practice of excluding decisions from the Act be discontinued.

The proposed change is not particularly remarkable, since judicial review of administrative action in the Federal sphere is entrenched in the Constitution. The main effect would be to allow the reformation in judicial review brought about by the Act to apply to areas currently reviewable only under an older and more complex system. The draft report thus proposes rationalisation of the manner in which judicial review currently is provided, so that it becomes more cost-effective, but does not propose an extension of judicial review to decisions not presently reviewable by the prerogative writs.

The draft report proposes that Schedule 1 to the AD(JR) Act be repealed. It argues that there is no basis for excluding from judicial review under the Act decisions which can be reviewed in the same court under another judicial review regime. Either all judicial review in the Federal Court should be subject to the same exclusions or there should be no exclusions.

In suggesting that the Act ought to cover decisions presently reviewable only by means of the prerogative writs and decisions of the Governor-General, the draft report recognises that the non-justiciable nature of particular decisions may render them inappropriate for judicial review in certain circumstances. Draft recommendation 3 proposes the addition to the Act of a provision requiring the Federal Court to refuse an application for review if it regards the decision concerned as non-justiciable.

The draft Report emphasises that section 13 of the AD(JR) Act, the requirement to provide statements of reasons on request, may not be appropriate in all cases which now are covered only by prerogative writs. The Council proposes to address this question in the next stage of its review of the Act.

Chapter 5 of the draft report examines the concept 'decision of an administrative character made under an enactment', which is central to the present scope of review under the AD(JR) Act. The draft proposes to allow review of a report or recommendation whether or not a decision is made or is required on the basis of it. Chapter 5 also considers whether the Act should be extended to decisions of a delegated legislative character. It concludes that the Act should not be extended in this way, but invites comments on whether a statutory consultative procedure should be established before such decisions are made.

Chapters 6 and 7 deal with overlapping judicial remedies and the exclusion of State Supreme Courts from review of Commonwealth administrative action. Chapter 6 concludes that the discretion

of the Federal Court under section 10 of the Act provides a sufficient mechanism for dealing with potential problems of overlapping remedies. Nonetheless, it suggests the rationalisation of certain appeal and review provisions to improve the overall coherence of the Commonwealth review system.

Another issue raised in the draft report is whether decisions of judges of the Family Court and of members of the Conciliation and Arbitration Commission should be excluded if the Act is expanded to apply to 'decisions of an officer of the Commonwealth' (paras 109, 113 and 150).

The Council has invited submissions on the issues and proposed recommendations in the draft report to be forwarded to the Council Secretariat by Friday 9 September 1988. Those who are unable to respond by that date should contact the Secretariat on (062) 434696.

R E G U L A R R E P O R T S

Administrative Review Council

LETTERS OF ADVICE

Since the May 1988 issue of Admin Review the Council has provided the Attorney-General with several letters of advice. They addressed the following issues:

- . referral of matters between the Ombudsman and the AAT;
- . the appropriate body to conduct review on the merits of decisions under the proposed Commonwealth companies scheme (see also Admin Review 16:25);
- . the proposed transfer of functions of the Publications Review Board of the ACT to the AAT.

CURRENT WORK PROGRAM - DEVELOPMENTS

Access to administrative review. In the May 1988 Economic Statement the government announced that the Department of Social Security's review officer system was to be abolished and replaced with a new system of full-time area review officers. Since this pre-empted the Council's project on the existing review officer system, the Council decided to discontinue the project as it stood but to incorporate some of the material it had obtained in its monitoring of the new system.

Review of the AD(JR) Act Stage 2. The AD(JR) Act Committee's draft report on review of the AD(JR) Act has now been released (see Focus, pp.46-9). The Council met with practitioners in Melbourne to discuss the report, prior to the Council meeting on