ADMINISTRATIVE LAW

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Administrative Decisions (Judicial Review) Act 1977 (Cth)

The *ADJR Act* made three major changes to the law that existed prior to its enactment. The Act:

- **simplified procedures for seeking judicial review;**
- **"codified" the common law grounds of review.**
  - note that two of the 'codified' grounds are broader than their common law equivalents – error of law and no evidence grounds (see e.g. *Minister for Immigration and Multicultural Affairs v Rajamanikkam*).
  - The codified grounds are set out in sections 5 and 6 of the *ADJR Act*.
  - Kirby J complained in his judgment in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) that "[t]o some extent the development of the common law of judicial review in Australia was retarded by the enactment of the ADJR Act in 1977" [157].
- **provided a right to reasons in respect of certain government decisions.**

The *AD(JR) Act* was intended to provide legality, not merits review. The Act allows review of Commonwealth government powers – it does not apply to exercises of power under state legislation (s 3 definition of "enactment").

The Federal Court and the Federal Circuit Court generally conduct reviews under the Act - see ss 8 and 3 *ADJR Act*. Note s 18A and the potential role of the Family Court.

- <u>Relationship with other remedies</u>

Common law and equitable remedies were not removed by the *AD(JR) Act* - see s 10.

There are cases where *Act* review is not available (due to technical limitations regarding the scope of the Act), but where prerogative writs or declarations are. If there is doubt over the applicability of the *Act* then it is advisable to make applications under both the *Act* and the traditional remedies (Rule 31.01 provides that applications can be made together).

Judicial review options before the Federal Court:

- review the exercise of power under the *ADJR Act*;
- review the exercise of power relying on a prerogative writ pursuant to s 75(5) Constitution;
- Review relying on an equitable remedy of declaration or injunction; or
- A combination of the above

- <u>Historical Application</u>

Following the enactment of the *AD(JR) Act*, most cases of judicial review in the federal sphere in the 1980's involved applications under that Act.

- Kirby J observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* that the "effects of the ADJR Act were overwhelmingly beneficial and review of federal administrative action was more commonly pursued under that Act than had been the case under the earlier common law."

However, in the early 2000s this trend was disrupted, and Aronson, Groves and Weeks note that s39B is "often pleaded cumulatively and in the alternative" to claims under the Act.

- The large increase in section 39B applications appears to reflect changes in 2004-2006 in migration review arrangements (through *Migration* Act) which made judicial review more difficult.

- <u>Criticisms</u>

The technical limitations on the availability of the *ADJR Act* has prompted some to question whether the *ADJR Act* should be repealed.

Professor Aronson recommends significant changes to the *ADJR Act*. The 2012 ARC Report did not call for the repeal of the *ADJR Act*, and it also recommended a number of important amendments.

A significant recommendation was that s75(v) style applications be incorporated into the *ADJR Act* (see Chapter 4 and Recommendation 1 of the Report). The ARC did not, however, recommend any equivalent extension to the right to reasons.

- Requirements to claim under the *AD(JR) Act*

For each application, the person must have:

- Standing
- An application with regards to a "decision to which the Act applies"
- A ground for review

1. For a decision

Per section 5(1):

A person who is **aggrieved** by **a decision to which this Act applies** that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the **following grounds**:

2. For conduct

Per section 6(1):

Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of **making a decision to which this Act applies**, a person who is **aggrieved** by the conduct may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the conduct on any one or more of the **following grounds**:

3. For failure to act

Per section 7(1):

Where:

a. a person has a duty to **make a decision to which this Act applies**;

b. there is no law that prescribes a period within which the person is required to make that decision; and

c. the person has failed to make that decision;

a person who is **aggrieved** by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the failure to make the decision on the ground that there has been **unreasonable delay** in making the decision.

Subsection 2 applies where there is a prescribed period within which the decision must be made. A person may apply for an order of review on the grounds that the person had a duty to make the decision notwithstanding the expiration period.

Judicial Review Act 1991 (Qld)

The *JR Act* made three major changes to the law that existed prior to its enactment. The Act:

- **simplified procedures for seeking judicial review;**
- **"codified" the common law grounds of review** (Pt 3)
- **provided a right to reasons in respect of certain government decisions** (Pt 4)

The *Act* authorises judicial review on grounds of legality. In the words of the Queensland Attorney-General "...it is not the (Supreme) Court's task to review the merits of an administrative decision" (see also *Hoffman v Queensland Local Government Superannuation* Board). The Act allows review of state government powers – it does not apply to exercises of power under state legislation (ss 4 and 3).

The Queensland Supreme Court reviews under the Act - see ss 19 and definition of "court" in s 3.

Section 16 of the Act makes clear that if a provision of the *AD(JR)* expresses an idea in particular words, and a provision of that Act appears to express the same idea but uses different words, the ideas must not be taken to be different merely because different words are used.

- Relationship with other remedies

There are a number of applications which may be made for administrative/judicial review in Queensland, including:

- Statutory order of review, per part 3 of the Act
- Review resulting in a prerogative order, per part 5 of the Act
- An application under both part 3 and part 5 can be combined together (Rule 568 *UCPR*)
- Combined pt 3 and pt 5 review
- Traditional equitable remedies e.g. declarations or injunctions in supreme court's inherent jurisdiction

- Requirements to claim under the *JR Act*

For each application, the person must have:

- Standing
- An application with regards to a "decision to which the Act applies"
- A ground for review

1. For a decision

Per s 20(1):

A person who is **aggrieved** by a **decision to which this Act applies** may apply to the court for a statutory order of review in relation to the decision.

(2) The application may be made on any 1 or more of the **following grounds**—

2. For conduct

Per s 21(1):

If a person has engaged, is engaging, or proposes to engage, in **conduct for the purpose of making a decision to which this Act applies** (whether by the person engaging in the conduct or by another person), a person who is **aggrieved** by the conduct may apply to the court for a statutory order of review in relation to the conduct.

(2)The application may be made on any 1 or more of the **following grounds**—

Per s 8, conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including

a. the taking of evidence; or
b. the holding of an inquiry or investigation.

3. For failure to act

Per s 22(1):

If—

a. a person has a duty to **make a decision to which this Act applies**; and
b. there is no law that fixes a period within which the person is required to make the decision; and
c. the person has failed to make the decision;

a person who is **aggrieved** by the failure of the person to make the decision may apply to the court for a statutory order of review in relation to the failure to make the decision on the **ground that there has been unreasonable delay in making the decision.**

Subsection 2 applies where there is a prescribed period within which the decision must be made. A person may apply for an order of review on the grounds that the person had a duty to make the decision notwithstanding the expiration period.

Contrasting the Judicial Review Acts

Significant differences between Federal and State Act appear to occur for one of two reasons:

- changes in administrative law which have occurred between 1977 and 1991.
    - E.g. decisions of the Governor-General are not reviewable under the *ADJR Act* but decisions of the Qld Governor are reviewable under Part 3 of the *JR Act*; and
- The Queensland legislature has sought to avoid perceived problems with the *ADJR Act* or the law generally - see, e.g., s4(b) *and* s49 and 50 of the *JR Act*.

Differences include:

- Broadening of a decision to which this Act applies to include decisions made under non-statutory instruments (note that an application under this section (4(b)) has not yet been successful).

Statutory Review

The following are the jurisdictional requirements for an application under either of the judicial review Acts. Note that they do not apply regarding an application not under the Acts (i.e. under s 75(5)), with the exception of the standing requirements.

Jurisdictional Requirements

Decision to which this Act applies

Note that the elements required to establish "cannot be construed in isolation. They are interrelated. Each informs the meaning and content of the others" – *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) [116] per Kirby J.

1. **Under Which Act?**

- *JR Act*

Section 4 of the Act defines "decision to which this Act applies" as:

a. a **decision** of an **administrative character** made, proposed to be made, or required to be made, **under an enactment** (whether or not in the exercise of a discretion); or
b. a **decision** of an **administrative character** made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority **under a non-statutory scheme or program** involving funds that are provided or obtained (in whole or part)—
    i. out of amounts appropriated by Parliament; or
    ii. from a tax, charge, fee or levy authorised by or under an enactment.

- *AD(JR) Act*

Section 3(1) defines decision to which this act applies as a decision of an administrative character made, proposed to be made, or required to be made:

- under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or
- by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment;

other than:

- a decision by the Governor-General; or
- a decision included in any of the classes of decisions set out in Schedule 1.

Decision

Per s 5 of the *JR Act* and s 3(2) of the *AD(JR) Act*, a decision will include:

a. making, suspending, revoking or refusing to make an order, award or determination; or
b. giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; or
c. issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; or
d. imposing a condition or restriction; or
e. making a declaration, demand or requirement; or
f. retaining, or refusing to deliver up, an article; or
g. doing or refusing to do anything else;

and a reference to a failure to make a decision is to be construed accordingly.

- This list of decisions has been used to give 'decision to which the Act applies' a broad understanding - *Lamb v Moss* (note that the HCA has not given such a broad meaning to the term, nonetheless, the section still helps in understanding scope).

Per s 6 *JR* and s 3(3) *ADJR*, if a provision is made by an enactment for the making of a report or recommendation, such report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

- The federal provision has been narrowly construed (*Edelsten v Health Insurance Commission*).
    - The enactment must specifically make the report or recommendation a condition precedent to making of subsequent decision.
- However, some Queensland suggest a more liberal interpretation of the *JR* provision – *Wells v Carmody*, cf *Vega Vega v Hoyle*.

- Is the decision a preliminary decision?

The general rule is that a preliminary decision will be reviewable if it is **substantive** and if **provided for by an enactment** (*Australian Broadcasting Tribunal v Bond*, per Mason CJ). Note that the preliminary decision may be implied by an enactment (*Minister for Immigration and Ethnic Affairs v Mayer).*

	Action	**Determination**
Procedural	This is conduct and is reviewable per s 21 *JR Act*; s 6 *AD(JR) Act*, if it provided for by an enactment.	This is neither conduct nor a decision. It is unreviewable.
Substantive		This is a decision which is reviewable per s 20 *JR Act*; s 5 *AD(JR) Act*, if provided for by an enactment.

Australian Broadcasting Tribunal v Bond

- Facts: Concerned an inquiry by the Australian Broadcasting Tribunal into whether or not to suspend or impose conditions on the radio and television licences held by companies effectively controlled by Alan Bond.
  The main question under the *Broadcasting Act 1942* for the Tribunal was whether to cancel or impose conditions on the corporate licences held by the Bond companies. The statute required the Tribunal to consider whether the companies were fit and proper "persons" to hold the licences. The Tribunal's determination on that question was actually reached by considering the following preliminary questions:
    1. Was Bond a fit and proper person to hold a licence? Concluded, no.
    2. Did Bond control the corporate licensees? Concluded, yes.
    3. Were the corporate licensees fit and proper persons to hold licences? Concluded no as a result of the former conclusions.
       Finally, should the Tribunal cancel or impose conditions of the broadcast licences granted to Bond's companies? This ultimate decision had not yet been made.

  The critical question was whether the Tribunal's "decision" that Mr Bond was not a fit and proper person was a "decision" for the purposes of the *ADJR Act.*

- Ratio: A decision will have the following features: **provision is made for the decision under an enactment, it is generally final/operative/determinative, and it is a substantive determination.** The strict criteria are that the decision is provided for by an enactment and that it is substantive.
- Held: the decision was not reviewable, as there was nothing in the *Broadcast Act* providing that a person must be a fit and proper person. However, it was a substantive decision.

Where there is a preliminary decision which is not reviewable, this does not mean that there is no avenue for review. Mason CJ suggests that if there is an operative decision made, review of that decision will expose the reasons for the decision and the process by which it is made.

This test must be modified in the Queensland context because of section 4(b).

- Policy concerns

There were a number of policy concerns enumerate in *Bond*: