

COMMERCIAL BAR JUDICIAL REVIEW SEMINAR

Overview of Judicial Review mechanisms available in the Federal Court

Introduction

1. The following brief discussion is aimed at providing an overview of the judicial review mechanisms available in the Federal Court which your clients might want to use to challenge a decision of the Federal Executive government.
2. There are 4 main mechanisms by which decisions of the Commonwealth Executive Government can be reviewed by the courts. The first arises under s 75(v) of *The Constitution* and I do not intend to cover that today. The second and third arise under the *Judiciary Act 1903* (Cth) and the fourth under the *Administrative Decision (Judicial Review) Act 1977* (Cth) (the *ADJR Act*).
3. Each has its benefits and, depending on the circumstances, one path may be more suitable than the other.

Section 39B(1) and (1A)(c)

4. Section 39B(1) of the *Judiciary Act*, introduced in 1983, gives the Federal Court jurisdiction similar to the High Court's jurisdiction under s 75(v) of the Australian Constitution. Essentially s 39B(1) the *Judiciary Act* allows people affected by decision-making by an "officer of the Commonwealth" to have those decisions reviewed through two of the common law writs or an Injunction.
5. The two common law writs (also known as prerogative writs or constitutional writs) available under s 39B(1) are Mandamus and Prohibition. A third remedy provided under s 39B(1) is Injunction. Certiorari and Declaration may also be available as ancillary remedies.
6. In 1997, s 39(1A) was added to the Judiciary Act and paragraph (c) gives the Federal Court jurisdiction "in any matter... arising under any laws made by the Parliament", substantially broadening and liberalising the availability of s 39B and no longer tying it to particular forms of relief or a particular kind of respondent (an officer of the Commonwealth).
7. To succeed in an application under s 39B(1) or s 39B(1A)(c), an applicant must show that some error of law in the decision-making process that infects the decision itself such that it cannot be regarded to have been made according to law. This is known as jurisdictional error.
8. For example, imagine you had a client who sought a licence from a Commonwealth agency. Prior to putting in the application, your client ensured that every detail of their application and all criteria for the grant of licence had been addressed. The application was lodged and rejected. Your client asked for reasons (perhaps under s 13 of the *ADJR Act*) and discovered that the agency applied the wrong test, or acted upon a mistaken assumption or opinion as to the existence of a certain fact when the Act makes the validity of the decision contingent on the actual existence of that fact.

9. This kind of error goes to jurisdiction and, if the Federal Court is satisfied that the error was made, the Court is empowered by s 39B(1) to issue Mandamus, Prohibition or an Injunction to remedy the error. The Court might also grant Certiorari or a Declaration as a form of ancillary relief. The Federal Court can issue any of those remedies if its jurisdiction under s 39B(1A)(c) is invoked.
10. To access a remedy, your client would have to make an originating application, stating grounds for the application – namely, a jurisdictional error by the decision maker (the scope of jurisdictional error has been significantly broadened in recent years). The central argument before the judge will be about whether or not a jurisdictional error does exist.
11. In the ordinary course of a successful application, a court will not remake the decision for the Commonwealth agency, but most likely will quash (set aside) the decision and remit the decision to be made “according to law”, that is in accordance with the Court’s judgment. The relevant remedies in that type of case would be Certiorari to quash the decision and Mandamus to require the decision to be made again according to law. Declaration and Prohibition are relevant in different circumstances.
12. The law about the common law writs is ever developing and very technical. Because of its technical nature there have been many reforms since the mid-20th century designed to make review of administrative decisions more straight forward. The introduction of the ADJR Act is one such reform.

ADJR

13. The *ADJR Act* is the alternate pathway for judicial review of Commonwealth Government decisions in the Federal Court. It was developed to streamline the review of Commonwealth administrative decisions.
14. The ADJR approach to judicial review differs from the *Judiciary Act*.
15. First, the grounds for review are codified. Sections 5, 6 and 7 each contain a list of grounds relating to decisions that have been made, decisions that are being made and decisions that are yet to be made.
16. The grounds of review in the *ADJR Act* are similar to the common law grounds for review, but it is not necessary to establish jurisdictional error. The grounds of review available under the ADJR Act include breach of the rules of natural justice, the procedures required by law for the making of the decision were not observed, the decision involved an error of law, the decision was affected by fraud, there was no evidence to make the decision or the decision was an improper exercise of power.
17. An improper exercise of power in turn includes references to failing to take into account relevant considerations, taking into account irrelevant considerations, exercising the power unreasonably or in bad faith.
18. Second, the *ADJR Act* simplified the review process by giving applicants a right to reasons for administrative decisions, giving courts the power to more flexibly tailor remedies and generally simplifying the review process.

19. The remedies available under s 16 of the *ADJR Act* are similar to the prerogative writs, but are framed with greater flexibility and in plain language. For example, s 16(1)(d) empowers the Court to direct “the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing of which the Court considers necessary to do justice between them”.
20. While the *ADJR Act* in many respects provides a more flexible and comprehensible pathway for litigants, the Act has a number of difficulties not present in s 39B.
21. First, there are relatively short statutory time limits on *ADJR Act* applications – 28 days from notification of the decision or of the reasons for the decision (whichever is the later).
22. Second, in order for administrative behaviour to be reviewable it must be either “a decision” or “conduct for the purpose of making a decision” to which the *ADJR Act* applies – namely, “a decision of an administrative character made... under enactment, other than a decision by the Governor-General or a decision... set out in Schedule 1.”
23. If a case relates to a decision not made under enactment then the litigant may be deprived of a remedy before getting to the point of showing a legal error in the decision. Further, Schedule 1 contains a list of non-ADJR reviewable decisions, which include decisions made under a range of Commonwealth legislation, including for example, decisions made under legislation in the fields of industrial law and taxation. For those decisions, the only avenue for review in the Federal Court is s 39B of the *Judiciary Act*.
24. Some of those limitations have led to practitioners, who were once enthusiastic about *ADJR Act* review, once again turning to the prerogative writs and s 39B to meet their client’s needs.
25. Because of the limitations in either review pathway, it is now quite common to see applications that rely on both s 39B of the *Judiciary Act* and the *ADJR Act*. For example, if a decision might not have been made under enactment, the alternative review mechanism may still provide a pathway to relief.

And if your application is successful?

26. There is of course no guarantee that, if the decision which adversely affects your client is set aside, a different outcome will be achieved following the re-making of the decision. For example, a breach of the rules of procedural fairness may be cured by giving our client an opportunity to comment on an adverse matter, without those comments leading to a different decision. However, despite difficulties in tracking through the ‘success rates’ of applicants post-remittal, a 2004 study of judicial review outcomes showed the majority of government losses were followed by substantive decisions in the challengers’ favour (see R Creyke and J McMillan, “Judicial Review Outcomes – An Empirical Study” (2004) 11 AJAL 82).

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Further reading:

- M Aronson & M Groves, *Judicial Review of Administrative Action*, 5th Edition, 2013
- Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50, 2012.
- R Creyke and J McMillan, "Judicial Review Outcomes – An Empirical Study" (2004) 11 AJAL 82
- A Robertson, "The administrative law jurisdiction of the Federal Court – Is the AD(JR) Act still important?" (2003) 24 *Aust Bar Review* 89.