

## Using Judicial Review – 2 Examples

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1. Judicial review is sometimes described as the exercise, by a Court, of its supervisory jurisdiction.
  - 1.1. The Court focuses on the question whether a governmental decision is affected by legal error – such as a failure to follow the right process, a failure to address the statutory agenda, a failure to take into account considerations that the relevant statute demanded should be taken into account.
  - 1.2. Apart from isolated exceptions (very rare cases of *Wednesbury* unreasonableness), judicial review is not concerned with the quality, or the merits, of the governmental decision.
2. If the Court grants a remedy, judicial review is essentially negative: the most common order is one quashing or setting aside the decision under review, usually accompanied by remittal of the matter to the initial decision-maker for further consideration according to law. The Court will not re-make the decision, or substitute a decision that the Court thinks would be preferable.
3. Judicial review in the Federal Court can be used by an applicant to protect itself from the legal effects of a governmental decision. The applicant can use the essentially negative character of judicial review as a form of a shield. The first case I want to discuss today, *ANZ Banking Group Ltd v Konza*, was an attempt (only partially successful) to use the protective effect of judicial review, so as to keep the Commissioner for Taxation from reading the Bank's records.
4. Judicial review can also be used by an applicant to destroy a governmental decision. The second case I want to discuss today, *WA Land Authority (Landcorp) v Minister for Sustainability etc*, was an attempt (successful in the short term) to destroy a decision that threatened to stop Landcorp's development of land.
5. Initially, judicial review in the Federal Court was based on the 1977 ADJR Act – developed as part of the new administrative law reform package (along with the AAT and the Ombudsman).
6. The ADJR Act was very soon encumbered by a series of technical restrictions on its operation. In 1983, s 39B was added to the Judiciary Act, to give the Federal Court the same jurisdiction as the High Court's jurisdiction under

s 75(v) of the Constitution, to overcome some of the restrictions on the ADJR Act's operation. When that proved inadequate, s 39B(1A) was added in 1997. In particular, paragraph (c) of s 39B(1A) has proved to be a flexible and adequate foundation for judicial review of a wide range of governmental decisions.

***ANZ Banking Group Ltd v Konza***

**[2012] FCA 196; (2012) 289 ALR 286 (Lander J)**

**[2012] FCAFC 127; (2012) 206 FCR 450 (Kenny, Edmonds and Robertson JJ)**

7. The Commissioner of Taxation, through a delegate, issued two notices under s 264(1) of the ITAA 1936. The notices required the ANZ Bank to provide information about customers who had accounts with it or any of its subsidiaries in Vanuatu. That information was stored in Melbourne, having been sent regularly from Vanuatu to the ANZ Bank's electronic information system.
8. The Bank argued that:
  - 8.1. the notices were not authorised by s 264(1);
  - 8.2. the decision to issue the notices involved an error of law, was contrary to law and involved an improper exercise of power; and
  - 8.3. the notices were uncertain.
9. The Bank based the application on:
  - 9.1. Judiciary Act, s 39B(1) ... because the delegate (Mr Konza) was "an officer of the Commonwealth" and they were seeking prohibition to prevent the enforcement of the notices;
  - 9.2. Judiciary Act, s 39B(1A)(c) ... because the controversy (the "matter") arose under a law made by the Commonwealth Parliament – ITAA 1936, s 264(1); and
  - 9.3. ADJR Act ... because the Bank claimed that the decision to issue the notices was infected by the types of errors identified in s 5(1)(d), (e), (f) and (j) of the ADJR Act.
    - s 5(1)(d) ... "the decision was not authorized by [s 264]";
    - s 5(1)(e) ... "the making of the decision was an improper exercise of the power conferred by [s 264]" because the decision involved "an exercise of a power for a purpose other than a purpose for which

the power is conferred” within s 5(2)(c), and “the result of the exercise of the power is uncertain” within s 5(2)(h);

- s 5(1)(f) ... “the decision involved an error of law”; and
- s 5(1)(j) ... “e decision was otherwise contrary to law”.

10. There were two broad attempts to limit s 264(1).

10.1. First, the Bank claimed that s 264(1) could not breach the obligation of confidentiality owed by a banker to a customer ... rejected by the primary Judge and the Full Court.

10.2. Second, the Bank claimed that s 264(1) could not oblige a person to provide information if doing so would be an offence under the law of another country ... rejected by the primary Judge and the Full Court, because:

- provision of the information in Australia would not, as a matter of fact, breach Vanuatu’s bank secrecy laws; and
- in any event, foreign laws could not override s 264(1).

11. The Bank also argued that the notices had been issued for an improper purpose because they sought information about persons not liable to the assessment and payment of Australian income tax. That argument was rejected by the primary Judge and the Full Court, because s 264(1) was a broad investigatory power designed to assist the Commissioner in deciding whether there might be a tax liability.

12. Finally, the Bank argued that the notices were uncertain because the notices used terms that the Bank said were not clear, or required the Bank to apply the law of a number of different countries to work out what information it needed to supply to the Commissioner. The primary Judge and the Full Court found the first notice was not uncertain, but the Full Court found that the second notice was uncertain and therefore invalid.

13. The Full Court used the power in s 16(1)(a) of the ADJR Act to set aside the second notice, but otherwise confirmed the primary judge’s orders.

***WA Land Authority (Landcorp) v Minister for Sustainability, Environment, Water, Population and Communities***

**[2012] FCA 226; (2012) 291 ALR 52 (Gilmour J)**

14. The Minister’s delegate decided that Landcorp’s residential, retail and office development proposal was “controlled action” for the purposes of the EPBC Act because it would have a significant impact on a listed threatened species – Carnaby’s Black Cockatoo; consequently, the development could not proceed until it passed through an assessment of that impact.
15. Landcorp asked the Minister to reconsider that decision; another delegate confirmed the decision, acting under s 78C of the EPBC Act; and Landcorp applied to the Federal Court for an order quashing that decision.
16. Again, the application to the Federal Court was based on s 39B(1) and (1A) of the Judiciary Act and the ADJR Act. As the case proceeded, only the ADJR Act claims were developed: it was not controversial that the confirmation decision was “a decision of an administrative character made under an enactment”.
17. Several grounds of challenge were advanced by Landcorp. In the end, Gilmour J rejected two grounds but upheld one ground – that the Minister’s delegate had denied Landcorp natural justice (or procedural fairness) by not disclosing to Landcorp three matters that influenced the confirmation decision –
  - 17.1. documents reflecting the Department’s accumulated knowledge and approach to assessing proposed actions (that is, accumulated over more than 10 years of decision-making);
  - 17.2. information about other developments in the area; and
  - 17.3. an assumption made by the delegate that an expert report provided by Landcorp was deficient as to the basis upon which the report rested.
18. Landcorp’s success was built on the basic proposition, well established in Australian administrative law, articulated in the landmark case, *Kioa v West* 159 CLR 550 at 629, adopted by Gilmour J at [127]:
 

Once it is accepted that a person’s interest may be seriously affected by the exercise of a statutory power, an opportunity ought ordinarily be given to that person concerned to respond to adverse information that is credible, relevant and significant to the decision to be made.
19. In the result, Gilmour J used the power in s 16(1)(a) and (b) of the ADJR Act to quash the reconsideration decision and refer the matter to the Minister for reconsideration according to law.