ADMINISTRATIVE REVIEW COUNCIL: FEDERAL JUDICIAL REVIEW IN AUSTRALIA

On 24 September 2012 the Administrative Review Council released its Report No. 50, *Federal Judicial Review in Australia*. The Report is available on the Council's website, http://www.arc.ag.gov.au.

The Council has previously considered the topic of judicial review in 1986, 1989 and 1991. Since those reports were made, there have been significant changes in Australia's federal judicial review landscape, in particular in the growth of constitutional review under section 75(v) of the *Constitution* and its mirror provision, s39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). In view of these changes, it was considered timely to review the current state of judicial review in Australia, with a view to improving its effectiveness and accessibility.

The Council commenced this project in late 2010, and conducted extensive consultation throughout 2011. In addition to the 23 formal submissions received in response to the consultation paper (released in April 2011), the Council met with a number of academics, lawyers, government officials and experts in the field. It also obtained statistical data from the Federal Court and Federal Magistrates Court to assist in building an accurate picture of litigation trends in judicial review.

A Government response to the Council's report will be prepared in 2013.

Key findings

The Council draws two key conclusions about the current state of judicial review. First, it considers that the divergence between constitutional review and review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) is undesirable. For example, statutory judicial review only applies to 'decisions made under an enactment', whereas constitutional review applies more broadly. Similarly, there are a number of decisions which are specifically exempt from review under the *ADJR Act*, but which are not exempt from constitutional review. This can be confusing for applicants and can also create anomalies, as the procedure, standing and remedial rules depend on whether constitutional or statutory judicial review is sought.

Second, and in light of the above, the Council considers that the *ADJR Act* should be the primary avenue for federal judicial review. The *ADJR Act* offers a clear and simple procedure, effective rights of review and flexible and appropriate remedies, all underpinned by a right to written reasons. These features helped to change the face of judicial review in Australia when the Act was introduced in the 1970s. Over the intervening years they have played a role in improving the overall quality of government decision making and they remain relevant today. The recommendations, therefore, aim to restore the *ADJR Act* to a central place in the judicial review system.

Recommended model for judicial review

To achieve its aim of restoring the primacy of the *ADJR Act*, the Council proposes expanding the ambit of that Act to match the constitutional jurisdiction for review. The central recommendation of the Report is that a new section be included in the *ADJR Act* to allow an

application to be made under that Act whereby a person would otherwise be able to initiate proceedings in the High Court under s75(v) of the *Constitution*.

Following this model, the grounds and reasons provisions in the *ADJR Act* would not be available to a person bringing an application under this section. The right to review would be established by reference to the constitutional jurisdiction, with jurisdictional error as the threshold requirement. However, the simple procedure and flexible remedies in the *ADJR Act* would be available, making this an accessible and convenient alternative to review under s39B(1) of the *Judiciary Act*.

The expanded *ADJR Act* would be subject to some limited exceptions, including decisions about criminal justice matters, decisions under the Scheme for Compensation for Detriment caused by Defective Administrative, and some decisions made by the Governor-General.

Existing separate statutory arrangements for judicial review would also remain, namely the avenue for AAT appeals to the Federal Court in s44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), the separate scheme for taxation decisions, and Part 8 of the *Migration Act 1958* (Cth) (which mirrors the constitutional review jurisdiction for migration decisions).

The Council would ultimately prefer migration decisions to be brought back under the *ADJR Act*. However, it acknowledges that return to this structure would have resourcing implications for the courts and the Government, and the Report makes no formal recommendation about these decisions.

In relation to *AAT Act* appeals and taxation decisions, the Council acknowledges that these schemes are well-established and equally as effective as the *ADJR Act*. Abolishing them at this stage would create uncertainty and would impair, rather than improve, the accessibility of review. However, as the existence of separate statutory schemes implicitly detracts from the central role of the *ADJR Act*, new separate statutory schemes should not be established unless exceptional circumstances exist.

The Council also encourages the Government to reduce and rationalise the existing exemptions from the *ADJR Act*, which are set out in Schedules 1 and 2 to the Act and in the Regulations. Categories of decisions should only be exempted from review under the *ADJR Act* where truly necessary. In this Report, the Council has identified a set of general principles to guide decisions about exemptions, and has also made specific recommendations in relation to each of the existing exemptions from the *ADJR Act*.

Improving accessibility and effectiveness

To support the model outlined above, the Council has made recommendations aimed at improving the accessibility and effectiveness of the *ADJR Act*. The Report considers each aspect of the *ADJR Act* in detail—the ambit of review, the right to seek review, grounds of review, the obligation to give reasons, remedies and court procedures. An outline of our recommendations on these topics is set out below.

To strengthen and clarify the availability of review under the *ADJR Act*, the Council recommends extending review to specified reports and recommendations. This would be accomplished by adding a Schedule to the Act, which could be amended by Regulation, listing the reports and recommendations to which the Act applies. This would both clarify the availability of review in relation to particular reports and recommendations, as well as potentially expanding the availability of review. For example, it would be possible to extend review to reports and recommendations prepared for the Government by a third party, which are currently beyond the reach of judicial review.

It also recommend clarifying the rules on standing to ensure that public interest organisations can bring applications under the *ADJR Act*. This could be modelled on the existing provisions in the *AAT Act*, which provide that an organisation may bring an application for review if the decision relates to a matter included in the objects or purposes of the organisation. Enabling public interest applications under the *ADJR Act* will help to ensure that judicial review remains effective—particularly where people affected by a decision do not have the resources to seek review, or where a decision has an impact on the community as a whole, such as decisions which affect the environment.

While the Council canvassed possible amendments to the list of grounds for review in the *ADJR Act*, and the introduction of 'general principles' to assist in interpreting these grounds, the Report ultimately recommends that the existing list be retained (with a minor amendment to clarify the operation of the 'no evidence' ground). This list remains a valuable guide for legal practitioners and government decision makers, and there was broad support among the groups consulted for a codified list of grounds.

In this Report the Council reaffirms the importance of the obligation to provide reasons in section 13 of the *ADJR Act*. This provision is a key mechanism underpinning the availability of review under the *ADJR Act*. The right to reasons ensures that a person affected by a government decision can understand how and why that decision was made. This not only facilitates challenge to the legality of the decision, it improves communication and understanding between those making decisions and those affected by them. The Report specifically recommends that, where possible, reasons should be recorded at the time of making the decision. To strengthen the obligation to provide reasons, it was also recommended that, where an agency fails to provide adequate reasons, the court should take this into account in determining costs in an *ADJR Act* proceeding.

The Council's recommended model would make the existing *ADJR Act* remedies available in most cases where the constitutional writs would otherwise be available. While the Council canvassed the possibility of including damages as an ancillary remedy under the *ADJR Act*, no recommendation was made on the proposal at this stage. However, in relation to costs orders, it was recommended that the *ADJR Act* be amended to specify that parties will bear their own costs, unless the court orders otherwise. Adverse costs can play a big role in discouraging people from pursuing their legal rights, particularly where an individual is considering legal action against a large government agency. This recommendation would go some way to addressing these concerns, while still enabling the court to make costs orders where appropriate.

The future of judicial review

The Council's recommendations in this Report aim to ensure that the primary avenue for people to seek judicial review is accessible, simple and effective. The recommended model would address the current fragmentation of the system, combining the convenience and flexibility of the *ADJR Act* with the broad availability and well-established principles of review in the constitutional jurisdiction.

Judicial review is a central feature of Australia's administrative law system, which upholds the lawful limits of executive power. It provides the individual aggrieved by a government decision with the means to challenge the lawfulness of that decision. A minimum guarantee of judicial review is enshrined in Australia's *Constitution* as a fundamental aspect of our democracy. The Council's Report aims to ensure that this guarantee is given form in a meaningful and accessible judicial review system.