The Courts

Scope of AD(JR) Act

In Mercantile Credits Ltd v Commissioner of Taxation (29 August 1985) the applicant sought an order of review in respect of decisions by the Commissioner refusing to issue certificates that certain loans complied with section 128H(2) of the Income Tax Assessment Act 1936. The decisions were said to be excluded from the scope of the AD(JR) Act under paragraph (e) of Schedule 1 to that Act. The Court held that the refusal to issue a certificate under section 128H was a decision affecting liability to payment of withholding tax, not a decision forming part of the process of making or leading to the making of the calculation of the tax and, therefore, was not within paragraph (e) of Schedule 1 to the Act. The fact that the applicant had exercised the right given under the Income Tax Assessment Act 1936 to have his objection referred to the State Supreme Court was not, in the circumstances, sufficient to warrant the Court declining to exercise jurisdiction in the matter, mainly because the question was one of law as to the application of the statutory provisions, and such a question could be dealt with by the Court expeditiously.

Review of Magistrate's Order

In Woss v Jacobsen and Zempilas (5 June 1985) seven warrants were issued by a Queensland Magistrate on seven charges of conspiracy to defraud the Commonwealth. The warrants were endorsed under the Service and Execution of Process Act 1901 for execution in Woss' home State, Western Australia. Woss was brought before a WA Magistrate, Zempilas, who ordered Woss' return to Queensland in respect of two of the warrants. Woss applied for review of the order on the grounds that Zempilas had no jurisdiction under the Service and Execution of Process Act 1901 and that he improperly exercised the power under the Act because it was unreasonable for him to order Woss' return. The primary judge rejected the first argument and decided that it was inappropriate for the Federal Court to deal further with the matter, even though it had jurisdiction, because adequate provision was made in the Act for review of the decision in the State Supreme Court. Woss appealed to the Full Court of the Federal Court. The Full Court held that section 9 of the AD(JR) Act precluded State Courts from only

those reviews which are similar in nature to those described in section 9(2) and that they are not similar merely because they may result in the same types of orders. Further, review under section 10(2) of the AD(JR) Act had a wider meaning than in section 9 and a review under section 19 of the Service and Execution of Process Act 1901 was not a review under section 9 but is within section 10(2). As this was also the conclusion of the primary judge, the appellant could succeed only if he showed that the primary judge had erred in exercising his discretion. This had not been shown and the appeal was dismissed.

Expert Committees and Natural Justice

In Minister for Health v Thomson (14 June 1985), Thomson was found by the Medical Services Committee to have rendered excessive professional services under the Health Insurance Act 1973. The Minister subsequently decided to reprimand and fine Thomson. This decision was set aside by the Medical Services Review Tribunal on the basis that the reference to the Medical Services Committee was not in accordance with the terms of the Act. The primary judge agreed with the Tribunal. On appeal, the Full Court held that the departure from the Act would have had no effect. On natural justice, the Court held that the Committee of experts was entitled to rely on special knowledge arising from its expertise and act on its own views. The Court affirmed the Minister's decision.

Extension of time to appeal

In Brown v Tahmindjis & Ors (6 September 1985) an application for extension of time to appeal against the decision of Fox J. on 30 April 1985 (see [1985] 5 Admin Review 51) was refused by Bowen C.J. His Honour expressed the view that section 16(1) of the AD(JR) Act authorised the making of specific orders directing the Magistrate hearing committal proceedings to discharge a defendant in respect of the information and charge against him. He rejected the argument that the Court, in exercising its power under section 16(1), was limited to what could have been done at common law when reviewing an administrative decision under one of the prerogative writs.

Release from custody pending deportation hearing

In Long Dai Cuong v Minister for Immigration and Ethnic Affairs (10 July 1985) the applicant was a prohibited non-citizen who entered Australia illegally. The Court ordered that he be released from custody pending the hearing

and determination of an application for judicial review of the decision to deport him. The applicant's history of co-operation with the Department of Immigration and Ethnic Affairs since his apprehension, his work history and relationship with his de facto wife and her children were taken into account in ordering his release.

In Alpaslan & Anor v Minister for Immigration and Ethnic Affairs (16 July 1985) applications were pending before the Court for orders of review in respect of decisions to deport the first applicant and to refuse both applicants permanent resident status. The Court ordered the applicants' conditional release from custody pending reconsideration by the respondent of the decisions which were the subject of the applications. In so doing, the Court took into account the applicants' need for medical treatment and that the preparation of evidence to submit to the respondent could best be done if they were not in custody. The Court considered that the applicants were unlikely to abscond because they were each involved in other legal proceedings and required medical treatment.

Stay of deportation order

In Videto v Minister for Immigration and Ethnic Affairs (20 August 1985) the Court found that the applicant had shown that there was a serious question to be tried and granted a stay of a deportation order until determination of the application for review. However, the Court expressed strong reservations whether the "serious question" test, which applies in determining whether to grant interlocutory injunctive relief, was the appropriate test to apply under the AD(JR) Act. The Court expressed agreement with the views expressed by Mr Justice Jenkinson in Dallikavak v Minister for Immigration and Ethnic Affairs (6 August 1985) adopting with approval the principle suggested by Mr Justice Keely in Perkins v Cuthill (1981) 51 FLR 230 at 238: "section 15(1)(a) requires an applicant to satisfy the Court that reasons or circumstances exist which make it just that the Court should make the order sought".

Deportation

In Videto & Anor v Minister for Immigration and Ethnic Affairs (6 September 1985) an application for review of a decision to deport the first applicant was granted. The delegate who made the deportation decision based that decision on a written record of interview. The record of interview stated that the applicant did not claim to be eligible for change of status. The Court held that the record of interview was deficient in

not providing information to the delegate on the nature of Videto's relationship with his son and the delegate failed to enquire into the question whether Videto was eligible for change of status for humanitarian and compassionate reasons.

STATISTICS

Progressive statistics indicate significant increases in the use of the Act to challenge Broadcasting, Customs and Migration decisions.

Jurisdiction	No. Applications under AD(JR) Act				
	Oct 1980–Dec 1981	1982	1983	1984	1 Jan 1985–10 Oct 1985
Broadcasting and Television Act 1942	1	5	4	7	11
Compensation (Commonwealth Government Employees) Act 1971	5	4	5	3	2
Customs	3	9	6	35	34
Income Tax Assessment Act 1936	–	5	25	42	25
Migration Act 1958	14	26	33	36	48
Public Service Act 1922	7	31	15	12	6
Repatriation Act 1920	6	2	5	9	7
Telecommunications Act 1975	3	2	9	3	6
Other	41	34	62	77	45
Total	80	118	164	224	184

ADMINISTRATIVE LAW WATCH

Student Assistance Review Tribunal (SART)

Legislation was introduced into the Senate on 11 September 1985 which proposes significant changes, of an administrative nature, in the operation of the SARTs. The Council was not consulted before the legislation was introduced. The Bill proposes that the large number of existing Tribunals should be abolished and one Tribunal set up which, in effect, would comprise a pool of Convenors (formerly called Chairpersons) and members. It is expected that there would be one Convenor and a number of members in each State, and that Tribunals would be constituted out of this pool for the purpose of hearing individual appeals.

Other changes proposed would enable the appointment of acting Convenors, would allow the SART to remit matters to the Department for reconsideration in accordance with its directions or recommendations, and would provide for more flexible procedures regarding hearing notices.

These changes are contained in the Student Assistance Amendment Bill 1985. In introducing the Bill the Minister for Community Services, Senator Grimes, indicated that it was intended to reappoint all present Chairpersons and members of existing SARTs as Convenors and members of the new Tribunal. The Minister's second reading speech, which outlines the provisions of the Bill, may be found in Australian Senate, Hansard 11 September 1985, at pages 414–415.