INTRODUCTION

The modern development of judicial review in Australia can be traced back to the Commonwealth government’s administrative law reforms of the late 1970’s. These included the establishment of the Federal Court of Australia, the Administrative Appeals Tribunal and the office of Ombudsman. Most significantly, they involved the enactment of the Administrative Decisions (Judicial Review) Act 1977.

Thirty years on seems an appropriate time to review the current situation and plan for the future. In any event this seems to have been the attitude at both Commonwealth and State levels because the New South Wales Department of Justice and the Attorney General has this month issued a discussion paper titled “Reform of Judicial Review in NSW” and the Commonwealth Administrative Review Council is about to issue a consultation paper called “Judicial Review in Australia”.

The title proposed to me last year for this talk has turned out to be very apt.
RECENT HISTORY

Before looking at the future, it might be useful to look at the way judicial review has developed in recent years and where it now stands.

The administrative reforms of the 1970’s provided the most important influence on judicial review in recent times, but it is not the only significant influence. Another very significant matter is the contribution of the High Court and particularly its contribution with respect to what used to be called the prerogative writs, but are now called the constitutional writs. This development in the law is associated with the High Court’s well developed separation of powers doctrine. We should not forget, however, that developments are ultimately driven by cultural changes flowing from the ever increasing relevance of government decisions to the daily life of Australians. To an extent this reflects government intrusion in private affairs; but that is not all bad. The intrusion begins with the protection of the public interest through the regulation of activities which might harm individuals, such as the giving of bad financial advice. It extends to the raising of revenue and the redistribution of wealth through social security. Although beneficial, all these matters impact on the financial and personal interests of citizens. The increasing impact of government decision-making (of administrative decision-making) on citizens, has inevitably led to the development by the courts, and the government itself, of mechanisms for more and more scrutiny of the decisions. To an extent, the courts have simply been responding to these pressures and government activity which addresses them.

ORIGINS

The historic origin of judicial review of administrative action is to be found in the ancient prerogative writs of mandamus, prohibition and certiorari. The prerogative writs arose from the royal prerogative, or the monarch’s right or privilege over subjects. The writ was issued by the King’s Bench or Queen’s Bench division of the Royal Courts. Its use was closely associated with the rights of the Crown and particularly the prevention of encroachment upon those rights. Mandamus compelled the performance of a public duty; prohibition
prevented conduct outside jurisdiction and certiorari quashed past conduct for which there was no jurisdiction.

THE HIGH COURT OF AUSTRALIA

Section 75(v) of the Commonwealth Constitution confers jurisdiction on the High Court of Australia where “a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. For nearly a century these writs were known as the prerogative writs until the High Court, and particularly Gaudron and Gummow JJ, expressed the view in Re Refugee Review Tribunal; ex p Aala\(^1\) that the separation of powers mandated by the Constitution made the writs provided for in the Constitution fundamentally different to the prerogative writs which were associated with the executive or administrative power of the Crown. Henceforth, they should be called the constitutional writs.

The change in terminology did not, however, change the bases upon which the writs could be issued. For prohibition the basis was jurisdictional error or error of law on the face of the record.

The fundamental jurisdiction conferred on the High Court in s 75(v) to issue prerogative or constitutional writs is expanded by its s 75(iii) jurisdiction where “a person suing or being sued on behalf of the Commonwealth, is a party”. Section 33 of the Judiciary Act 1901 (Cth) further extends the jurisdiction of the High Court to issue public law remedies.

Although the limitations upon the issue of the constitutional writs continue to apply, two important factors have nevertheless permitted the reach of common law judicial review to expand. The first is the expansion of what amounts to jurisdictional error. Jurisdictional error has always been a slippery concept. It has now been relegated, at least, to secondary status in the United Kingdom\(^2\) because of this. The High Court has specifically avoided spelling out the content of jurisdictional error, although recognising the difficulty of

\(^1\) (2000) 204 CLR 82, 92-3.
distinguishing jurisdictional error from non-jurisdictional error. Broadly, jurisdictional error arises “if the decision-maker makes a decision outside the limits of the function and powers conferred on him or her, or does something which he or she lacks power to do”.

We know that breaches of the principles of procedural fairness amount to jurisdictional error as do failures to comply with the rules of evidence. This gives a flavour to the extent of jurisdictional error.

The second factor which has influenced the extent of judicial review in the High Court is the availability of alternative remedies which do not have the same limitations. Injunction and declaration are the prime illustrations. For example, the High Court has made a declaration that the Queensland Criminal Justice Commission failed to observe the requirements of procedural fairness when mandamus was inappropriate and certiorari did not lie.

In contrast to section 75(v), which confers jurisdiction by reference to remedies, s 75(iii) confers jurisdiction by reference to subject matter. Where the High Court has jurisdiction under s 75(iii) it is not limited in the remedies available to it. The Court can grant certiorari, for example. The Court is not powerless to grant certiorari, even under s 75(v), although the remedy will only be granted in aid of a remedy, such as prohibition, which the Court does have power to grant. The court can grant injunctions and make declarations.

The result is that notwithstanding the limits on the High Court’s jurisdiction it is unusual for deserving cases to go without remedy.

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3 Kirk v Industrial Court of NSW (2010) 239 CLR 531.
4 Aala, above n 1, 141 (Hayne J).
5 Craig v South Australia (1995) 184 CLR 163.
6 Kirk, above n 3.
The High Court has stood firmly against intruding into the merits of decisions.\textsuperscript{9} Curial review is confined to error of law. The High Court accordingly takes a narrow view of the ground of error of law which is most likely to stray into merits review. That is the ground of unreasonableness originating in the judgment of Lord Greene MR in \textit{Associated Provincial Picture Houses Ltd v Wednesbury Corporation}\textsuperscript{10}. The Court has rejected proportionality as a test of error of law.\textsuperscript{11} In the United Kingdom, by contrast, unreasonableness is measured on a spectrum of proportionality with the latter consideration now prevailing. While the High Court’s rigidity in confining judicial review to error of law is sourced in the separation of powers doctrine, some of its reluctance may be ascribed to the very significant level of merits review already available in Australia, at the Commonwealth level, through the Administrative Appeals Tribunal.

The result is that while the High Court may remain opposed to the correction of error in the merits of decisions it is a rare case of error of law that will go without a remedy. Indeed, error of law remains the primary ground for judicial review. Jurisdictional error is important because, as the basis for the issuing of the constitutional writs, its operation cannot be diminished by the legislature, again because of the separation of powers doctrine. So, in \textit{Plaintiff S157 v The Commonwealth},\textsuperscript{12} the Court held that an otherwise valid privative clause could not stand in the way of the Court’s jurisdiction to issue constitutional writs.

The remaining question for determination in connection with the High Court’s entrenched power to issue constitutional writs is whether or to what extent jurisdictional error is co-extensive with error of law. The effect of what the High Court has said is that it will deal with the issue incrementally. So far no significant area of error of law which does not involve jurisdictional error has emerged. Over the course of time the two may prove to be co-extensive. That appears to be the case in the United Kingdom.\textsuperscript{13} It strikes me as unlikely that

\textsuperscript{9} Attorney-General (NSW) \textit{v} Quin (1990) 170 CLR 1, 36 (Brennan J).
\textsuperscript{10} [1948] 1 KB 223.
\textsuperscript{12} \textit{Plaintiff S157}, above n 8.
\textsuperscript{13} \textit{Anisminic}, above n 2.
the High Court will find something that it labels as an error of law without finding that there is a remedy.

Jurisdictional error is, of course, based on error of law. The question is whether it is narrower than error of law. Accordingly, the High Court cases on jurisdictional error are also cases on error of law. The common law rules relating to judicial review of administrative decisions are well established. They apply where administrative action is not authorised or where the decision-maker misunderstands the authorisation or exceeds it. They require a fair hearing, both through an unbiased decision-maker and a fair process. They require the decision-maker to act on all materially significant matters and not to ignore significant matters. The action must involve a real exercise of discretion and the power must be exercised *bona fide*. Other, more detailed, descriptions of the requirements of the common law tend to be particulars of the more general powers.

This is where common law judicial review in the High Court stands today. However, the day to day basis for judicial review is found more in the Federal Court of Australia than in the High Court. Cases commenced in the High Court are almost always remitted to the Federal Court.¹⁴

**THE FEDERAL COURT OF AUSTRALIA**

Understanding judicial review in the High Court takes one a long way down the path of understanding common law judicial review in the Federal Court of Australia.

Section 39B(1) of the Judiciary Act re-enacts s 75(v) of the Constitution for the Federal Court. Section 39B(1A) also confers jurisdiction on the Federal Court “in any matter… arising under any laws made by the Parliament…”.

The common law jurisdiction of the Federal Court is accordingly at least as extensive as the jurisdiction of the High Court. For practical purposes the

¹⁴ s 44 *Judiciary Act 1903* (Cth).
question in applications for common law judicial review in the Federal Court is whether there has been an error of law by the administrative decision-maker.

**ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT**

In addition to its common law jurisdiction, the Federal Court also has statutory jurisdiction to undertake judicial review pursuant to the AD(JR) Act. The conferring of this jurisdiction on the Federal Court itself had a significant effect on the development of judicial review, including common law judicial review.

The AD(JR) Act did three important things:

1. It removed the technical requirements of the prerogative writs – review was available for error of law simpliciter. The remedies available were expanded. The principles relating to standing may have been simplified.

2. It set out in simple terms the grounds which would establish error of law (ss 5 & 6).

3. It imposed an obligation on most decision-makers to give reasons for their decisions (s 13).

The third of the requirements may have been the most significant. This is because the availability of grounds of review is often of no assistance unless the reasoning of the decision-maker has been exposed to enable it to be tested against the grounds.

The actual grounds of review (ss 5 & 6) are plain and easily comprehensible. They restated the existing common law. As Mason J said in *Kioa v West*:

“The statutory grounds of review enunciated in s 5(1) are not new – they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law.”

Indeed, in *Kioa v West* the High Court read the procedural fairness ground in s 5 as limited by the common law.

The continued existence of rights to judicial review at common law, alongside statutory rights of review, has inevitably tended to lead to decisions which equate the two. This is, of course, consistent with Kioa v West. Moreover, the convenience of the statement of grounds in the AD(JR) Act has tended to influence the common law grounds. Any tendency to stultify the grounds of review has in part been countered by the separate existence of the common law grounds, which are capable of development, and by the presence of a catch all ground in s 5(1)(j), namely, “that the decision is otherwise contrary to law”. It is not impossible, however, that the rigid statutory statement of the grounds, coupled with their being read as restating the common law, has lead to some limitation in the development of grounds of review both at common law, and under s 5. The reluctance of Australian courts to embrace want of proportionality as a ground, while firmly based in separation of powers considerations and their reluctance to enter the world of merits, may have been partly influenced by the presence of the ground of reasonableness in, and the absence of any concept of proportionality in, s 5.

The benefits of AD(JR) Act review are not, therefore, unqualified. That said, it seems to me that the benefits far outweigh the detriments. It is, of course, untidy to have complementary bases for judicial review which will require a court, at least notionally, to examine two claims in every case. In practice this does not generally add to time or cost, but it could. A system of jurisprudence in which one avenue will lead to a remedy and the other will not is not a system which will do justice, even according to law, in every case.

Other limitations on AD(JR) Act review have come from the limitation of review to “a decision of an administrative character made... under an enactment”16. Certain decisions are expressly excluded. These limitations, however, do not affect common law judicial review.

So what are the benefits? First, the AD(JR) Act casts a bright light over administrative decision-making. It is a mistake, of course, to think of the ambit

16 s 3(1) definition of “decision to which this Act applies".
of the Act as confined to its application to litigation in the Federal Court. The Act’s greatest influence is, of course, its influence on initial decision-making. It provides a guide to primary decision-makers. In that role, because of its simple characterization of the grounds of review, it must have had a significant impact. This benefit must extend to lawyers advising clients, because it provides a simple basis for that advice. I venture to suggest that administrative law would not have developed in Australia as it has, without the AD(JR) Act.

Secondly, the AD(JR) Act imposes an obligation to give reasons which will aid an application for common law judicial review as well as AD(JR) Act review. The Act has also developed its own jurisprudence which is regularly applied. Although applicants habitually frame their claim in the alternative under the Act and under s 39B this does not create real problems. As well as a negative aspect of alternative claims there is the positive aspect that where justice may not be achieved under the one, the remedy may be under the other.

Thirdly, the AD(JR) Act gives a much greater discretion in the remedies that may be granted than the common law does. In particular, decisions can be quashed or set aside “from the date of the order or from such earlier or later date as the court specifies”\(^\text{17}\). Problems of voidness versus invalidity do not arise. In addition, although questions of standing under the AD(JR) Act are not without their complexity (“a person who is aggrieved by a decision” may apply\(^\text{18}\)), they may not be as difficult to resolve as common law questions of standing.

The problems arising from the diversity of jurisdiction are, however, associated, not so much with the presence of the AD(JR) Act, but with the constitutional requirement that it must co-exist with common law judicial review. That bar is, of course, a vital protection of the role of the courts in supervising administrative decision-making. The proper resolution of the dilemma seems to me to be for common law judicial review to be kept for cases in which statutory review provides no remedy and cases in which legislation attempts to limit judicial review whether by privative clause or otherwise. The bulk of cases

\(^{17}\) s 16.
\(^{18}\) s 5(1).
should be dealt with under the AD(JR) Act. This is how, in practical terms, the cases are dealt with at the moment.

THE STATES

A number of the states have introduced parallel legislation to the AD(JR) Act. This has not happened, however, in New South Wales. Judicial review in New South Wales is confined to common law review. The Supreme Court of New South Wales has developed over many years a significant common law judicial review jurisprudence. The present Chief Justice has played a significant role in this jurisprudence in recent years. His decision in Bruce v Cole\(^{19}\) on excess of power, and whether the principle of proportionality has any role to play, comes to mind.

The most significant decision in recent years for judicial review in the states is, of course, Kirk v Industrial Court (NSW)\(^{20}\) in which the High Court held that the recognition by the Constitution of “Supreme Courts of the States”\(^{21}\) carried with it the recognition of the existence of a court with supervisory jurisdiction over executive power. Such power is a defining characteristic of the Courts as recognised in the Constitution and could not be interfered with by legislation.

THE 30 YEAR REVIEWS

Both the Commonwealth Administrative Review Council and the NSW Attorney General’s Department are examining judicial review. The state Attorney General’s Department has released a paper for discussion. The Administrative Review Council is about to do so.

At the Commonwealth level, the Administrative Review Council is particularly looking at the utility of separate routes for review. It asks whether there should be some adjustment of the relationship of the two jurisdictions. It asks whether

\(^{19}\) (1998) 45 NSWLR 163.
\(^{20}\) Kirk, above n 3.
\(^{21}\) s 73.
AD(JR) Act review has outlived its usefulness having regard to the significant and robust developments in common law judicial review.

The New South Wales Attorney General’s Department, on the other hand, asks whether an AD(JR) Act ought to be enacted in New South Wales. Had I addressed you a few years ago I would have said that any such legislation could modify or limit common law judicial review so that while no deserving case could go without a remedy claimants would not have to wrestle with the question of whether to raise two grounds or one. *Kirk*\(^{22}\) changed all that.

The New South Wales Attorney General’s Department’s discussion paper is available on its website (www.lawlink.nsw.gov.au). The Administrative Review Council consultation paper will be available shortly on its website (http://www.ag.gov.au/arc). Both papers discuss the current state of judicial review in Australia and seek submissions relating to reforms. I commend them to you, both as a convenient analysis of the law as it is today and because you may be able to make a submission which will affect judicial review in Australia tomorrow.

\(^{22}\) *Kirk*, above n 3.