JUDICIAL REVIEW: A JURISDICTIONAL LIMITS MODEL

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In its recent report the Administrative Review Council concluded that 'the primary issue facing the federal judicial review system is that in practice there are two systems of review.'[1] These are 'constitutional review' (under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903* (Cth)), and 'statutory review' (under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*). Unsurprisingly, the growing divergence between the two systems has caused confusion and overlap.

To address this divergence, there are two possible approaches. The first approach, preferred by the Council, is to amend the *ADJR Act* to align it more closely with the constitutional jurisdiction.

The second possible approach, which I personally support, is outlined in Appendix A to the *Report.* It would involve repealing the *ADJR Act* and instead relying solely on constitutional review, supplemented by statutory jurisdictional limits.

What is the jurisdictional limits model?

The jurisdictional limits model was originally suggested in a 2010 article[2] by Justice Stephen Gageler (then Commonwealth Solicitor-General).

Under this model, the *ADJR Act* would be repealed. Judicial review would only be available under section 75(v) of the *Constitution*, or under the mirror jurisdiction in section 39B of the *Judiciary Act*.

This would be supplemented by Parliament setting out in general terms the 'jurisdictional limits' on decision makers—that is, the limits on the power of executive officers to make decisions under statute. Like the grounds in the *ADJR Act*, these limits would reflect the common law expectations of decision makers. For example, the jurisdictional limits might require a decision maker to accord procedural fairness to those affected by the decision, or to follow any procedures required by law in making the decision.

The set of jurisdictional limits is a key feature of this model. Under the constitutional jurisdiction, judicial review is available for 'jurisdictional error' (where a decision maker exceeds his/her jurisdiction). The determination of jurisdictional limits is therefore central to the availability of review.

A clear legislative statement of jurisdictional limits would assist in determining whether a particular decision maker had exceeded his/her jurisdiction. It could be set out in an Act of

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general application, such as the *Acts Interpretation Act 1901* (Cth), and implied in every statute. Where appropriate, a particular statute could provide for more specific limits on decision makers' jurisdiction.

The jurisdictional limits would essentially play a role similar to the grounds of review in the *ADJR Act*, providing a clearly articulated and generally applicable threshold for judicial review.

What would the model look like?

The central features of the model would be:

- the repeal of the *ADJR Act* (although useful features, such as the right to reasons and the flexible remedies should be retained); and

- the development of a set of statutory jurisdictional limits.

There would be a number of ways of accomplishing this. For example, the Federal Court's jurisdiction in section 39B of the *Judiciary Act* could be moved to a new 'Judicial Review Act', which would also contain the right to reasons and remedies for review.

Alternatively, the remedies for review could be included alongside section 39B in the *Judiciary Act*, with the right to reasons also included here, or set out in other relevant legislation such as the *Freedom of Information Act*.

The jurisdictional limits could either be set out in the new 'Judicial Review Act' or included in the *Acts Interpretation Act 1901*, as originally suggested by Justice Gageler.

What are the advantages of a jurisdictional limits model?

The jurisdictional limits model offers a number of advantages.

A single system of judicial review

This model is the only one which would provide a single system of federal judicial review. Since constitutional review cannot be excluded, to truly achieve a fully unified system of review it would be necessary to repeal the *ADJR Act*.

In practical terms, this would not limit the availability of review; the constitutional review jurisdiction already encompasses and exceeds the scope of review under the *ADJR Act*. The only exceptions to this are review of decisions for non-jurisdictional errors of law and review of decisions made under enactment by persons who are not officers of the Commonwealth. However, both of these exceptions are limited, due to the common law development of these concepts.

A truly unified system of judicial review would arguably improve access to justice by removing the technicalities and confusion created by the availability of two slightly different systems of review.

In particular, this model would remove the need for a separate system for judicial review of migration decisions. This is important because review of migration decisions accounts for the vast majority of applications for judicial review. For example, in 2010–11, 1,213 judicial

review applications were made to the Federal Court and the Federal Magistrates Court in relation to migration decisions. During the same period only 44 applications were made under the *ADJR Act* and 32 under the *Judiciary Act*.[3]

Under the jurisdictional limits model, the scope and grounds of review would be the same for both judicial review and review of migration decisions. This would allow the coherent development of case law in relation to all Australian Government decision making.

Focus on decision makers, not review

Another advantage of the jurisdictional limits model is that it would shift the focus of judicial review from the review stage to the primary decision-making stage.

It has been suggested that the grounds for review in the *ADJR Act* play a significant role in communicating the standards for administrative decision making. In other words, the grounds are supposed to instruct decision makers on their role and powers, in addition to educating those affected by administrative decisions about their review rights.

Neither of these claims bears up well under close consideration. First, the *ADJR Act* grounds affect decision makers only indirectly, by setting out the circumstances in which their decisions may be reviewed. By contrast, a jurisdictional limits model would address decision makers directly by stating judicial review rules in terms of what the decision maker may and may not do.

Second, the *ADJR Act* grounds remain strongly reliant on the common law. As Mason J explained in *Kioa v West*,[4] it is a mistake to suppose that the grounds provide a right of review in relation to all administrative decisions. Rather, the applicability of a particular ground of review to a particular decision must be satisfied at common law before the *ADJR Act* may be engaged. For example, a decision may only be reviewed for compliance with the rules of natural justice where, at common law, the rules of natural justice apply to that decision.

Accordingly, the precise boundaries of the decision maker's power are determined not by the *ADJR Act*, but by limits implied (in the statute) by common law. The jurisdictional limits model would provide greater clarity to those seeking review, as the jurisdictional limits would apply to every administrative decision, unless the statute expressly excluded them.

By shifting the focus from the review process to the decision-making process, the jurisdictional limits model would provide better instruction to decision makers, encouraging better primary decision-making. It would also provide clearer signals to those considering a judicial review application, as to the availability of review.

Reduction of judicial review applications

A further (albeit somewhat speculative) benefit of the jurisdictional limits model would be a possible improvement in the number and quality of judicial review applications.

Such a result might flow from the greater clarity which this model provides. First by encouraging better primary decision making, the model would reduce overall demand for judicial review. Second, by providing clearer signals as to the availability of review, the model could reduce the number of misguided or speculative applications.

A reduction in the judicial review caseload would lessen public expenditure on these matters, as well as improving access to justice by freeing precious court resources for other matters.

Conclusion

The jurisdictional limits model would require a fundamental shift in thinking about judicial review. In essence, the model involves redesigning many of the innovations of the *ADJR Act*, but with a focus on incorporating these into the constitutional review jurisdiction.

- Like the *ADJR Act*, this model seeks to give clear guidance to decision makers about the exercise of statutory power, as well as clearer signals to applicants about the availability of review.

- Like the *ADJR Act*, this model includes a right to reasons, which underpins judicial review, and it offers flexible remedies.

- Like the *ADJR Act*, this model would provide flexibility to determine which limits should be applicable to which decisions. Unlike the *ADJR Act*, however, this would be achieved without sacrificing clarity.

The jurisdictional limits model would provide a complete solution to the problem of bifurcation in our current judicial review system. While the *ADJR Act* embodies a number of excellent developments in administrative law, the *Act* itself is increasingly irrelevant. By salvaging what is useful from the *ADJR Act* and building that into a model centred on the constitutional writs, the jurisdictional limits model would provide the best of both jurisdictions in a single accessible system.

Endnotes

1 Administrative Review Council, *Federal Judicial Review in Australia*, 2012, 72.
2 (2010) 17 *Australian Journal of Administrative Law* 92, 105.
3 Administrative Review Council, *Federal Judicial Review in Australia*, 2012, 66–68.
4 159 CLR 550, 576–77.