

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

PETER ROGER SHERGOLD, AS DELEGATE
OF PETER KEASTON REITH, MINISTER OF
STATE FOR EMPLOYMENT, WORKPLACE
RELATIONS AND SMALL BUSINESS

APPELLANT

AND

LINDSAY TANNER

RESPONDENT

Shergold v Tanner
[2002] HCA 19
23 May 2002
M63/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

A L Cavanough QC with W A Harris for the appellant (instructed by Australian Government Solicitor)

K H Bell QC with S G E McLeish for the respondent (instructed by Maurice Blackburn Cashman)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Shergold v Tanner

Administrative Law (Cth) – Judicial review – Freedom of information – Documents affecting relations between the Commonwealth and a State – Internal working documents of an agency, a Minister or the Government of the Commonwealth – Refusal of access to documents in respect of which Minister's delegate issued certificates pursuant to ss 33A(2) and 36(3) of the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") – FOI Act provides that, subject to Pt VI of the Act, certificates, while in force, "establish conclusively" that disclosure would be contrary to public interest or that documents are exempt documents and do not contain matter the disclosure of which would be in the public interest – Whether "conclusive evidence" provisions impliedly amend conferral of jurisdiction on the Federal Court by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") or by the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") – Whether issue of certificates reviewable by the Federal Court under the ADJR Act or the Judiciary Act.

Federal Court of Australia – Jurisdiction – Whether Court's jurisdiction under ADJR Act or the Judiciary Act impliedly limited by "conclusive evidence" provisions of the FOI Act – Whether jurisdiction conferred by the ADJR Act and the Judiciary Act extends to judicial review of decision to issue certificates under ss 33A(2) and 36(3) of the FOI Act.

Statutes – Interpretation – Conferral of jurisdiction upon a court – Whether later legislation withdraws or limits conferral of jurisdiction – Need for clear and unmistakable implication to have such effect.

Commonwealth Constitution, s 77(i).

Freedom of Information Act 1982 (Cth), ss 11, 33A, 36.

Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 5, 8.

Judiciary Act 1903 (Cth), s 39B.

Administrative Appeals Tribunal Act 1975 (Cth).

Ombudsman Act 1976 (Cth).

- 1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The issues arising in this appeal turn upon the interrelationship between various items of legislation of the Commonwealth which make significant provision in the area of public law.

The federal system of administrative law

- 2 The legislation is, on the one hand, the *Freedom of Information Act* 1982 (Cth) ("the FOI Act") and, on the other, the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"), the *Ombudsman Act* 1976 (Cth) ("the Ombudsman Act") and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). The ADJR Act operates in addition to the jurisdiction of this Court conferred by s 75 of the Constitution with respect to judicial review; a significant measure of the s 75(v) jurisdiction is also conferred on the Federal Court by s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

- 3 The AAT Act, the Ombudsman Act and the ADJR Act set up the framework for the federal system of administrative law and followed detailed consideration of the subject over many years, particularly by the Kerr Committee Report¹, the Bland Committee Interim Report², the Bland Committee Final Report³ and the Ellicott Committee Report⁴. On introducing the Bill for the ADJR Act, the Attorney-General, Mr Ellicott QC said⁵:

"It will thus be seen that the 3 avenues of review, appeal on the merits to the Administrative Appeals Tribunal ['the AAT'], investigation by the Commonwealth Ombudsman, and judicial review by the Federal

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- 1 *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971.
- 2 *Interim Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 of 1973.
- 3 *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No 316 of 1973.
- 4 *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973.
- 5 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 April 1977 at 1395.

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Court of Australia, provide different approaches to the remedying of grievances about Commonwealth administrative action. Each has its own place in a comprehensive scheme for the redress of grievances."

4 The FOI Act provides for the making of various decisions of an administrative nature for which one or more of the three avenues of review is open. It is the Federal Court, operating under the ADJR Act, with whose jurisdiction this appeal particularly is concerned. The "conclusive evidence" provisions in certain sections of the FOI Act are said by the appellant to foreclose any avenue of review under the ADJR Act, or under s 39B of the Judiciary Act.

The facts

5 The respondent at the relevant time was a member of the House of Representatives holding the position of Shadow Minister for Transport in the Federal Opposition, with primary responsibility for representing the Federal Opposition on matters relating to the waterfront. On 17 December 1997, he made a request to the Department of Employment, Workplace Relations and Small Business ("the Department") for access to documents, being reports arising from certain consultancies on waterfront reform. The appellant was the Principal Officer and Secretary of the Department.

6 Section 11 of the FOI Act provides that, subject to that statute, "every person has a legally enforceable right to obtain access in accordance with this Act to ... a document of an agency, other than an exempt document". The expressions "document of an agency" and "agency" are defined in s 4(1) in terms which include the Department.

7 The request by the respondent was refused on 16 February 1998 and that refusal then was the subject of an internal review under s 54 of the FOI Act. Section 54 is in Pt VI (ss 53-66) which is headed "Review of decisions". The Deputy Secretary of the Department, Mr R Stewart-Crompton, on 20 April 1998 affirmed the decision to refuse access to most of the contents of the reports sought by the respondent.

8 Thereafter, on 30 April 1998, the respondent applied under s 55 of the FOI Act to the AAT for a review of the Deputy Secretary's decision. Then, by instrument dated 27 August 1998, the Minister delegated his powers under certain provisions of the FOI Act, including ss 33A and 36, to the appellant as the Principal Officer of the Department. Sections 33A(6) and 36(8) confer upon the responsible Minister of an agency a power of delegation and the effect of s 33A(7) and s 36(9) respectively is that the exercise of power by a delegate is

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deemed to have been performed by the responsible Minister. On or about 30 December 1998, the appellant issued what were stated to be certificates under ss 36(3) and 33A(2) of the FOI Act in respect of the documents. This step was taken at a time when the hearing of the review by the AAT had been fixed for 10 February 1999.

The applicable legislation

9 Sections 33A and 36 are included in Pt IV (ss 32-47A) of the FOI Act, which is headed "Exempt documents". The term "exempt document" is defined in s 4(1) in terms which include the documents to which Pt IV applies. Section 33A is concerned with documents affecting relations between the Commonwealth and a State and s 36 with internal working documents of an agency, a Minister or the Government of the Commonwealth.

10 Section 33A does not apply to a document "in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest" (s 33A(5)). Subject to that caveat, sub-s (1) of s 33A classifies as an exempt document one whose disclosure under the FOI Act "would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State" (s 33A(1)(a)). Exemption also is conferred in respect of documents which, again subject to sub-s (5), "would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth" (s 33A(1)(b)).

11 Section 33A(2) states:

"Where a Minister is satisfied that a document:

- (a) is an exempt document for a reason referred to in subsection (1); and
- (b) is not a document containing matter the disclosure of which under this Act would be, on balance, in the public interest;

the Minister may sign a certificate to that effect, specifying that reason."

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12 Section 36(1) provides:

"Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act:

(a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and

(b) would be contrary to the public interest."

13 Provision with respect to the issue and conclusiveness of certificates is made in s 36(3). This states:

"Where a Minister is satisfied, in relation to a document to which paragraph (1)(a) applies, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that effect (specifying the ground of public interest in relation to which the certificate is given) *and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively* that the disclosure of that document would be contrary to the public interest." (emphasis added)

14 With respect to the conclusiveness of certificates issued under s 33A, provision is made in a separate sub-section. Section 33A(2A) provides:

"Subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the document:

(a) is an exempt document referred to in subsection (1); and

(b) does not contain matter the disclosure of which under this Act would, on balance, be in the public interest." (emphasis added)

15 The effect of the decisions of the appellant, as the Minister's delegate, to issue the certificates was to negate the respondent's legally enforceable right of access otherwise conferred by s 11 of the FOI Act; that was because that right under s 11 does not extend to exempt documents.

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16 The issue of the certificates had a significant impact upon the pending review application made to the AAT under s 55 of the FOI Act. The conclusiveness stipulated in ss 33A(2A) and 36(3) is expressed as being subject to the operation of Pt VI. Section 55 is found in that Part, and s 58(1) confers upon the AAT a power of "merits review" with its decision having the same effect as a decision of the agency or the Minister in question. However, succeeding provisions in s 58 curtail that general provision.

17 In particular, in respect of certificates issued under ss 33A and 36, the powers of the AAT do not extend to reviewing the decision to give the certificate; rather in a case such as the present, the AAT might do no more than determine the question whether there existed reasonable grounds for the claim of exemption (s 58(3), (4)). If the AAT determines that such reasonable grounds did not exist, then s 58A is enlivened. This requires the appropriate Minister to decide whether to revoke or not to revoke the certificate; if the decision is against revocation, then the Minister is obliged by s 58A(3) to take various steps. These include the reading to the House in which the Minister sits a notice in writing of his decision which includes the material on which the Minister relied and the reasons for the decision (s 58(4)).

The challenge to the certificate

18 Rather than seek to pursue that avenue through the AAT, the respondent sought to challenge, by judicial review, the decisions of the delegate of the Minister to exercise the powers conferred by ss 33A(2) and 36(3) to sign the certificates. On 15 February 1999, the respondent filed in the Federal Court an application for an order of review under the ADJR Act. Reliance was placed upon s 5 of the ADJR Act. The opening words of s 5(1) then read:

"A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds ...".

The expression "decision to which this Act applies" was defined in s 3(1) so as to include a decision of an administrative character made "under an enactment". The FOI Act was an "enactment" within the definition of that term in s 3(1) of the ADJR Act.

19 The respondent claimed to be aggrieved, within the meaning of s 5, by the decisions by the appellant, as the Minister's delegate, that he was satisfied that

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the documents in question met the criteria outlined in ss 33A(2) and 36(3) of the FOI Act and that the certificates be signed. Various of the grounds enumerated in s 5(1) of the ADJR Act were relied upon by the respondent.

20 Section 8 of the ADJR Act stated that the Federal Court had "jurisdiction to hear and determine" the application. Section 8 is a law "defining the jurisdiction" of a federal court within the meaning of s 77(i) of the Constitution. A law defines that jurisdiction if it gives or confers, or determines or marks the boundary or extent of jurisdiction with respect to any of the matters in s 75 and s 76 of the Constitution⁶.

21 The appeal in this Court springs from the litigation which ensued in the Federal Court respecting the competency of the application for judicial review. It should be noted that that application had been amended by including reliance upon s 39B of the Judiciary Act as a further source of jurisdiction. Section 39B was inserted in 1983, after the commencement of the FOI Act⁷.

The operation of the ADJR Act

22 It is convenient first to consider the position that arises from reliance upon the ADJR Act, a statute which preceded the FOI Act. That temporal sequence is the reverse of that with which this Court was concerned in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*⁸.

23 The provisions of the *Income Tax Assessment Act* 1936 (Cth) relied upon in *Richard Walter*, in particular the "conclusive evidence" provision in s 177(1) and the system for review and appeal with respect to assessments, predated the conferral of jurisdiction upon the Federal Court (by s 39B of the Judiciary Act). An issue upon which various views were expressed in *Richard Walter* was whether the conferral of jurisdiction by s 39B impliedly amended s 177⁹; here it

6 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 604; *Gould v Brown* (1998) 193 CLR 346 at 444 [187]; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 592 [235].

7 By the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1983 (Cth). Section 39B has since been amended but not in a manner presently relevant.

8 (1995) 183 CLR 168.

9 (1995) 183 CLR 168 at 181, 193, 213, 234, 242-243.

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is whether the "conclusive evidence" provisions of the FOI Act impliedly amend the conferral of jurisdiction by the ADJR Act.

24 The issue now before this Court may be expressed as being whether the decisions of the appellant to issue the certificates under the FOI Act were not decisions reviewable by the Federal Court under s 5 of the ADJR Act because of the effect of the phrase "establishes conclusively" in ss 33A(2A) and 36(3) of the FOI Act in the context of that statute as a whole.

25 In the Federal Court, the primary judge (Marshall J) determined that issue in a manner favourable to the subsistence of jurisdiction under the ADJR Act¹⁰. The Full Court, by majority (Black CJ and Finkelstein J; Burchett J dissenting) dismissed an appeal¹¹.

26 It will be apparent from a consideration of the issue as expressed above that the effect of an answer adverse to the existence of jurisdiction is that the phrase "establishes conclusively" in the provisions of the FOI Act redefines, within the meaning of s 77(i) of the Constitution, the jurisdiction otherwise conferred upon the Federal Court by the ADJR Act. These provisions of the FOI Act, if they have this operation, like the provisions of the ADJR Act which conferred the jurisdiction, require for their validity support by s 77(i) of the Constitution. The power which validly supports a law supports the law which amends or repeals it¹².

27 In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ observed¹³:

"[W]here a question arises as to the creation of new rights and liabilities which will engage Ch III of the Constitution, it is to be expected that the Parliament will clearly state its will¹⁴."

10 *Tanner v Shergold* (2000) 60 ALD 771; 171 ALR 672.

11 *Shergold v Tanner* (2000) 102 FCR 215.

12 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 356-357 [15].

13 (1995) 185 CLR 410 at 458. See also *DJL v The Central Authority* (2000) 201 CLR 226 at 236-238 [12]-[13].

14 cf *Willocks v Anderson* (1971) 124 CLR 293 at 297-298.

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So also where the Parliament, by redefining the jurisdiction of a federal court, withdraws rights and liabilities from what otherwise would be the engagement of Ch III.

28 No provision in the FOI Act in terms amends the operation of the ADJR Act by contracting the jurisdiction otherwise enjoyed by the Federal Court. It is true that the enactment of the ADJR Act predated the creation by the FOI Act of the very rights and liabilities in respect of which jurisdiction under the ADJR Act attaches. However, it is well settled that the expression "decision to which this Act applies", as it appears in s 5 and other provisions of the ADJR Act, is ambulatory in nature and not fixed in time so as to identify only decisions made under enactments in force at the time of the commencement of the ADJR Act. It has been accepted that provisions such as s 5 of the ADJR Act apply to review of decisions made under later as well as earlier laws of the Commonwealth and that their operation is not confined to decisions made under laws which preceded the enactment of the ADJR Act¹⁵.

29 The ADJR Act itself provides (in s 19) for the making of regulations declaring that a class or classes of decisions are not subject to judicial review under the ADJR Act. Further, the definition in s 3(1) of "decision to which this Act applies", whilst speaking in general terms of decisions of an administrative character made under an enactment, expressly excludes a decision included in any of the classes of decisions set out in Sched 1. Schedule 1 has been amended from time to time and at the time of the events giving rise to this litigation included decisions under a range of laws of the Commonwealth enacted after the commencement of the ADJR Act. The decisions under the FOI Act with which this litigation is concerned do not fall within any of the various classes of decision for which specific exclusion has been made in or under the ADJR Act itself.

30 Sub-sections (2) and (2A) were introduced into s 33A of the FOI Act by s 23 of the *Freedom of Information Amendment Act* 1991 (Cth) and replaced the "conclusive certificate" provision which had been included in s 33A as enacted by the *Freedom of Information Amendment Act* 1983 (Cth); that statute commenced on 1 January 1984. Section 36(3) has been in its present form at all times. The above being the effect of the ADJR Act at the time of the commencement of ss 33A(2), 33A(2A) and 36(3) of the FOI Act, the question is

15 See *Courtice v Australian Electoral Commission* (1990) 21 FCR 554.

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whether those sections effected an implied partial repeal of ss 5 and 8 of the ADJR Act.

31 Section 33A(2) confers a new power of decision by Ministers, the exercise of which is conditioned upon satisfaction that the document in question meets the positive criterion in par (a) ("an exempt document for a reason referred to in [s 33A(1)]"), and the negative criterion in par (b) ("not a document containing matter the disclosure of which under this Act would be, on balance, in the public interest"). Provision then is made for the implementation of the Minister's satisfaction by signing a certificate.

32 Upon a decision made under s 33A(2), s 5 of the ADJR Act operates and s 8 of the ADJR Act confers jurisdiction upon the Federal Court. The same reasoning applies to decisions under s 36(3). However, the appellant submits that the provision then made in the FOI Act by the phrase "establishes conclusively" enacts "a substantive rule of law"; this, it is said, denies to the anterior decision of the Minister to issue the certificate the character of a "decision to which this Act applies" within the meaning of s 5 of the ADJR Act and, by this implied partial repeal of s 5, contracts the jurisdiction conferred upon the Federal Court by s 8 of the ADJR Act.

33 There is a difficulty with adopting the common law doctrine of implied repeal to permit characterisation of the law containing the implication as a law made by the Parliament under the power conferred by s 77(i) of the Constitution to define the jurisdiction of a federal court. A law which on its face does not purport to redefine a conferral of jurisdiction may not answer the description of a law "defining" the jurisdiction of a federal court for the purposes of s 77(i). A law for the withdrawal of a subject-matter from a subsisting conferral of jurisdiction, namely by amending the statutory expression by reference to which the conferral is made, may not be a law with the specificity required by s 77(i). In the absence of argument in this case, it is inappropriate to pursue the point.

34 However, the present case at least attracts the general proposition that a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably¹⁶. An example is Sched 1 of the ADJR Act, to which reference has been made. That proposition reflects the general principles respecting implied

16 cf *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121 at 134.

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repeal to which Gaudron J referred in *Saraswati v The Queen*¹⁷. Her Honour said¹⁸:

"It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see *Butler v Attorney-General (Vict)*¹⁹."

35 In *Butler*, Kitto J expressed the question as being whether the two items of legislation could stand or live together²⁰. In the same case, Fullagar J spoke of "contrariety"²¹, Taylor J of "direct conflict"²², and Windeyer J asked whether the two statutes were clearly and indisputably contradictory displaying such repugnancy that they could not be reconciled²³. Later, in *Travinto Nominees Pty Ltd v Vlattas*²⁴, Gibbs J used the expression "could stand together".

36 The respondent submits that the phrase "establishes conclusively" in the two provisions of the FOI Act is directed to the effect of the certificates in proceedings under and in accordance with the FOI Act. The consequence is that these provisions do not work any implied repeal of the conferral of jurisdiction

17 (1991) 172 CLR 1.

18 (1991) 172 CLR 1 at 17.

19 (1961) 106 CLR 268 at 276 per Fullagar J, 290 per Windeyer J.

20 (1961) 106 CLR 268 at 280.

21 (1961) 106 CLR 268 at 275. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375 [67].

22 (1961) 106 CLR 268 at 285.

23 (1961) 106 CLR 268 at 290.

24 (1973) 129 CLR 1 at 34.

on the Federal Court by another statute, the ADJR Act. That submission should be accepted.

37 A perusal of the FOI Act in the form it stood at the time of the issue of the certificates indicates an awareness by the Parliament of the differential impact of the FOI Act upon the public law regime comprising the AAT Act, the Ombudsman Act and the ADJR Act. That regime may be described as follows. The AAT is empowered to review on the merits certain decisions but only if the relevant legislation in terms attracts the operation of the AAT Act. The Commonwealth Ombudsman is not concerned directly with merits review and is not empowered to substitute a decision for that under review; rather, corrective action may be recommended where there has been maladministration. Finally, judicial review under the ADJR Act by the Federal Court (and now²⁵ the Federal Magistrates Court) is not concerned at all with the merits of the decision or action under review; the question for the Court is whether the decision or action is lawful and the Court cannot substitute its own decision for that of the decision-maker.

38 In Pt VI of the FOI Act, special provision is made (in s 57) for the exercise of powers under the Ombudsman Act. Reference already has been made to the particular relationship between the FOI Act and the AAT Act which is established by s 55 and succeeding provisions of Pt VI of the FOI Act. Finally, specific provision is made in the FOI Act that certain decisions thereunder will not attract the operation of particular provisions of the ADJR Act. Examples are found in ss 26(1A), 29(10) and 30A(5), which in terms remove what otherwise would be the operation of s 13 of the ADJR Act with its requirement for the provision of reasons for decisions.

39 The result is that, in enacting the provisions in the FOI Act with respect to conclusive certificates, the Parliament did not clearly state its will to redefine the jurisdiction of the Federal Court under the ADJR Act. The nature of the conclusiveness given the decision is to be seen within the operation of the FOI Act. So long as it remains in force and has not been revoked, for example under the procedures indicated in s 58A, the certificate withdraws the documents in question from access by the legally enforceable right conferred by s 11.

25 By force of Items 13 and 14 of Sched 4 of the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth).

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40 That does not deny the anterior question of law, namely whether the decision to issue the certificate will withstand judicial review under the ADJR Act. It may be that various of the grounds specified in s 5 of that statute can have but limited or no operation with respect to applications such as the present brought under the ADJR Act. For example, the range of relevant considerations may be very wide and the range of irrelevant considerations very narrow. The content of a requirement to provide natural justice to the person aggrieved by the decision may be very limited. However, such questions are for determination by the Federal Court when dealing with the applications for review.

The operation of s 39B of the Judiciary Act

41 Section 39B of the Judiciary Act is taken from s 75(v) of the Constitution, as explained in *Richard Walter*²⁶. Section 75(v) is no wider than and may well be less in scope than s 5 of the ADJR Act. Hence the concentration by the respondent in his submissions upon the ADJR Act as the basis for the jurisdiction of the Federal Court which he invoked.

42 However, it is convenient to deal briefly with the issues which arise respecting s 39B. Section 39B commenced on 20 December 1983; this preceded the enactment in 1991 of the relevant provisions of s 33A. The question here is whether the conferral of jurisdiction by s 39B is limited by the subsequent enactment. Reasoning which explains the relationship between the conferral of jurisdiction by the ADJR Act and the later enactment of the FOI Act applies here. There is the further point noted by Brennan J in *Richard Walter*²⁷. This is that a law which would confine jurisdiction conferred by s 39B should not be construed "more narrowly than the jurisdiction conferred by s 75(v) of the Constitution unless the restriction appears expressly or by necessary intendment".

43 A different situation obtains respecting s 36(3) of the FOI Act. This came into operation on 1 December 1982 and thus preceded the enactment of s 39B. However, once it again is seen that the phrase "establishes conclusively" refers to the operation of the FOI Act and, in particular, to merits review under the adjusted procedures of the AAT provided for in the FOI Act, it will be apparent that the jurisdiction conferred by s 39B may stand with the provisions in s 36(3) of the FOI Act. That is to say, the particular, and, in a sense, limited, operation

26 (1995) 183 CLR 168 at 181, 212-213, 231.

27 (1995) 183 CLR 168 at 193.

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of the certificate provision in s 36(3) is not diminished by the distinct operation of s 39B with respect to judicial review.

Order

44 The appeal should be dismissed with costs.

