State Courts and the Administrative Decisions (Judicial Review) Act

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Although the aim of the Administrative Decisions (Judicial Review) Act (hereinafter the "AD(JR) Act") is to "confer new rights of appeal and permit review of administrative actions by the Courts",[1] the Commonwealth has submitted in three recent cases that the Act, paradoxically, precluded review of a "decision" of an officer of the Commonwealth[2] by either a State or the Federal Court. Practically, this had the effect of requiring a litigant who wished to review a federal administrative decision to seek relief in the High Court, with the attendant difficulties such an action entailed.[3] The recent insertion of section 39B into the Judiciary

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1. *Nomad Industries of Australia Pty Ltd* v. *Federal Commissioner of Taxation* (1983) 83 A.T.C. 4480 *per* Rogers J.
2. A "decision of an administrative character made ... under an enactment" is required (pursuant to s.3 of the AD(JR) Act) before the Federal Court has jurisdiction to grant an order of review. Pursuant to s.75(v) of the Constitution, the High Court has original jurisdiction:
   "In all matters —
   (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".
3. As Waddell J. noted in *Appliance Holdings Pty Ltd* v. *Lawson* [1983] 1 N.S.W.L.R. 246, 250: "That court [the High Court] is, in a geographical sense, sometimes difficult to reach and time might be lost in reaching it during which great damage might be caused to a citizen". In *Nomad*, note 1 *supra*, the plaintiff considered applying directly to the High Court but feared the costs involved if the decision was against him. When he sought indemnification from the Commissioner the latter, in the pungent words of Mr Justice Rogers (at 4482) "felt able to rebuff the plaintiff in that request". Furthermore, review under the AD(JR) Act appears to be wider than that available under s.75(v) since the Constitution imports all the requirements of the common law prerogative writs and it is not clear whether certiorari is available under it.
   In *Powell* v. *Manufacturers Mutual Insurance Co. Ltd* [1983] 3 N.S.W.L.R. 183 Needham J., sitting in the Equity Division, held that the Court had no jurisdiction to continue an *ex parte* injunction which had been granted to restrain the Director-General of Social Security from obtaining payment pursuant to statutory notices served pursuant.to s.115 of the Social Services Act 1947 (Cth).
   It was argued for the plaintiff that "in joining the first defendant, the court would not be 'reviewing' the decision" (p.187) within the meaning of s.9 of

Act 1903 (Cth) has to some extent mitigated the full rigour of the problem.[4] Interesting questions, however, still remain; this short note will examine them and the cases which have discussed them.

The AD(JR) Act reveals a legislative intention to exclude State Courts from the process of adjudicating upon federal administrative action.[5] Pursuant to section 38(e) of the Judiciary Act, jurisdiction over matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth is

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the AD(JR) Act. Needham J. held against this submission. His Honour observed: "To say, of a decision that a person is immediately liable to pay an amount of money to another, that that payment shall not be made until further order of the court is ... to review the decision. The fact that it is not a complete review on the facts and the law does not seem to me to be conclusive of the question" (p.188).

4. S.39B of the Judiciary Act 1903 (Cth) provides:
(1) The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.
(2) ... ."
The insertion of the words "or officers" is difficult to explain. S.75(v) of the Constitution, upon which s.39B is based, speaks only of "an officer of the Commonwealth". It seems redundant to include the plural. It is, of course, still possible to commence an action in the High Court's original jurisdiction since s.39B cannot affect the relief conferred by the Constitution at all. It is the apparent intention, however, that any such matter originally commenced in the High Court be remitted to the Federal Court pursuant to s.44 of the Judiciary Act; see statements in the Second Reading Speech on the Statute Law Bill (No.2) on 7 October 1983, 1291.
In *Re Hassell; Ex parte Pride* (1984) 52 A.L.R. 181, 183 Toohey J. held that s.39B and O.54A, r.26 of the Federal Court Rules empowered the Court to hear an application for mandamus in respect of conduct anterior to the conferral of jurisdiction on the Federal Court by the section. In *Coward* v. *Allen* (1984) 52 A.L.R. 320, 322 Northrop J. dealt with an application in respect of search warrants which was brought under s.39B on remitter from the High Court pursuant to s.44 of the Judiciary Act. Significantly, the matter had been remitted first to the Supreme Court of Victoria; "thereafter, doubts arose relating to whether the Supreme Court of Victoria, having regard to the provisions of s.9 of the Administrative Decisions (Judicial Review) Act 1977, had jurisdiction to hear and determine those proceedings". The orders were vacated and the proceedings remitted to the Federal Court.
In relation to the power of remitter under s.44(2)(a) of the Judiciary Act 1903, see *State Bank of New South Wales* v. *Commonwealth Savings Bank of Australia* (1984) 58 A.L.J.R. 394, 395-396.

5. "One must recognise and pay proper regard to the evident wish of the Federal Parliament to place the governmental and judicial conduct of its affairs beyond the reach of State Courts": *Nomad*, note 1 *supra*, 4486 *per* Rogers J.

vested in the High Court.[6] This has been supplemented by the recent addition to the jurisdiction of the Federal Court under section 39B. Thus, the general supervisory jurisdiction vested in the High Court by section 75(v) of the Constitution and the Federal Court by section 39B has not been conferred on the State Courts as invested jurisdiction under section 77(iii) of the Constitution, although presumably it could well have been.[7]

The AD(JR) Act continues the approach of removing from State review the actions of federal officers. The condition precedent to the granting of an order of review by the Federal Court under the AD(JR) Act is a "decision" to which the Act applies.[8] Sections 5, 6 and 7 respectively confer jurisdiction on the Federal Court to review decisions to which the Act applies, conduct engaged in for the purposes of making such decisions, and the failure to make such decisions.[9]

Section 9 of the Act relevantly states:[10]

> (1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review —
> (a) a decision to which this section applies that is made after the commencement of this Act;
> (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
> (c) a failure to make a decision to which this section applies; or
> (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is

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6. S.38(e) of the Judiciary Act provides:
"The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:
(e) matter in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court". It is clear that a State court exercising State jurisdiction could not issue a mandamus to an officer of the Commonwealth: *Ex parte Goldring* (1903) 3 S.R.(N.S.W.) 260. Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed. 1978) note: "The proposition goes beyond the single case of mandamus, and the accepted view is that in its State jurisdiction a State court could not entertain a suit against the Commonwealth, or grant prohibition against an officer of the Commonwealth". It is a question whether the grant of certiorari falls within this.
7. Cowen and Zines, note 6 *supra*, 46, n.171: "Clearly if a State court were invested with *federal* jurisdiction under sec.77(iii) in respect of matters covered by sec.75(v), the situation would be different." The authors apparently see no difficulty in investing a State court with jurisdiction to review federal decisions within s.75(v).
8. On the width of "decision", see generally *Lamb* v. *Moss* (1983) 49 A.L.R. 533.
9. See, generally, G. Flick, *Federal Administrative Law* (1983).
10. S.9 was amended by the Administrative Decisions (Judicial Review) Amendment Act 1980 (No.111 of 1980).

proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.

(2) In this section —

"decision to which this section applies" means —

(a) a decision that is a decision to which this Act applies; or

(b) a decision of an administrative character that is included in any of the classes of decisions set out in Schedule 1, other than paragraphs (m) and (n);

"officer of the Commonwealth" has the same meaning as in paragraph 75 (v) of the Constitution;

"review" means review by way of —

(a) the grant of an injunction;

(b) the grant of a prerogative or statutory writ (other than a writ of *habeas corpus*) or the making of any order of the same nature or having the same effect as, or of a similar nature or having a similar effect to, any such writ; or

(c) the making of a declaratory order.

(3) ....

(4) ....

There is a deliberate parallelling of the jurisdiction reserved to the Federal Court by sections 5, 6 and 7 of the Act, and that excluded from the State Courts by sections 9(1)(a), (b), and (c).[11] Section 9(1)(d) is, in one sense, supererogatory because there is no jurisdiction conferred on the Federal Court by the Act to review "any other decision" of an officer of the Commonwealth apart from review of decisions defined by section 3.[12] Thus, all decisions reviewable by the Federal Court are excluded from the jurisdiction of the State Courts as well as that category of decisions which even the Federal Court cannot review.[13] This hiatus has caused applicants for review certain difficulties and led to complaints by state judges that aggrieved parties are being left without a remedy.[14] The result has been stigmatised as an apparent "catch-22 situation".[15] Fortunately, however, the State

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11. *Appliance Holdings*, note 3 *supra*, 249; *Nomad Industries*, note 1 *supra*, 4484.
12. "[T]here is no grant of power to the Federal Court corresponding with the exclusion of the State Court jurisdiction contained in sec.9(1)(d)": *per* Rogers J. in *Nomad*, note 1 *supra*, 4484.
13. S. 3 of the AD(JR) Act excludes from the definition of reviewable decisions "a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1".
14. *E.g. Appliance Holdings*, note 3 *supra*, 250 *per* Waddell J., who reached his decision with "very considerable reluctance"; Rogers J. in *Nomad*, note 1 *supra*, stated that drastic erosion of the citizen's rights to protection from the Executive flowed from the Act.
15. Rogers J. in *Nomad*, note 1 *supra*, 4484 stated: "I should mention, in parenthesis, that this is not the first time that such an unattractive

Courts, by using a number of devices have demonstrated that the problem is not insurmountable.

In *Appliance Holdings Pty Ltd* v. *Lawson*,[16] the plaintiffs by summons sought the delivery up to the State Court of certain items taken by the defendants, two members of the Federal Police Force, who had acted under the authority of a search warrant issued pursuant to section 10[17] of the Crimes Act 1914 (Cth). The defendants, relying on section 9 of the AD(JR) Act, denied that Waddell J. could grant the relief sought. The defendants further denied that his Honour could examine the issue of the warrant itself by the magistrate.

His Honour noted that section 9 went further than a mere exclusion of the jurisdiction of the State Court from inquiry into federal matters. "... [I]t also excludes decisions as to which the Federal Court is precluded from consideration by the terms of schedule 1".[18] In *Appliance*, the plaintiffs had already sought relief in the Federal Court unsuccessfully.[19] Although the reasons for the Federal Court's rejection of jurisdiction do not appear from Mr Justice Waddell's judgment,[20] they were probably similar to those of Keely J. in *Baker* v. *Campbell*.[21] In *Baker*, when considering the jurisdiction of the Federal Court with

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proposition has been advanced on behalf of Federal officers and the apparent catch-22 situation exposed".

16. Note 3 *supra*.
17. Whether the issuing of a warrant under the Commonwealth Crimes Act is a reviewable decision has been the subject of debate. Keely J. in *Baker* v. *Campbell* (1982) 44 A.L.R. 431 concluded that the decision by the justice of the peace to issue a warrant was judicial in character and, accordingly, not reviewable under the AD(JR) Act. Cf. *Moss* v. *Brown* (1983) 47 A.L.R. 217, 222-223 *per* St John J. In *Coward* v. *Allen*, note 4 *supra*, Northrop J. declined to make an order quashing a warrant issued by a State Stipendiary Magistrate acting under s.10 of the Commonwealth Crimes Act because he was not an officer of the Commonwealth within the meaning of s.75(v) of the Constitution and certiorari does not lie against such a decision: *R* v. *Murray*; *ex parte Commonwealth* (1916) 22 C.L.R. 437. Likewise, certiorari would not lie against federal police officers: *per* Northrop J., 325. His Honour did, however, consider that prohibition would lie against them. He specifically declined to decide whether the decision to grant the warrant might be reviewed under the AD(JR) Act.
18. [1983] 1 N.S.W.L.R. 246, 249.
19. *Id.*, 250.
20. *Ibid.*
21. (1983) 44 A.L.R. 431. S. 9(1)(d) was relied on to deny the Supreme Court of Western Australia jurisdiction to grant interlocutory relief. When the matter was commenced in the Federal Court the applicant sought to review five alleged "decisions" taken under the Commonwealth Crimes Act, 1914. These were: (1) the "decision" to seek a warrant by the Commonwealth

respect to Commonwealth search warrants, his Honour had said, "I do not consider that the AD(JR) Act is intended to apply to such an act by a police constable pursuant to his duty as such and acting under a search warrant issued by a justice of the peace."[22] Thus, the plaintiffs were effectively deprived of any relief short of an application to the High Court for a prerogative writ or an injunction pursuant to section 75 (v) of the Constitution.[23]

Waddell J. also remarked the wide application of section 9(1)(d). "[B]y the absence of any qualification or any apparent qualification, the words ... have a general application and extend to any conduct as to which the Federal Court has no jurisdiction and even if the conduct is contrary to law and an infringement of the proprietary rights of a citizen."[24] The seriousness of the situation has to a certain extent been alleviated by the insertion of section 39B of the Judiciary Act which would enable an applicant to seek relief in the Federal Court. Even that power is, however, hedged about with all the restrictions which exist in relation to the High Court's jurisdiction under section 75(v) of the Constitution. To take the most obvious example, it could not be asserted with any confidence that a situation which required the writ of certiorari to be granted would be properly dealt with by the Federal Court exercising its new jurisdiction for the same reasons which may invalidate the High Court's exercise of such jurisdiction.[25]

The power of the State Court to review any conduct at all of a federal officer is *ex facie* totally excluded because the words of section 9(1)(d) which speak of "any other decision ... any order ... or any other conduct"are limitless. In *Appliance*[26] the plaintiffs submitted that some limitation might be implied by a restrictive interpretation of the concept of "review" which conditions the operation of section 9. The State Court, while lacking power to "review" a decision, order or conduct, might have jurisdiction to do something else. Section 9(2) defines review

police officer (2) the laying of the information before the magistrate (3) the magistrate's decision to issue a warrant (4) the police officer's decision to execute the warrant (5) the act of seeking to execute the warrant.

22. *Id.*, 438. His Honour accepted that the act of executing the warrant was not a legislative or judicial act but held that this did not necessarily make it an administrative act within s.3(1) of the AD(JR) Act.
23. Presumably now they could apply to the Federal Court pursuant to s.39B; the difficulties adverted to in *Coward* v. *Allen*, note 4 *supra* would still apply.
24. Note 3 *supra*, 249.
25. *R* v. *Cook*; *Ex parte Twigg* (1980) 31 A.L.R. 353, 361.
26. Note 3 *supra*.

in broad terms to mean the grant of an injunction, a prerogative or statutory writ, or the making of a declaratory order.[27] It is hard to disagree with the conclusion reached by his Honour that neither the word itself, nor its context in the legislation, led to any restriction on its broad meaning.[28] It is for this reason that the Full Federal Court in *Lamb* v. *Moss* said:

> [i]t should finally be noted that the interpretation to be placed on the word "decision" in the Act will necessarily have a bearing on the relationship between the jurisdiction of the Federal Court and courts of the States in this field. This is because s.9 precludes the court of a State from exercising jurisdiction to review decisions to which the Act applies. The jurisdiction of State courts to review matters under federal enactments (eg by declaration) expands or contracts according as a narrow or a wide meaning is accorded the word "decision" in the Act (see *Clyne* v. *DC of T* [1983] 1 N.S.W.L.R. 110, and *Nomad Industries of Aust Pty Ltd* v. *FC of T* (1983) 83 ATC 4480). Any vagueness or uncertainty in the scope of the word "decision" in the Act could only lead to the growth of a grey area between the jurisdictions of the Federal and State courts in this field, which would be most undesirable. A broad practical approach to the language of the Act, on the other hand, will not only accord with the evident legislative policy but will also more likely result in a consistent and logical relationship between this court and State courts and reduce the grey area of jurisdictional uncertainty.[29]

It may be remarked, with respect, that the real difficulty with section 9(1)(d), contrary to the view of the Full Court, is not so much any imprecision with the word "decision" itself, but rather its collocation as the first in a series of ever widening terms. It may be contended that "order" is wider than "decision", and that "any other conduct" is wide enough to subsume within it both "decision" and "order". It is in deciding the ambit of this penumbra that the real difficulties arise.

Finally, in *Appliance*,[30] with respect to the seizure of the items, it was submitted that the examination was only "collateral" and for that reason did not fall within section 9.[31] His Honour rejected this submission summarily since it was impossible on the facts to characterise the actions of the two defendant police officers as collateral to the operation of section 9.

Interestingly, however, Waddell J. held that he had jurisdiction

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27. Note 1 *supra*.
28. Note 3 *supra*, 249.
29. Note 8 *supra*, 551.
30. Note 3 *supra*, 249.
31. Reliance was placed on *Director of Public Prosecutions* v. *Head* [1959] A.C. 83 which dealt with an accused's liability for having carnal knowledge of a mental defective. It is hard to see how that decision had any relevance to the case before the court unless by some analogy with the validity of the certificate of defectiveness which was a key issue in *Head*.

to examine the validity of the warrant issued pursuant to the Crimes Act 1914 (Cth).[32] He did so because the issuing of the warrant, on the authorities previously decided under the Act,[33] had been held not to be a "decision of an administrative character" within the meaning of section 3. Thus, the decision to issue the warrant is neither a "decision" to which section 9 applies[34] nor a decision of an administrative character included in the class of decisions set out in Schedule 1.[35]

Such a finding leads to the somewhat odd result that while it is not possible to scrutinise the actual action taken by the police pursuant to the warrant, the warrant itself may be impugned. Although his Honour did not comment on the point, it might have been thought that a holding that the warrant was improperly issued would be equally beneficial to the plaintiffs because the actions taken by the defendants would have been without any colour of right.

In *Clyne* v. *Deputy Federal Commissioner of Taxation*[36] Rogers J. faced a similar argument to that which had been advanced in *Appliance*.[37] The applicant, Mr Peter Clyne, sought relief to prevent the Court of Petty Sessions from paying out money, which he had lodged as bail, to the defendant and which was demanded by the latter pursuant to a notice issued under section 218 of the Income Tax Assessment Act 1936 (Cth). For reasons which need not be examined, Rogers J. found that the purported notice was ineffective.[38] The defendant argued, however, that the State Court lacked jurisdiction, praying in aid of section 9 of the AD(JR) Act. His Honour commented:

> if the submission be upheld all that I have said so far has been writ in sand. On this view whether I am right or wrong my labours have been in vain. The scarce judicial resources of the State have been wasted and time and money expended in useless argument. This is said to be so because the plaintiff knocked on the wrong door. Instead of being on level 12 of the

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32. Note 3 *supra*, 251 following Keely J. in *Baker*, note 17 *supra*.
33. It is a question which the court seems not to have considered why the issue of a warrant is not caught by s.9(1)(d) which specifically extends to a decision or order made in the exercise of judicial power.
34. And thus outside the extended definition in s.9(2).
35. Compare Schedule 1(e) which defines, and excludes from the operation of s.3, "decisions" involving assessment to tax with Schedule 2(e)(iii) which excludes from s.13, "decisions in connection with the issue of search warrants under a law of the Commonwealth ...".
36. (1983) 83 A.T.C. 4001.
37. Note 3 *supra*.
38. Briefly, his Honour held that s.218 of the Income Tax Assessment Act 1936 (Cth) which speaks of "any person" holding money, *inter alia*, on the taxpayer's behalf is not apt to include a court (p.4006).

> Law Court Building he should have gone to level 21 or 22 of the same building where a similarly wigged and gowned figure would have had jurisdiction to give effect to the view on the merits I have expressed.[39]

As his Honour pointed out, such a result flowed unfortunately from the parallel system of courts introduced by the Federal Court Act 1976 (Cth) and "would defeat the elementary principle of justice that a litigant who has shown a good case should not be turned away from a Court of law empty handed."[40]

Rogers J. avoided this result by holding that the grant of a declaration on the proper construction of the Commonwealth Act "does not infringe the prohibition against 'review of a decision' ".[41] In other words, in certain circumstances, the State Court may effectively review the conduct of a federal officer. It is, with respect, difficult to see how such a conclusion can be correct in the face of the clear words of section 9(2) of the Act which speak in terms of "the making of a declaratory order". His Honour's reasoning would seem to rely upon the distinction between making a declaration *simpliciter* with respect to the words of an Act, and declaring that the particular action of an officer of the Commonwealth was unlawful. In the latter case it is the "decision" of the officer which is being examined, while in the former no "decision" is questioned. Such a view ignores the context in which the question arose for decision. Had there not been a "decision" by the appropriate Commonwealth officer to issue a section 218 notice, the money of the plaintiff would never have been liable to seizure. It is artificial to separate the meaning of the statute from the factual background giving rise to the dispute. Without some action no occasion for a declaration would have arisen.[42]

Similar sophisticated reasoning pervades the decision in *Nomad Industries of Australia Pty Ltd* v. *Federal Commissioner of Taxation*.[43] Here, once again, Rogers J. managed to avoid the apparent shackles of section 9. The plaintiff sought declaratory relief with respect to the liability to sales tax of an item which it imported into Australia. The defendant denied that the State Court had jurisdiction. It had previously suggested that the Federal Court also lacked jurisdiction because the "decision" involved fell within paragraph (e) of Schedule 1 of the AD(JR)

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39. Note 36 *supra*, 4007.
40. *Id.*, 4008.
41. *Ibid.*
42. On declarations in taxation matters generally, see P.W. Young, *Declaratory Orders* (1975) paras 2109-2110.
43. Note 36 *supra*, 4480.

Act[44] and thus could not be reviewed by the Federal Court. Furthermore, as Rogers J. caustically demonstrated, the defendant's submission that declaratory relief was unavailable in the High Court would have meant that no tribunal at all could have adjudicated upon the matter.

His Honour avoided finding that no court had jurisdiction. He did so by holding that there was no decision or conduct by the defendant which was sought to be reviewed. The imposition of tax occurred by the operation of the legislation itself, not by any administrative action.[45] So, "in an action for recovery of sales tax, the defendant is entitled to challenge his liability to tax on any and all grounds, save for non-compliance with formality".[46] The defendant, relying on reasoning similar to that advanced in *Clyne's* case, submitted that if there was no "decision", the question for the court would be entirely hypothetical and not justiciable. Rogers J. pointed out that:

> [c]ontentions or opposing viewpoints may proffer a dispute for resolution by the Courts without need for a 'decision' being made by either party. It is sufficient for the contestants to embrace opposite views of the proper construction or application of a statutory provision. Thus, for example, a vendor and purchaser may seek a declaration as to the applicability or otherwise of land tax legislation. Neither of them has any power to make a 'decision'.[47]

Even though there was no "decision" by the defendant, it could still be argued that the granting of a declaration fell within the broader prohibition of section 9(1)(d). As his Honour demonstrated, the potential sweep of that prohibition is limitless. For that reason he held that it must be read down. "[I]t cannot be thought that the freedom conferred extends to complete licence from the supervision of all Courts in all aspects of conduct simply by wearing the appointment of a Commonwealth officer".[48] Rogers J. concluded that the granting of a declaration did not constitute a "review" of the conduct of a particular officer.

Finally, his Honour considered the argument that the State Court lacked jurisdiction because there was no substantive source

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44. A decision involved in the assessment of duty under the Sales Tax Assessment Act.
45. Note 36 *supra*, 4485.
46. *Ibid.* See *Deputy Commissioner of Taxation* v. *Hankin* (1959) 100 C.L.R. 566, 578.
47. Note 36 *supra*, 4486.
48. *Ibid.* Regrettably, his Honour did not attempt to state the limits of s.9(1)(d). Rather, he stated an absurd and extreme example of "conduct" and then his own *ipse dixit* that a declaration did not consitute "review" of a Commonwealth officer's action.

of jurisdiction pursuant to which the court could make the declaration sought. The Commissioner of Taxation is the Commonwealth for the purposes of section 75(iii) of the Constitution.[49] Section 39(2) of the Judiciary Act operates to confer jurisdiction upon State Courts in matters against the Commonwealth. It has, however, long been a subject of dispute whether jurisdiction arises purely from the operation of the Constitution or whether it is necessary to find a substantive law which may be applied in respect of that jurisdiction as well. The only head of jurisdiction to which one could point if the latter is the correct position would appear to be section 56 of the Judiciary Act.[50] Reliance on that provision, however, would require the matter to be characterised as an action in contract or tort.

Rogers J. rejected the narrow view. He preferred instead to follow the reasoning of Yeldham J. in *Australian Airport Services Pty Ltd* v. *Commonwealth*.[51] The early decision of the High Court in *Commonwealth* v. *New South Wales*[52] supports the proposition that section 75 of the Constitution on its own is sufficient jurisdictional basis for the bringing of a suit against the Commonwealth without the interposition of some enactment pursuant to section 78 of the Constitution.[53] That decision, of course, has been subjected to much criticism.[54] To uphold the want of jurisdiction in the instant case, however, would have resulted in no court having jurisdiction which certainly strengthens an *ab inconvenienti* argument. His Honour also found

49. See Lane, *The Australian Federal System* (2nd ed. 1979) pp.648-649, n.23 citing *Deputy Federal Commissioner of Taxation* v. *Brown* (1958) 100 C.L.R. 32, *James* v. *Deputy Commissioner of Taxation* (1957) 97 C.L.R. 23, 35.
50. S.56 provides: "A person making a claim against the Commonwealth, whether in contract or in tort, may ...". See, generally, P. Hogg, *Liability of the Crown* (1971).
51. (1976) 10 A.L.R. 167. The plaintiff, a lessee from the Commonwealth, erected fixtures during the currency of his lease. The Director-General of Civil Aviation refused his approval for their removal, which was required under the lease. The plaintiff sought a declaration that it was allowed to remove the fixtures. The defendant alleged that Yeldham J. lacked jurisdiction. His Honour concluded that jurisdiction existed pursuant to s.75 of the Constitution and s.35(2) of the Judiciary Act 1903 (Cth), and that s.75 of the Supreme Court Act 1970 (N.S.W.) empowered the court to make the declaration sought.
52. (1923) 32 C.L.R. 200.
53. Note 51 *supra*, 170.
54. *Werrin* v. *Commonwealth* (1938) 59 C.L.R. 150, 165-7 *per* Dixon J.; *James* v. *Commonwealth* (1939) 62 C.L.R. 339, 359; *Suehle* v. *Commonwealth* (1967) 116 C.L.R. 353, 355; *Washington* v. *Commonwealth* (1939) 39 S.R.(N.S.W.) 133, 140-141 *per* Jordan C.J.

that jurisdiction to make the declaration sought existed through the operation of section 78 of the Constitution and section 64 of the Judiciary Act,[55] as interpreted in *Maguire* v. *Simpson*.[56]

The three cases reveal a problem of jurisdiction which is likely to continue. They raise a fundamental question about the division of Federal and State judicial power which has received little attention. Why is it not appropriate that the State Courts have jurisdiction to examine the actions of an officer of the Commonwealth?[57] As noted, there would be no difficulty in conferring jurisdiction upon State Courts over the decisions of federal officers.[58] No argument of judicial competence or partiality is open. It could be argued that it is better if one court develops an expertise in relation to federal administrative law, and that it is wiser to exclude State Courts. That does not apply, however, if no court has jurisdiction to examine the conduct impugned.

It is interesting to note that the exclusion of jurisdiction by section 38(e) of the Judiciary Act extends only to matters involving a writ of mandamus or prohibition. The High Court has held on several occasions that certiorari may be sought under section 75 (v) in the original jurisdiction of the High Court and it does not appear to have been argued that such jurisdiction is conferred on the courts of the States by the operation of section 39 of the Judiciary Act.[59]

One is driven to conclude that the legislative lacuna revealed by the cases cannot have been intended by the draftsman. The enactment of section 39B of the Judiciary Act will do something to alleviate the situation. Cases will, however, remain where neither a State nor the Federal Court can act. It would seem that the reasoning of Rogers J. in *Clyne* and *Nomad Industries* would be effective to cover most situations. That leaves unresolved the width of section 9(1)(d). One may ask, "where does the width of

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55. S.78 of the Constitution relevantly provides that the Parliament may make laws conferring rights to proceed against the Commonwealth in respect of matters within the judicial power and s.64 of the Judiciary Act 1903 (Cth) provides that in a suit in which the Commonwealth is a party the rights of the parties shall be as nearly as possible those which pertain in a suit between subject and subject.
56. (1976-1977) 139 C.L.R. 362; compare *Strods* v. *Commonwealth* [1982] 2 N.S.W.L.R. 182.
57. The State courts do not, of course, suffer from that judicial infirmity which existed in the United States and which is not carried over in our own position: Owen J. in *Ex parte Goldring* (1903) 3 S.R.(N.S.W.) 260, 264.
58. Note 7 *supra*.
59. Note 6 *supra*.

the provision stop? Is the method of driving a post office truck excluded from the supervision of State Courts? Is the discharge of a firearm in a public street by a Commonwealth officer excluded from the supervision by a State Court?"[60]

It is submitted that section 9(1)(d) cannot be construed so as to render inscrutable all actions and conduct of a Commonwealth officer. The paragraph must be read in the context of the legislation. It limits the scope of judicial review of administrative action by a federal officer; it does not give him carte blanche to do whatever he chooses, in complete disregard of State law. *Pirrie* v. *McFarlane*[61] would suggest that only activity which was specifically authorised by an overriding federal statute would be beyond the reach of the State criminal law. His Honour may be forgiven for indulging in slight exaggeration of the possible consequences of the ambit of the provision to make his point that section 9 is too broad.

The truth of this becomes clear when it is recalled that the aim of the AD(JR) Act was to remove existing impediments to the review of federal administrative action. It is ironic that the very legislation which was designed to ameliorate the position of the aggrieved applicant is now being invoked to deny him relief. The aim of section 9(1) is to exclude State review. It is unfortunate that this goal has resulted in a potential absence of jurisdiction in any court. Nor must it be assumed that the conferral of section 39B jurisdiction upon the Federal Court is a complete remedy. There are still many unresolved questions concerning the operation of the prerogative writs and it must be remembered that a major impetus for the introduction of the AD(JR) Act itself was the cumbersome and unsystematic operation of those writs.

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60. Note 36 *supra*, 4486.
61. (1925) 36 C.L.R. 170. The High Court, by a majority, held that nothing in the Constitution expressly or impliedly exempted the members of the Commonwealth defence force from the operation of State traffic legislation.