

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with section 15G of the *Legislation Act 2003*

Administrative Decisions (Judicial Review) Act 1977

Administrative Decisions (Judicial Review) Regulations 2017

Outline

The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) provides for judicial review of Commonwealth decisions in the Federal Circuit Court of Australia and the Federal Court of Australia.

Section 20 of the ADJR Act provides that the Governor-General may make regulations prescribing matters required or permitted by the ADJR Act to be prescribed by regulations, or necessary or convenient to be prescribed by regulations, for carrying out or giving effect to the ADJR Act.

Subsection 19(1) of the ADJR Act provides the regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Federal Court or the Federal Circuit Court under the ADJR Act.

Section 13 of the ADJR Act provides that a person entitled to apply for review of a decision may obtain a statement of reasons for that decision. Subsection 13(8) provides that the regulations may declare a class or classes of decisions to be decisions that are not decisions to which section 13 applies.

The *Administrative Decisions (Judicial Review) Regulations 1985* (1985 Regulations), which are due to sunset on 1 April 2018, prescribe:

- the classes of decisions to which section 13 of the ADJR Act does not apply, and
- the classes of decisions that are not subject to judicial review by the Federal Court or the Federal Circuit Court under the ADJR Act.

The Attorney-General's Department has conducted a review of the 1985 Regulations and determined that they should be remade in an updated form that retains provisions that continue to be required, updates references where necessary and removes provisions that are redundant.

The purpose of the *Administrative Decisions (Judicial Review) Regulations 2017* (2017 Regulations) is to remake the 1985 Regulations in substantially the same form with amendments to ensure fitness for purpose and consistency with current drafting practices, including simplifying language, restructuring provisions for ease of navigation, updating references to obsolete legislation, and removing references to legislation that is no longer in force.

Details of the provisions

Appropriate principles that may justify exempting a decision-making power from the application of the ADJR Act were set out by the Administrative Review Council in its 2012 report *Federal Judicial Review in Australia*, including the following.

- Judicial review has the potential to fragment or frustrate another legal process which is already underway.
- A well-established alternative scheme already exists which is as accessible and effective as ADJR Act review.
- The decisions have a strong link with other constitutional considerations, and as such are better dealt with via constitutional review.
- Judicial review is also not available under section 39B of the Judiciary Act 1903, because the decisions are most appropriate to be heard in the High Court in the first instance.

- The decisions relate to the management of the national economy, do not directly affect the interests of individuals and are likely to be most appropriately resolved in the High Court.
- The decisions are related to diplomatic or consular community.
- Judicial review of the decisions could pose a risk to personal safety.
- The decisions relate to the deployment or discipline of defence force members.

The 2017 Regulations prescribe the classes of decisions that are not subject to judicial review under the ADJR Act. These include the following classes of decisions that are prescribed in the 1985 Regulations:

- decisions made by the Fair Work Commission under or by virtue of the *Builders Labourers' Federation (Cancellation of Registration—Consequential Provisions) Act 1986*, which are already appealable to a Full Bench of the Fair Work Commission and have a right of judicial review to the Federal Court or High Court;
- decisions made by a person employed by Western Australian under a law of Western Australia as applied in the Territories of Christmas Island and the Cocos (Keeling) Islands, which are already subject to review under the general jurisdiction of the Western Australian Supreme Court; and
- decisions made under the *Biosecurity Act 2015* in relation to biosecurity emergencies and human biosecurity emergencies, where judicial review processes may unduly delay the control or eradication of biosecurity and human biosecurity threats of national significance.

The 2017 Regulations also prescribe a new class of decisions as decisions that are not subject to judicial review under the ADJR Act, being decisions made by a person employed by New South Wales under a law of New South Wales as applied in Norfolk Island. This would ensure consistency in the treatment of decisions made under applied laws in Australia's external territories.

Each of these classes of decisions has been assessed by the Attorney-General's Department as falling under at least one of the principles that would justify exempting a decision-making power from the application of the ADJR Act.

A provision-by-provision description of the 2017 Regulations is set out at [Attachment A](#).

Statement of Compatibility with Human Rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker of a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. A Statement of Compatibility with Human Rights has been prepared to meet that requirement and is set out at [Attachment B](#).

Regulatory Impact Assessment

The Office of Best Practice Regulation (OBPR) has confirmed that a Regulation Impact Statement is not required for the 2017 Regulations. The OBPR reference is ID 22295.

Consultation

The following agencies were consulted during the process of the making of the 2017 Regulations: the Australian Federal Police, the Department of Agriculture and Water Resources, the Department of Defence, the Department of Employment, the Department of Finance, the Department of Infrastructure and Regional Development, and the Department of the Prime Minister and Cabinet.

There is a general obligation on the rule-maker under section 17 of the *Legislation Act 2003* to be satisfied that any consultation that is appropriate and reasonably practical has been undertaken before a legislative instrument is made. The Attorney-General was satisfied that consultation was appropriate and reasonably practicable to be undertaken.

Administrative Decisions (Judicial Review) Regulations 2017

Section 1 Name

This section provides that the instrument is named the *Administrative Decisions (Judicial Review) Regulations 2017* (2017 Regulations).

Section 2 Commencement

This section provides that the whole of the instrument commences on the day after it is registered.

Section 3 Authority

This section provides that the instrument is made under the *Administrative Decisions (Judicial Review) Act 1977*.

Section 4 Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed according to the terms set out in the Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

Section 5 Definitions

This section provides that, for the purposes of this instrument, ‘Act’ means the *Administrative Decisions (Judicial Review) Act 1977*.

This section also provides that a reference in section 6 of the instrument to an Act or a provision of an Act includes a reference to instruments made under that Act or for the purposes of that provision.

Section 6 Decisions not subject to judicial review

Subsection 6(1) prescribes, for the purposes of subsection 19(1) of the Act, the following classes of decisions that are not subject to judicial review under the Act.

Paragraph 6(1)(a) prescribes decisions under the *Builders Labourers’ Federation (Cancellation of Registration—Consequential Provisions) Act 1986* (Consequential Act). This retains the existing exemption in paragraph 3(b) of the *Administrative Decisions (Judicial Review) Regulations 1985* (1985 Regulations).

Paragraph 6(1)(b) prescribes decisions under the *Fair Work (Registered Organisations) Act 2009* (ROC Act) in its application by virtue of the Consequential Act. This retains the existing exemption in paragraph 3(c) of the 1985 Regulations, but replaces the obsolete reference to the *Conciliation and Arbitration Act 1904* (C&A Act) with a reference to the ROC Act.

Paragraph 6(1)(c) prescribes decisions under the provisions of the *Fair Work Act 2009* (FW Act), to the extent that the provisions apply to proceedings under or by virtue of the Consequential Act. This retains the existing exemption in paragraph 3(d) of the 1985 Regulations, but replaces the obsolete reference to the C&A Act with a reference to the FW Act.

The Consequential Act provides for the consequences of the deregistration of the Australian Building Construction Employees’ and Builders Labourers’ Federation (the Federation) as an organisation of employees under the C&A Act, including providing for the conditions for the re-registration of the Federation, or any other association formed by members or former members of the Federation.

The Consequential Act, among other things, regulates the conditions upon which the Federation or a similar body may obtain registration under the ROC Act. Under section 5 of the Consequential Act, a ‘non-registered association’ (defined to include the former Federation or another association with similar characteristics) is not entitled to apply for registration under the ROC Act unless Fair Work Australia (now the Fair Work Commission) on application declares that it is satisfied certain conditions have been met. This includes satisfying itself that the requirements of the ROC Act have been complied with. A declaration of the Fair Work Commission made under section 5 of the Consequential Act would have fallen under paragraph 3(b) of the 1985 Regulations and will now fall under paragraph 6(1)(a) of the 2017 Regulations.

When the Consequential Act was first enacted, section 5 made reference to the C&A Act, which was repealed in 1989, and to the Australian Conciliation and Arbitration Commission, which was replaced by the Australian Industrial Relations Commission which was then replaced by the Fair Work Commission. These references have accordingly been updated to refer to the ROC Act and the Fair Work Commission.

As such, the reference in paragraph 3(c) of the 1985 Regulations to the C&A Act has been replaced with a reference to the ROC Act. A decision by Fair Work Commission that the ROC Act has been complied with would have fallen under paragraph 3(c) of the 1985 Regulations and will now fall under paragraph 6(1)(b) of the 2017 Regulations.

Paragraph 3(d) of the 1985 Regulations dealt with decisions relating to subsection 6(2) of the Consequential Act, which refers to decisions made pursuant to the provisions of the FW Act and *Fair Work Regulations 2009* with respect to the procedure and powers of the Fair Work Commission as they apply, so far as they are capable of application, in relation to proceedings before the Fair Work Commission under the Consequential Act. The reference in paragraph 3(d) of the 1985 Regulations to the now-repealed C&A Act has accordingly been replaced with a reference to the FW Act.

Currently, decisions of the Fair Work Commission are not subject to judicial review under the Act. Paragraph (a) of Schedule 1 to the Act excludes certain classes of decisions from judicial review and includes decisions under the FW Act, the ROC Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Paragraphs 6(1)(a), (b) and (c) of the 2017 Regulations ensure that all decisions of the Fair Work Commission, including those made under or by virtue of the Consequential Act, would be excluded from judicial review under the Act.

The Fair Work Commission is not an ordinary adjudicative tribunal. Its major decisions have an important impact on the Australian economy, and the parties to its proceedings are generally private individuals. Further, some decisions of the Fair Work Commission are of general application and are therefore not purely administrative in character.

Exclusion of these decisions from judicial review under the Act is appropriate because a well-established alternative scheme already exists, being appeal rights to a Full Bench of the Fair Work Commission and a right of judicial review to the Federal Court or High Court. Decisions of a single Fair Work Commissioner are appealable to a Full Bench of the Fair Work Commission under section 604 of the FW Act and decisions of a Full Bench of the Fair Work Commission are reviewable by the High Court under section 75(v) of the Constitution or the Federal Court under section 39B of the *Judiciary Act 1903*. Certain decisions of the Fair Work Commission are also appealable to the Federal Court under sections 562 and 563 of the FW Act.

Paragraph 6(1)(d) prescribes decisions made under a law of Western Australia, in its application in the Territory of Christmas Island by virtue of the *Christmas Island Act 1958*, by a person employed by Western Australia.

Paragraph 6(1)(e) prescribes decisions made under a law of Western Australia, in its application in the Territory of Cocos (Keeling) Islands by virtue of the *Cocos (Keeling) Islands Act 1955*, by a person employed by Western Australia.

Paragraphs 6(1)(d) and (e) of the 2017 Regulations retain, in a simplified form, the existing exemptions in paragraph 3(g) of the 1985 Regulations. Paragraph 3(g) was inserted into the 1985 Regulations by the *Administrative Decisions (Judicial Review) Regulations (Amendment) 1993 No. 155* following the commencement of the *Territory Law Reform Act 1992*, which provided for the application of the laws of Western Australia as Commonwealth laws in Christmas Island and the Cocos (Keeling) Islands. The purpose of paragraph 3(g) was to declare that, pursuant to an agreement between the Commonwealth and the State of Western Australia, decisions made by Western Australian officers under Western Australian State laws as applied in Christmas Island and the Cocos (Keeling) Islands would be excluded from judicial review under the Act. The drafting of paragraphs 6(1)(d) and (e), in conjunction with the definition provision in subsection 6(2), is consistent with the underlying policy intent and removes the need for the extensive list of carve-outs in subparagraphs 3(g)(iii) to (xii) of the 1985 Regulations.

Exclusion of these decisions from judicial review under the Act is appropriate because a well-established alternative scheme already exists, being the general jurisdiction of the Western Australian Supreme Court to undertake judicial review of State executive action.

Paragraph 6(1)(f) prescribes decisions under a law of New South Wales, in its application in Norfolk Island by virtue of the *Norfolk Island Act 1979*, by a person employed by New South Wales. The *Norfolk Island Act 1979*, as amended by the *Norfolk Island Legislation Amendment Act 2015*, provides for the application of the laws of New South Wales as Commonwealth laws in the Territory of Norfolk Island. Paragraph 6(1)(f) ensures that decisions made under the applied laws by State officials in Norfolk Island are treated in the same manner as decisions made by State officials under applied laws in Christmas Island and the Cocos (Keeling) Islands.

Similarly, exclusion of these decisions from judicial review under the Act is appropriate because a well-established alternative scheme already exists, being the general jurisdiction of the New South Wales Supreme Court to undertake judicial review of State executive action.

Paragraphs 6(1)(g), (h), (i) and (j) prescribe:

- decisions under Part 1 of Chapter 8 of the *Biosecurity Act 2015* (Biosecurity Act) in relation to a declaration made under subsection 443(1) of that Act;
- decisions under Part 1 of Chapter 8 of the Biosecurity Act to determine a requirement, give a direction, take any action or exercise any other power during a biosecurity emergency period (within the meaning of that Act);
- decisions under Part 2 of Chapter 8 of the Biosecurity Act in relation to a declaration made under subsection 475(1) of that Act; and
- decisions under Part 2 of Chapter 8 of the Biosecurity Act to determine a requirement or give a direction during a human biosecurity emergency period (within the meaning of that Act).

These provisions retain the existing exemptions in paragraphs 3(h), (i), (j) and (k) of the 1985 Regulations with minor, non-substantive modifications to accord with modern drafting practice.

The *Biosecurity (Consequential Amendments and Transitional Provisions) Regulation 2016* inserted paragraphs 3(h), (i), (j) and (k) into the 1985 Regulations as part of consequential amendments arising from the transition of the quarantine legislative framework to the biosecurity legislative framework on commencement of the Biosecurity Act.

Subsection 443(1) of the Biosecurity Act provides for the Governor-General to declare that a biosecurity emergency exists if the Agriculture Minister is satisfied of certain things. Subsection 475(1) of the Biosecurity Act provides for the Governor-General to declare that a human biosecurity emergency exists if the Health Minister is satisfied of certain things.

Part 1 of Chapter 8 of the Biosecurity Act provides for the Agriculture Minister to make certain determinations, give directions or take actions during a declared biosecurity emergency for the

purposes of preventing or controlling the establishment or spread of a declared disease or pest. Part 2 of Chapter 8 of the Biosecurity Act provides for the Health Minister to determine requirements or give directions during a declared human biosecurity emergency for the purposes of controlling, reducing or removing the threat of harm posed by a listed human disease, preventing or controlling the spread of disease to another country, or giving effect to a World Health Organization recommendation.

These provisions of the Biosecurity Act allow for the management of a pest or disease that poses a nationally significant threat to human, plant and animal health, the environment or the economy. The focus of these powers is to enable a fast and effective response that helps manage the amount of damage to Australia's communities, local industries and economy. They are intended to be used in circumstances where the scale and significance of an emergency requires management at a national level.

Excluding these decisions from judicial review under the Act is appropriate because these decisions relate to the management of emergencies that pose a severe and immediate threat, or are causing harm, on a nationally significant scale. It ensures that review processes do not unduly delay the control or eradication of biosecurity and human biosecurity threats that can cause damage of national significance.

In addition, human biosecurity emergencies are declared only in circumstances where a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale. As such, excluding these decisions from judicial review under the Act is also appropriate because subjecting these decisions to judicial review could pose a risk to the personal safety of all persons.

Subsection 6(2) provides a non-exclusive definition of a person employed by a particular State for the purposes of paragraphs 6(1)(d), (e) and (f).

Schedule 1 Repeals

This Schedule provides that the whole of the *Administrative Decisions (Judicial Review) Regulations 1985* is repealed.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Administrative Decisions (Judicial Review) Regulations 2017

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Administrative Decisions (Judicial Review) Regulations 2017* (Regulations) prescribe, for the purposes of subsection 19(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Act), the classes of decisions that are not subject to judicial review by the Federal Court or the Federal Circuit Court under the Act.

The following classes of decisions are prescribed:

- decisions made by the Fair Work Commission under or by virtue of the *Builders Labourers' Federation (Cancellation of Registration—Consequential Provisions) Act 1986*;
- decisions made by State officers under the laws of Western Australia or New South Wales, as the case may be, as in their application in the external territories of Christmas Island, the Cocos (Keeling) Islands and Norfolk Island; and
- decisions made under Chapter 8 of the *Biosecurity Act 2015* in relation to or during declared biosecurity emergency and human biosecurity emergency periods.

Human rights implications

The Attorney-General's Department has assessed whether the instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the instrument and the nature of the applicable rights and freedoms, the Attorney-General's Department has formed the view that the instrument does not engage any of those rights or freedoms.

The Regulations exclude various classes of decisions from judicial review under the Act. However, this does not prevent justiciable decisions from being subject to judicial review in the Federal Court or the High Court under section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution, respectively. As such, the Regulations do not unduly affect the ability of individuals to seek review of administrative decision-making.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.