

Chapter 5

Review of Visa Cancellation or Refusal Decisions on Character Grounds: A Comparative Analysis

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Professors Robin Creyke and John McMillan have made notable contributions to academic commentary in Australia concerning review of decision-making under the *Migration Act 1958* (Cth) (the *Migration Act*). Their commentary has been directed to the full range of accountability mechanisms which are available to persons aggrieved by migration decision-making, not just the Courts. The focus of my chapter is more limited. It is directed to judicial review of decisions concerning the removal or exclusion from Australia of persons who are not of good character. I will also touch on the role of the Administrative Appeals Tribunal (AAT) in reviewing some such decisions. The focus will be on the tension created between the Executive and the Courts (as well as the AAT, itself part of the Executive and not the Judiciary) in performing these review roles and to contrast the position in other jurisdictions with which Australia has some affinity, namely the United Kingdom, New Zealand, the United States and Canada, where similar issues arise.

It is well to start with a brief overview of some of the key points made by Professors Creyke and McMillan in relation to this discrete area of review.

Some key points made by Professors Creyke and McMillan

In their influential casebook entitled *Control of Government Action: Text, Cases and Commentary* (4th ed, 2015), Professors Creyke and McMillan and Mr Mark Smyth trace the many legislative changes in response to migration litigation, including the enactment in 1992 of Pt 8 of the *Migration Act*. It will be recalled that, under those amendments, the grounds of judicial review in the Federal Court in relation to migrant entry and refugee claims was more confined than those available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act).

Part 8 was again substantially amended in late 2001, following the notorious *Tampa* episode. The effect of the new scheme was to confine judicial review of migration decisions to proceedings commenced in the Federal Court under s 39B of the *Judiciary Act*

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This is a preview. Not all pages are shown.