



ADMINISTRATIVE REVIEW COUNCIL

**JUDICIAL REVIEW IN AUSTRALIA**

**CONSULTATION PAPER**

APRIL 2011

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## MAKING A SUBMISSION

You are invited to make submissions in response to this consultation paper. The Administrative Review Council is interested in submissions from all areas of the community, including those with a special interest in judicial review.

You may respond to as many or as few of the questions as you wish. Please note in your submission the number of each question that you are responding to.

Submissions may be mailed, emailed or faxed to:

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### **Confidentiality**

Submissions provide an important resource for the authors of a final report that are most useful if they may be referenced and drawn on directly. Non-confidential submissions may be made available to any person upon request. They may also be published on the Council's website.

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In the absence of a clear indication that a submission is intended to be confidential, the Council will treat the submission as non-confidential.

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## **MEMBERS OF THE ADMINISTRATIVE REVIEW COUNCIL**

The members of the Administrative Review Council at the date of the publication of this consultation paper were:

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Justice Garry Downes AM

Allan Asher

Professor Rosalind Croucher

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# CONTENTS

<b>MAKING A SUBMISSION</b> .....	<b>3</b>
<b>MEMBERS OF THE ADMINISTRATIVE REVIEW COUNCIL</b> .....	<b>4</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>7</b>
<b>DISCUSSION QUESTIONS</b> .....	<b>10</b>
<b>1 OVERVIEW OF THE INQUIRY</b> .....	<b>13</b>
<b>Introduction</b> .....	<b>13</b>
<b>Previous consideration by the Administrative Review Council</b> .....	<b>14</b>
<b>Other reports</b> .....	<b>16</b>
<b>2 THE AUSTRALIAN ADMINISTRATIVE LAW SYSTEM</b> .....	<b>20</b>
<b>Introduction</b> .....	<b>20</b>
<b>The development of the administrative law system</b> .....	<b>20</b>
<b>Changes in government since the 1970s</b> .....	<b>24</b>
<b>The current system of administrative law in Australia</b> .....	<b>27</b>
<b>3 THE CURRENT SYSTEM OF JUDICIAL REVIEW IN AUSTRALIA</b> .....	<b>35</b>
<b>Introduction</b> .....	<b>35</b>
<b>Constitutional judicial review</b> .....	<b>35</b>
<b>Alternative sources of judicial review under the <i>Constitution</i> and the <i>Judiciary Act 1903</i></b> .....	<b>44</b>
<b><i>Administrative Decisions (Judicial Review) Act 1977</i></b> .....	<b>46</b>
<b>Other statutory appeals</b> .....	<b>50</b>
<b>Administrative review system statistics</b> .....	<b>53</b>
<b>4 ISSUES WITH THE CURRENT SYSTEM OF JUDICIAL REVIEW</b> .....	<b>57</b>
<b>Introduction</b> .....	<b>57</b>

---

<b>Ambit or scope of review .....</b>	<b>58</b>
<b>Grounds of review .....</b>	<b>74</b>
<b>Right to seek judicial review .....</b>	<b>81</b>
<b>Judicial review and reasons for decisions .....</b>	<b>86</b>
<b>Availability of remedies in judicial review proceedings .....</b>	<b>92</b>
<b>Court Procedures .....</b>	<b>96</b>
<b>Additional statutory review mechanisms.....</b>	<b>100</b>
<b>5        MODELS FOR REFORM OF JUDICIAL REVIEW.....</b>	<b>103</b>
<b>Comparative models of judicial review.....</b>	<b>103</b>
<b>Options for Australia.....</b>	<b>106</b>

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## **EXECUTIVE SUMMARY**

### **Introduction**

Judicial review plays an important role in Australia's system of government as a means of ensuring the accountability of public officials for the legality of their actions. Judicial review at a federal level has been available under the *Constitution* since the inception of the Commonwealth. The introduction of statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* ('*ADJR Act*') removed technical barriers to judicial review.

More than thirty years have passed since the commencement of the *ADJR Act* in 1980. The increase in judicial review litigation during this period has led to major developments in the legal principles associated with judicial review. The Administrative Review Council (the Council) considers it is timely to examine federal judicial review, and assess whether the existing system for judicial review of administrative decisions meets current needs. The development of legal principles and changes in the nature of government administration which are relevant to this inquiry include:

- the divergence of legal principle between constitutional judicial review and judicial review under the *ADJR Act*
- the differing jurisdiction of the three federal courts in judicial review matters
- the development of legal principle in all judicial review jurisdictions, including the alignment of state and federal judicial review
- the increase in both legislation and the volume of decisions made by government
- the privatisation of government functions through a variety of mechanisms
- changes in the way that decisions are made, in particular the use of technology to automate decision making, and
- the use of hybrid mechanisms which combine features of administrative decision making with decisions of a legislative character.

### **Approach in this review**

To inform its deliberations, the Council will consider:

- developments in the law of both statutory and constitutional judicial review
- changes in the broader system of government administration
- statistical data about judicial review applications under the current system

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- comparisons with other jurisdictions, and
  - views of stakeholders.

### **The consultation paper**

Part 1 sets out the background to this inquiry and the Council's aim of making recommendations for the future direction of judicial review including:

- the need for statutory review mechanisms, both general and specific, in light of the fact that constitutional judicial review is entrenched and cannot be excluded by legislation
- the ambit and provisions of a general statutory review scheme, if the Council considers such a scheme to be desirable, and
- general principles that should apply to any statutory review scheme, and guidance as to whether and when specific statutory review mechanisms are appropriate.

The Council has considered judicial review in a number of previous reports. Part 1 includes a summary of those reports and other recent reports of relevance to this inquiry.

Part 2 describes the administrative law system in Australia and the history of the development of the current system. It covers changes to government since the 1970s which justify reconsideration of the system and the administrative law principles upon which a program of reform might be based.

Part 3 sets out the complex mechanics of the current system of judicial review — the constitutional sources of review, the *ADJR Act* and other statutory sources of review. There is a statistical overview of judicial review in the Federal Court of Australia and the Federal Magistrates Court and statistics on the use of other elements of the administrative law system.

Part 4 identifies the key issues with the current system of judicial review with the variety of overlapping sources for judicial review potentially creating uncertainty for users of the system. Six elements of judicial review — the ambit of review, the grounds of review, remedies, standing, reasons and court procedures — are examined separately with issues and options for reform identified for each element.

The 'ambit or scope of judicial review' section identifies the range of decisions and decision makers that are subject to judicial review, and those that might be included under an expanded regime.

The 'grounds of review' section compares the grounds available under the common law and statutory models and poses questions about the best approach to ensuring that there is clarity around the grounds of review.

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The ‘right to seek judicial review’ section discusses the purpose and effect of standing requirements in judicial review proceedings and asks when a broader standing test should be available for judicial review.

The ‘judicial review and reasons for decisions’ section considers when there should be an obligation to provide reasons for a decision, and what that obligation should entail.

The ‘availability of remedies’ section compares the remedies available under the common law and statutory models and seeks feedback on whether any additional remedies are required.

The ‘court procedures’ section canvasses the role of the courts in the judicial review process and asks whether the streamlining processes which have been introduced into migration litigation might be introduced more broadly.

The ‘additional statutory review mechanisms’ section considers the role of specific statutory review provisions which operate in particular decision making jurisdictions as well as appeals from Administrative Appeals Tribunal decisions. These mechanisms add another layer to the multiple avenues of review, and their role could be reconsidered as part of the development of a new general statutory review scheme.

Part 5 of the paper considers various models for implementing reforms to judicial review. It compares models from other jurisdictions, and outlines possible models for reform in Australia.

The Council invites submissions in response to this consultation paper on the basis that all possible reforms of judicial review should be considered, but that any reforms will need to harmonise with the structure of the administrative law system generally. The discussion which the Council hopes to generate through this paper will centre on how the elements of judicial review should be defined in any proposed new direction for judicial review. This will assist the Council in developing a view on what direction federal judicial review in Australia should take in the future.

The Council will consider written submissions and also conduct face to face consultations with key stakeholders. Following consultations, the Council will review submissions made and produce a final report to government on the future direction of federal judicial review.

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## DISCUSSION QUESTIONS

### The current system of judicial review

1. How are applicants making use of review rights under s 39B(1A)(c) of the *Judiciary Act 1903*, s 75(iii) and/or s 75(i) of the *Constitution*. In what way, if any, do these avenues offer a broader scope for judicial review than the other avenues of judicial review? (page 46)
2. What are other examples of statutory judicial review? What are the appropriate policy reasons for having a statutory appeal or review mechanism as opposed to relying on general judicial review mechanisms? What characteristics should such a scheme have? (page 52)

### The ambit or scope of review

3. How should statutory judicial review cover subordinate legislation, particularly where an instrument can be characterised as an administrative decision? (page 60)
4. Should judicial review extend to reports and recommendations by bodies other than the final decision maker, as previously recommended by the Council, or should review extend more broadly? If so, by what means should review be extended? (page 61)
5. Should the *ADJR Act* be amended to include a statutory right to review decisions made under executive schemes for which financial or other assistance is provided to individuals? What examples are there of such schemes which are currently not subject to a statutory right of review? What are the reasons for making them or not making them subject to statutory review? (page 63)
6. What is the preferable focus of a test for judicial review jurisdiction — focus on the decision maker, the decision or another criteria — and why? (page 65)
7. In what circumstances should judicial review apply to private bodies exercising public power? What is the best method of extending review? What are other accountability mechanisms which might more effectively ensure accountability of private bodies? (page 68)
8. In 1989, the Council recommended including the concept of justiciability in the *ADJR Act*. Would this improve accessibility under a general statutory review scheme? What guidance on the concept of justiciability could be given in a general statutory judicial review scheme? (page 70)
9. In 1989, the Council recommended that limited categories of decision should be excluded from the *ADJR Act*, and that any exclusions should be listed in the *ADJR Act*. When and for what categories of decision are exclusions from general statutory review schemes justified? What is the relationship between general review schemes and specific statutory exclusions, and what restrictions should there be on including exclusions in other statutes? (page 72)
10. What decisions of the Governor-General — statutory and non-statutory — should be subject to judicial review? (page 73)
11. What commercial decisions of government should lie outside the scope of judicial review and how is this best achieved? (page 73)

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## **Grounds of review**

12. What are the advantages and disadvantages of different approaches to the grounds of judicial review—common law or codification of grounds and/or general principles? Which approach is to be preferred and why? What grounds should be included in a codified list? (page 79)

13. What is the role, if any, for statutory codes of procedure given that they may not provide certainty about what will amount to procedural fairness in a particular case? (page 81)

## **Right to seek judicial review**

14. What is the appropriate test for standing in judicial review proceedings? What are the arguments for making standing in judicial review consistent with standing under s 27(2) of the *AAT Act*, which gives organisations standing if a decision relates to a matter included in the objects or purposes of the organisation? What are other ways to achieve greater recognition of the public interest in judicial review proceedings? (page 85)

## **Judicial review and reasons for decisions**

15. Should we have a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions? (page 90)

16. One of the objectives of this examination of judicial review is to identify all examples of legislation or subordinate legislation that include a specific right to reasons. Are there examples of provisions giving a right to reasons which provide useful illustrations of effective content, timing and form of reasons? (page 90)

17. What, if any, exemptions should there be from any obligation to provide reasons? (page 90)

18. What form should a statement of reasons take when provided on request under general statutory scheme? What other forms do statements of reasons take? (page 91)

19. What other consequences, if any, should there be for of a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons? (page 92)

## **Availability of remedies in judicial review proceedings**

20. What are the potential restrictions on the availability of remedies under the *Constitution* and the *Judiciary Act*? Do these restrictions, if any, mean a statutory remedial scheme is desirable, and why? (page 93)

## **Court procedures**

21. What would be the benefits, if any, from extending the various streamlining measures relating to courts—such as time limits and discouraging unmeritorious litigation that apply to judicial review of migration decisions to all avenues for judicial review? (page 98)

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22. What further requirements, if any, should be placed on the courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity? (page 100)

### **Additional statutory review mechanisms**

23. What are the benefits of specific statutory appeals as compared to general judicial review? (page 101)

24. What benefits do government agencies responsible for statutory review schemes find that those statutory schemes give? Do agencies believe these benefits could also be achieved through a general statutory review scheme and why or why not? (page 101)

25. Section 44 of the *AAT Act* establishes a statutory appeal right which applies to decisions in many jurisdictions. Are there any examples of cases where an applicant has been unsuccessful in an application for review because of discrepancies between the jurisdiction of the Federal Court under s 44 of the *AAT Act* and under the *ADJR Act*? (page 102)

26. The Council has previously recommended that s 44 be retained. What reasons are there for retaining or removing s 44 of the *AAT Act*? (page 102)

### **Options for Australia**

27. Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future? (page 109)

28. What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review? (page 110)

29. What information should be provided to applicants about constitutional judicial review in the Australian federal jurisdiction if there is no general statutory review scheme? Which bodies are most appropriate to provide this information? (page 110)

30. Given the proliferation of statutory appeals and the declining use of general judicial review mechanisms, what are the advantages, if any, of the Council preparing policy principles to guide a variety of statutory judicial review mechanism, rather than attempting to streamline the range of existing judicial review mechanisms? (page 112)

# 1 OVERVIEW OF THE INQUIRY

## INTRODUCTION

1.1 Administrative law focuses on the actions of the executive branch of government, including ministers and public servants. In the Australian federal system, the power of courts to review executive action derives from the *Constitution*, which mandates a minimum degree of judicial review, and from statute. Judicial review is just one element of a broader system of administrative law which also includes merits review.

1.2 More than thirty years have passed since the commencement of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ('*ADJR Act*') in 1980. Many aspects of the judicial review landscape in Australia have changed since that time, as have the nature and functions of government. The Council considers it timely to assess the system of federal judicial review in Australia and to consider if it is the best model adapted to Australia's constitutional context. The Council is considering this issue on its own motion according to its powers under s 51 of the *Administrative Appeals Tribunal Act 1975 (Cth)* ('*AAT Act*').

1.3 In this regard, it is important to bear in mind the significant developments in the principles of judicial review under the *Constitution* and the *ADJR Act* through case law, since the *ADJR Act* was enacted. This development in legal principle has been accompanied by the establishment of a third federal court — the Federal Magistrates Court (FMC) — and an increasing divergence in the jurisdictions of the High Court of Australia (High Court), the Federal Court of Australia (Federal Court) and the FMC. A further development has been the alignment of federal judicial review and state judicial review. The Council will have the benefit of assessing how different administrative law mechanisms have operated since the introduction of the *ADJR Act* and how well they are functioning today.

1.4 As part of this inquiry, the Council will examine all current means of seeking review of Australian Government decisions — constitutional judicial review, general statutory review under the *ADJR Act* and specific statutory review mechanisms — and make recommendations for the future direction of judicial review of government actions for the whole of the judicial review system. The Council's aim is to make recommendations relating to the following areas:

- the need for statutory review mechanisms, both general and specific, in light of the fact that constitutional judicial review is entrenched and cannot be excluded by legislation
- the ambit and provisions of a general statutory review scheme, if the Council considers such a scheme to be desirable, and
- general principles to apply to all statutory review schemes, and guidance as to whether and when specific statutory review mechanisms are appropriate.

1.5 The Council has also asked a number of questions relating to reasons for decisions, and aims to either make recommendations in this area or to consider these issues as part of a separate project, depending on the responses received during consultations. Following consultations, the Council will release a final report containing its recommendations.

### **PREVIOUS CONSIDERATION BY THE ADMINISTRATIVE REVIEW COUNCIL**

1.6 In its role of providing oversight of the system of administrative law, the Council has produced a number of reports relating to judicial review of administrative action. In this consultation paper, the Council has revisited many of its previous recommendations in light of changes to the administrative law system since those recommendations were made.

1.7 In its first report in 1978,<sup>1</sup> the Council identified particular classes of decisions for exclusion from the *ADJR Act*. The Council was guided in its work by a statement of general principles, which was developed with the understanding that the *ADJR Act* did not introduce a new form of administrative review, but only modified existing judicial review. As such, the *ADJR Act* applied widely, and the Council adopted the view that ‘cogent reasons are required to justify excluding a class of decisions from the beneficial operation of the Act’.

1.8 Many of the Council’s recommendations from this first report were incorporated into the Administrative Decisions (Judicial Review) Amendment Bill 1980. In July 1980, the Council accepted an invitation from the Attorney-General to comment on the Bill. In Report No 9,<sup>2</sup> the Council noted that some exclusions in the Bill appeared to be inconsistent with the bases of the Council’s previous recommendations in Report No 1. The Council made a number of recommendations concerning regulations to delete classes of decisions from the Schs to the *ADJR Act* and about s 13A, which were not taken up in the Bill. However the Government accepted the Council’s recommendation that there be a future review of the operation of the *ADJR Act*.

1.9 This review was constituted by three reports. In 1986, Report No 26 considered claims that the *ADJR Act* was being abused.<sup>3</sup> This was followed in 1989 by Report No 32 which considered issues around the ambit of the *ADJR Act*<sup>4</sup> and in 1991 by Report No 33 which was concerned with statements of reasons.<sup>5</sup> In Report No 26, the Council considered whether experience of the operation of the *ADJR Act* had demonstrated that, in the course of

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<sup>1</sup> Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977 — Exclusions under Section 19*, Report No 1 (1978).

<sup>2</sup> Administrative Review Council, *Administrative Decisions (Judicial Review) Amendment Bill 1980*, Report No 9 (1980).

<sup>3</sup> Administrative Review Council, *Review of Administrative Decisions (Judicial Review) Act 1977: Stage 1*, Report No 26 (1986).

<sup>4</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

<sup>5</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statement of Reasons for Decisions*, Report No 33 (1991).

achieving its primary aims, the *ADJR Act* had left public authorities open to unwarranted litigation. The Council did not consider that an increase in the number of judicial review cases, whether generally or under specific legislation, or the mere fact of applications for an order of review being refused, indicated that the *ADJR Act* was being abused. The Council found little evidence of the *ADJR Act* being used to delay or frustrate Commonwealth administration merely to gain a tactical advantage, rather than to establish a genuine legal right or interest. The Council recommended amendments to the *ADJR Act*, by which the Federal Court's powers could be extended and clarified to enable it to stay or to refuse to grant applications for review in appropriate cases.

1.10 In Report No 32 the Council recommended widening the scope of judicial review under the *ADJR Act* commensurate with that available under s 75 of the *Constitution* by way of the Constitutional writs. The Council reiterated its recommendation from Report No 26 that the Federal Court's discretion to refuse relief or grant an application under the *ADJR Act* should be strengthened. The Council recommended that the *ADJR Act* should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament. The Council's recommendations from Reports 26 and 32 are considered in more detail in Part 4 of this paper in the sections on ambit or scope of review and court procedure.

1.11 In Report No 33, which was concerned with statements of reasons for decisions, the Council recommended that Sch 2 — which exempts classes of decisions set out in Sch 2 from the requirement to give reasons — be repealed. However, acknowledging the need to prevent the disclosure of information in statements of reasons for decisions that should not, in the public interest, be disclosed, the Council made certain recommendations aimed at bolstering the provisions of s 13A of the Act. These recommendations are considered in Part 4 of this paper in the section on reasons.

1.12 Report No 41 in 1999, concerned the need for a specific statutory right of appeal to the Federal Court from decisions of the Administrative Appeals Tribunal (AAT).<sup>6</sup> The Council recommended that the scope of review by the Federal Court should remain unchanged. However, the report also recommended that the Federal Court's powers be expanded slightly, to give it discretion to receive evidence and to make findings of fact where there has been an error of law, provided the Court's findings are not inconsistent with those of the AAT.

1.13 In Report No 38 the Council considered government business enterprises and administrative law.<sup>7</sup> In Report No 42 in 1998,<sup>8</sup> the Council considered the contracting out of

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<sup>6</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997).

<sup>7</sup> Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) 48.

government services. In both these reports the Council reiterated its recommendation that the ADJR Act should extend to include a decision of an administrative character made by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament.<sup>9</sup>

1.14 The Council has also addressed constitutional and policy considerations relevant to the scope of judicial review. Report No 47, *The Scope of Judicial Review* published in 2003, provided guidance in the form of indicative principles to assist in determining when limitations to judicial review are acceptable in the context of particular policy and legislative proposals.<sup>10</sup>

## OTHER REPORTS

1.15 There are a number of recent reports relevant to this inquiry. Two reports of relevance to the Australian civil justice system — relating to access to justice and human rights — were released in 2009. This section provides a brief summary of those reports, and how they relate to the Council's current inquiry. In 2010, the Law Commission for England and Wales ('Law Commission') released a report on administrative redress which discussed proposals relating to the reform of judicial review remedies. The Council has considered this report in preparing this consultation paper. In early 2011, Professor John McMillan conducted an inquiry into judicial review of refugee status assessments of irregular maritime arrivals at the request of the government. The NSW Department of Justice and Attorney-General released the *Discussion Paper: Reform of Judicial Review in NSW* in March 2011. This section considers how these reports relate to the Council's broad inquiry into federal judicial review.

### A Strategic Framework for Access to Justice

1.16 The Access to Justice Taskforce was established in the Australian Government Attorney-General's Department in January 2009 to develop a more strategic approach to and make recommendations on ways of improving access to justice for all Australians. The report of the Access to Justice Taskforce was released on 23 September 2009.<sup>11</sup> The central recommendation of the report was a Strategic Framework for Access to Justice which has been adopted by the Government.

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<sup>8</sup> Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998).

<sup>9</sup> Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998) rec 22; Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) 48.

<sup>10</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003).

<sup>11</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (3 December 2010) Australian Government Attorney General's Department <[www.ag.gov.au/a2j](http://www.ag.gov.au/a2j)>.

1.17 The Australian Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System*<sup>12</sup> sets out key principles to guide justice system reforms and initiatives, as well as resource allocation decisions, in order to best achieve access to justice. These principles are: accessibility, appropriateness, equity, efficiency and effectiveness. In November 2009, the Standing Committee of Attorneys-General adopted the access to justice principles to guide future decisions affecting civil justice. The principles will therefore be applied by policy makers in any implementation of recommendations resulting from this inquiry.

### **National Human Rights Consultation**

1.18 The National Human Rights Consultation was conducted by an independent Committee — the National Human Rights Consultation Committee — established by the Australian Government. It aimed to seek a range of views from across Australia about the protection and promotion of human rights. The Committee provided its report to Government on 30 September 2009.<sup>13</sup>

1.19 The most significant recommendations for administrative law were: that the *ADJR Act* be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making; and that the Australian Human Rights Commission President be included as a statutory member of the Council. The Australian Government is implementing the second of these recommendations, but not the first.

1.20 There is a distinction to be made between the framework for judicial review, which is the subject of the Council's current inquiry, and the substantive question of whether particular human rights should be taken into account by administrative decision makers. There is a further question of the distinction between judicial review and human rights review — human rights review is concerned with the substantive question of whether rights have been infringed, while judicial review focuses on decision making procedure. The Council considers that these issues are outside the scope of this inquiry into the framework for the system of federal judicial review in Australia.

### **Administrative Redress: Public Bodies and the Citizen**

1.21 The Law Commission published its report, *Administrative Redress: Public Bodies and the Citizen*, on 25 May 2010.<sup>14</sup> This followed publication of a discussion paper (October

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<sup>12</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (3 December 2010) Australian Government Attorney General's Department <[www.ag.gov.au/a2j](http://www.ag.gov.au/a2j)>.

<sup>13</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) <[www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report)>.

<sup>14</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010). The report and the papers which preceded it can be downloaded from <[www.lawcom.gov.uk/remedies.htm](http://www.lawcom.gov.uk/remedies.htm)>.

2004),<sup>15</sup> a scoping paper (October 2006)<sup>16</sup> and a consultation paper (3 July 2008),<sup>17</sup> as part of the Law Commission's review of the law on redress from public bodies for substandard administrative action.

1.22 In its consultation paper, the Law Commission proposed reforms to the court-based common law mechanisms for redress against public bodies, in judicial review and private law claims.<sup>18</sup> The proposed reforms involved the creation of a statutory discretion of the court to award damages against a public body for 'serious fault' in making a decision which was objectively intended to confer a benefit on a class of individuals.<sup>19</sup> In the final report, the Commission decided not to pursue these proposals due to opposition raised in consultations and the lack of data available to refute or support those criticisms.<sup>20</sup> However, recommendations were made about the collation and publication of data about the costs of compensation paid by government.<sup>21</sup> The Law Commission's recommendations are considered in more detail in Part 4, in relation to remedies.<sup>22</sup>

1.23 Other proposed reforms in the consultation paper were directed at improving access to, and powers of, public sector ombudsmen to aid them in undertaking their role in the redress system for administrative injustice.<sup>23</sup> No recommendations were made about these proposals in the report. However, the Law Commission will be undertaking a process of further review and consultation in this area.<sup>24</sup>

### **Professor McMillan paper on immigration processes**

1.24 On 7 January 2011, the Minister for Immigration and Citizenship, the Hon Chris Bowen MP, announced that the Government has asked Professor John McMillan AO to advise the Government on possible options for improving the efficiency and minimising the duration of the judicial review process for irregular maritime arrivals. Professor McMillan's advice was not published at the time of release of this Consultation Paper.

### **Discussion Paper: Reform of Judicial Review in NSW**

1.25 In March 2011, the NSW Department of Justice and Attorney-General released the *Discussion Paper: Reform of Judicial Review in NSW* for public consultation. NSW does not

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<sup>15</sup> Public Law Team, Law Commission, *Monetary Remedies in Public Law: A Discussion Paper* (2004).

<sup>16</sup> Law Commission, *Remedies Against Public Bodies: A Scoping Report* (2006).

<sup>17</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen, A Consultation Paper*, Consultation Paper No 187 (2008).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* 75.

<sup>20</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 21–22.

<sup>21</sup> *Ibid* 69.

<sup>22</sup> See below [4.132]–[4.137].

<sup>23</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen, A Consultation Paper*, Consultation Paper No 187 (2008) 104–116.

<sup>24</sup> See Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 70.

currently have a statutory judicial review right. The discussion paper seeks views on whether a statutory review jurisdiction should be established, and if so, which of a number of options for reform of common law judicial review in NSW should be recommended. Comments on the discussion paper have been sought by 14 April 2011.

## 2 THE AUSTRALIAN ADMINISTRATIVE LAW SYSTEM

### INTRODUCTION

2.1 This Part describes the broader Australian administrative law system in its historical context, the current structure of the administrative law system and the principles underlying the administrative law system.

### THE DEVELOPMENT OF THE ADMINISTRATIVE LAW SYSTEM

2.2 This section sets out the development of the modern administrative law system. In considering the best model for judicial review in Australia it is important to understand the reasons why the current system of administrative review was developed.

#### Review of administrative decisions in Australia until the 1970s

2.3 State Supreme Courts in Australia adopted the common law approach of superior courts having inherent power to conduct judicial review. At the inception of the Commonwealth, s 75(v) of the *Constitution* gave jurisdiction to the High Court to issue remedies against an officer of the Commonwealth ‘in all matters in which a writ of Mandamus or prohibition or an injunction is sought’. Section 75(v) therefore retained the focus on remedies or writs that is a feature of judicial review under the common law.

2.4 In the early decades after federation, there was no active field of administrative law litigation. Costs, government secrecy, legal technicalities, and other factors combined to make judicial review a difficult and hazardous process.<sup>25</sup> In addition, the High Court was the sole forum for federal judicial review matters until the Federal Court was established on commencement of the *Federal Court Act 1976*.

2.5 By the early 1970s, a number of administrative review tribunals and other administrative review schemes in specific jurisdictions had been introduced.<sup>26</sup> However, the system was uncoordinated, having grown as a response to the pressures felt in particular areas

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<sup>25</sup> Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parliament of the Commonwealth of Australia Paper No 144 (*‘Kerr Committee Report’*) (1971) 9–10, 16–20. For a retrospective analysis of the main themes in the Report, see Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (Australian National University, 1998).

<sup>26</sup> Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions*, Parliament of the Commonwealth of Australia Paper No 316 (*‘Bland Committee Report’*) (1973). Appendix E provides a list of tribunals and jurisdictions.

of administration, and contained many gaps and anomalies. In consequence, the system was not easily understood by the general community.<sup>27</sup>

### Reforms in other jurisdictions

2.6 The size and powers of government expanded in the twentieth century, beginning with the ‘New Deal’ in the United States in response to the Great Depression.<sup>28</sup> After the end of World War II the role of government in service provision and regulation in Europe, North America and Australia grew dramatically.

2.7 This increase in government intervention led to reforms in various common law jurisdictions during the 1960s and 1970s. In the United Kingdom, there was a developing framework of administrative law, based on the courts, tribunals, a Parliamentary Commissioner for Administration and a Council on Tribunals.<sup>29</sup> Administrative law reform had also been occurring in New Zealand, notably by the creation of an Administrative Division of the Supreme Court in 1968, and the appointment of an Ombudsman in 1962.<sup>30</sup>

### The beginning of an integrated system of review in Australia

2.8 Australian states and territories began to implement similar reforms in the early 1970s. Between 1971 and 1974, five of the Australian states took similar action to create Ombudsmen or Parliamentary Commissioners.<sup>31</sup> Reform proposals of a different kind had also been made in Victoria. Two reports in 1968, from the Victorian Statute Law Revision Committee and the Chief Justice’s Law Reform Committee, proposed the creation of a general administrative tribunal, an Ombudsman and a reformed system of judicial review.<sup>32</sup> Academic and judicial commentators in Australia had also spoken in favour of administrative law reform.<sup>33</sup>

2.9 The present Commonwealth system of administrative review can be traced to the report in 1971 of the Commonwealth Administrative Review Committee, chaired by Sir John Kerr (‘the Kerr Committee’). The major features of the present system — the statutory framework for judicial review, the AAT, the Commonwealth Ombudsman, and, indeed, the Administrative Review Council — stem largely from the recommendations of that

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<sup>27</sup> Administrative Review Council, *Overview of the Commonwealth System of Administrative Review* (8 March 2011) <[www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview](http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview)>.

<sup>28</sup> On the effect of the New Deal see Gary Lawson, ‘The Rise and Rise of the Administrative State’ (1994) 107 *Harvard Law Review* 1231.

<sup>29</sup> *Kerr Committee Report*, above n 27, ch 6.

<sup>30</sup> *Parliamentary Commissioner (Ombudsman) Act 1962* (NZ). See *Kerr Committee Report*, above n 27, ch 7.

<sup>31</sup> *Parliamentary Commissioner Act 1971* (WA); *Parliamentary Commissioner Act 1971* (Qld); *Ombudsman Act 1972* (SA); *Ombudsman Act 1973* (Vic); *Ombudsman Act 1974* (NSW).

<sup>32</sup> See *Kerr Committee Report*, above n 27, ch 5. Note also the subsequent Report of the NSW Law Reform Commission, *Appeals in Administration*, Report No 16 (1973).

<sup>33</sup> See articles in R A Woodman (ed), *Record of the Third Commonwealth and Empire Law Conference, Sydney — Australia, 25 August–1st September, 1965* (Law Book Co, 1966).

Committee. In its landmark report in 1971, the Kerr Committee drew attention to the steady development of a vast range of administrative discretions that could be exercised in a way that detrimentally affected the life, liberty, property, livelihood or other interests of a person.<sup>34</sup> The Committee concluded that established mechanisms were unable adequately to correct administrative errors and to ensure justice for the individual.

2.10 The major theme underlying the report of the Kerr Committee was the need to develop a comprehensive, coherent and integrated system of administrative review.<sup>35</sup> The main recommendations of the Kerr Committee were:

- the establishment of a general merits review tribunal
- codification of the grounds of judicial review, including clarification of the grounds and simplification of procedures
- creation of a new superior federal court to have jurisdiction to hear judicial review applications
- the introduction of an obligation for decision makers to provide a statement of findings of fact and reasons at the request of a person affected by the decision
- the introduction of an obligation to disclose relevant documents
- the establishment of a Counsel for Grievances, and
- the establishment of the Administrative Review Council with a continuing role overseeing and monitoring the new system.<sup>36</sup>

2.11 These recommendations form the basis for the major elements of the administrative law system today.

2.12 In this system, courts, tribunals and the ‘General Counsel for Grievances’ (which became the Ombudsman) would all play separate but overlapping roles. As Professors Robin Creyke and John McMillan have noted, the Kerr Committee considered the integration of the whole system to be a key means of creating a unified review system. However, generally speaking this integration and harmonisation has not occurred.<sup>37</sup> This is because a number of the Kerr Committee recommendations directed towards the integration of the system were never implemented, for example the recommendations that the Ombudsman have an

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<sup>34</sup> See for example, *Kerr Committee Report*, above n 27, 1, 3–4 and 6.

<sup>35</sup> Robin Creyke and John McMillan, ‘Administrative Law Assumptions ... Then and Now’ in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 1.

<sup>36</sup> *Kerr Committee Report*, above n 27, 112–116.

<sup>37</sup> Robin Creyke and John McMillan, ‘Administrative Law Assumptions ... Then and Now’ in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 10–11.

advocacy role in courts and tribunals and departmental representatives be appointed to tribunals.

2.13 The second key feature of the Kerr Committee's recommendations was the central role that administrative tribunals should play in review of executive action. The Committee downplayed the importance of the role of the courts, seeing judicial review as complementary to merits review, rather than the most important feature of the system.<sup>38</sup>

### **The establishment of the Administrative Appeals Tribunal, the Ombudsman and a statutory system of judicial review**

2.14 The Committee on Administrative Discretions, chaired by Sir Henry Bland, ('Bland Committee') was established to advance the Kerr Committee's recommendations, in particular to consider the variety of government discretions and to identify those which should be subject to merits review. The final report of the Bland Committee drew attention to the lack of consistent administrative review, the diversity of tribunal procedures and functions and the lack of external review in many jurisdictions. The Bland Committee supported the establishment of a general merits review tribunal and a Counsel for Grievances, or Ombudsman.<sup>39</sup>

2.15 The inquiry by the Committee of Review of Prerogative Writ Procedures, chaired by Mr Robert Ellicott QC ('Ellicott Committee') examined the Kerr proposals for a reformed system of judicial review. This Committee was established to review the prerogative writ procedures available in the courts and was primarily concerned with judicial review. The Ellicott Committee endorsed the Kerr Committee's view that the state of the law relating to judicial review of administrative action was technical and complex and in need of reform, simplification and legislative statement.<sup>40</sup> The Ellicott Committee also endorsed the Kerr Committee's recommendation that a Counsel for Grievances be established.

2.16 The recommendations of the Kerr, Bland and Ellicott Committees led to the establishment of the AAT under the *AAT Act* and the Ombudsman under the *Ombudsman Act 1976* (Cth), as well as the implementation of a statutory judicial review scheme under the *ADJR Act*.

### **The introduction of freedom of information and privacy laws**

2.17 Two interdepartmental committees in 1974 and 1976 considered the implementation of freedom of information laws in Australia, based on the US *Freedom of*

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<sup>38</sup> *Kerr Committee Report*, above n 27, 67.

<sup>39</sup> *Bland Committee Report*, above n 28.

<sup>40</sup> Committee of Review of Prerogative Writ Procedure, *Report of the Committee of Review of Prerogative Writ Procedure*, Parliament of the Commonwealth of Australia Paper No 56 (1973) ('*Ellicott Committee Report*').

*Information Act 1966*, in Australia. The report of the 1976 committee became the basis for the *Freedom of Information Act 1982* (Cth).

2.18 The *Privacy Act 1988* (Cth) was passed by the Federal Parliament at the end of 1988. The Act gave effect to Australia's agreement to implement guidelines adopted in 1980 by the Organisation for Economic Cooperation and Development (OECD) for the Protection of Privacy and Transborder Flows of Personal Data, as well as its obligations under Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

## **CHANGES IN GOVERNMENT SINCE THE 1970S**

2.19 There are a number of major themes which have emerged in terms of changes to government since the Kerr Committee handed down its report, all of which have altered the imperatives that prompted the various reforms instituted in the 1970s and 1980s. First, the expansion of government legislation and legislative instruments noted by the Committee has continued. Secondly, during the 1980s and increasing through the 1990s, the privatisation of government services became a central theme of government administration. Thirdly, there has been a significant growth in the regulatory state, in terms of the establishment of independent regulators and an increase in powers granted to those regulators. Fourthly, developments in technology have changed the way in which government administration is conducted. This section considers how the operation and functions of government has changed in the 1970s and how the administrative law system has changed since the *ADJR Act* was introduced.

### **Increase in legislation**

2.20 The number of pages of Commonwealth legislation passed each year has increased dramatically since 1990. From 1990 to 2006, the Australian Parliament passed more pages of legislation than were passed during the first 90 years of federation.<sup>41</sup> This increase, of itself, does not necessarily mean that government regulation has grown. For example, increased detail in legislation may make the intended operation of the statute clearer and more certain, with less room for variety in judicial interpretation. There have also been changes to the formatting of legislation. Nonetheless, it has been suggested that government has become more focused on legislative solutions to policy problems.<sup>42</sup> Chris Berg argues, in his study of the growth of the regulatory state, that 'technical changes in the manner in which legislation is drafted cannot explain modern legislative and regulatory excess'.<sup>43</sup>

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<sup>41</sup> Taskforce on Reducing Regulatory Burdens, Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006) 5.

<sup>42</sup> See Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008) 10–19.

<sup>43</sup> *Ibid* 17.

2.21 This increase in the amount of legislation has contributed to the increase in the volume of discretionary decisions made by public officials. In 2009–10, Centrelink alone had 7.02 million customers and administered 11.4 million individual entitlements.<sup>44</sup>

2.22 The increase in legislative instruments has also seen a new phenomenon arise — hybrid mechanisms which are part legislative and part administrative in nature, blurring the distinction between legislative and administrative actions of the Executive.

### **Privatisation of government functions**

2.23 In contrast with this growth in legislation, is the move during the 1980s and 1990s towards the privatisation of many functions traditionally carried out by the state. The main forces driving this trend were high budget deficits, perceived inefficiencies in government operations, and a loss of faith that government could continue to meet citizens' expectations of an increased standard of living.<sup>45</sup> The theory was that the market, through competition between service providers, could provide higher quality services more efficiently than government and many government services were outsourced to private providers. However, a consequence of such privatisation was to put private providers outside administrative review. Outsourcing was therefore seen by many commentators as a threat to government accountability.<sup>46</sup> While some elements of the system, in particular the Ombudsman, now apply to government contractors, the reach of judicial review has not extended into the private sector.<sup>47</sup>

2.24 Other jurisdictions have dealt with this issue in different ways. English courts have been prepared to find that private and domestic bodies that do not exercise statutory powers may nevertheless be amenable to judicial review.<sup>48</sup> The focus of the English courts is government power, although it has been admitted this can be as much a matter of 'feel' as deciding whether criteria are met.<sup>49</sup> The South African *Promotion of Administrative Justice Act 2001* applies to 'a natural or juristic person, other than an organ of state, when exercising

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<sup>44</sup> Centrelink, *Annual Report 2009–10*.

<sup>45</sup> Michael Taggart, 'The Changing Nature of the Administrative State' in Peter Cane and Mark Tushnet (eds), *The Oxford Companion to Legal Studies* (Oxford University Press, 2003) 103.

<sup>46</sup> See, for example, Rachel Livingston, 'Contracting out of employment services in Australia and administrative law' (2003) 10 *Australian Journal of Administrative Law* 77; Hannes Schoombie, 'Judicial Review of Contractual Powers', in Linda Pearson (ed), *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1997) 433; David De Carvalho, 'Social contract renegotiated: Protecting public law values in the age of contracting' (2001) 28 *AIAL Forum* 1; Margaret Allars, 'Private law but public power: Removing administrative law review from government business enterprises' (1995) 6 *Public Law Review* 44.

<sup>47</sup> See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

<sup>48</sup> *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] QB 815, 824–825. The English Court of Appeal found that the Take-overs Panel — which was part of a system of self-regulation 'without visible means of legal support', which had 'no statutory, prerogative or common law powers' and was 'not in contractual relationship with the financial market or with those who deal in that market' — could be subject to judicial review.

<sup>49</sup> *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599, [13] (Scott Baker LJ).

a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect'.<sup>50</sup> This means that the South African courts focus on whether the body or person made the decision while exercising public power or performing a public function.

### **Increase in the number and powers of regulatory bodies**

2.25 Another trend in government in Australia has been an increase in the number and powers of government regulators, such as the Australian Securities and Investment Commission, the Australian Consumer and Competition Commission, the Australian Prudential Regulation Authority, the Insolvency and Trustee Service Australia and the Australian Energy Regulator.<sup>51</sup> Some commentators have suggested that regulation has eclipsed traditional taxation and spending power of government as a means of directing and controlling economic and social behaviour.<sup>52</sup> This is significant to administrative law in that those affected by regulatory decisions will usually be corporations, rather than individuals, and may have different approaches to litigation and a different power relation to the government decision makers.

### **Technological developments**

2.26 Technology now plays a significant role in government decision making. This has assisted governments to deal with the increase in the volume of decisions being made, but has also changed the manner in which decisions are made.

2.27 The development of computer systems that can make decisions or guide decision makers has raised new issues for administrative law. 'Automated decision making' has the potential to lead to greater accuracy and consistency in decision making — for example through limiting the potential for irrelevant factors to be taken into account. However, automated decision making also has a number of potential pitfalls — for example narrowing the discretion granted by a statute or the possibility of discrepancies arising over time between the computer system and the legislation.

2.28 The Council considered the issues associated with automated decision making in 2004.<sup>53</sup> The Australian Government developed a best practice guide based on the Council's report.<sup>54</sup>

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<sup>50</sup> *Promotion of Administrative Justice Act 2001* (South Africa) s 1.

<sup>51</sup> Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008) 20.

<sup>52</sup> *Ibid* 57.

<sup>53</sup> Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46 (2004).

<sup>54</sup> Australian Government Information Management Office, *Automated Assistance in Administrative Decision Making: Best Practice Guide* (Commonwealth of Australia, 2007).

## **THE CURRENT SYSTEM OF ADMINISTRATIVE LAW IN AUSTRALIA**

2.29 This section describes the current administrative law system in Australia as well as other mechanisms for improving government decision making. The following section considers how different elements of the administrative law system accord with the underlying principles of the system.

### **Purpose of the administrative law system**

2.30 The Australian administrative law system consists of mechanisms for reviewing Australian Government decisions and for improving the future conduct of Australian Government officers and agencies. Expressed in its simplest form, the administrative law system has a dual purpose:

- to improve the quality, efficiency and effectiveness of government decision making generally, and
- to enable people to test the legality and the merits of decisions that affect them.

### **Principles of the administrative law system**

2.31 The original purpose of the administrative law system as envisaged by the Kerr and Bland Committees was to protect citizens against government at a time when government was growing in size and exercising more administrative authority and discretionary power.<sup>55</sup> The administrative law system is also superimposed upon a constitutional framework for judicial review which has regard to public law values such as the rule of law, the safeguarding of individual rights and executive accountability. There is also an expectation that external review of administrative action will lead to broader systemic improvements in the quality and consistency of government actions.

2.32 Flowing from these considerations, the Council has previously identified the general principles underlying the administrative law system as: lawfulness, fairness, rationality, openness, efficiency and accessibility.<sup>56</sup> Any reforms to judicial review should be consistent with these principles, recognising that the system as a whole should address all of the underlying principles.

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<sup>55</sup> Robin Creyke and John McMillan, 'Administrative Law Assumptions ... Then and Now' in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 1.

<sup>56</sup> See Administrative Review Council, *Automated Assistance in Administrative Decision Making, Report to the Attorney-General*, Report No 46 (November 2004) 3; Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008) 2; Administrative Review Council, *Annual Report 2008–09*.

*Application of principles in the administrative law system*

2.33 The principle of lawfulness is supported in particular by the availability of judicial review of government actions. Through judicial review, courts can ensure that public officials do not exceed their legal powers, and can provide remedies when officials do overstep those bounds. Specialist external review bodies such as the AAT also have significant legal expertise which contributes to lawful government decision making.

2.34 Fair and rational decision making is achieved through a number of elements of the administrative law system, including: legal standards applied to decision-making procedures through judicial review; finding the ‘correct or preferable decision’ through external merits review; and investigations conducted by various accountability agencies.

2.35 Freedom of information legislation supports the principle of openness in government decision making. Public reporting of the decisions of merits review tribunals and courts also contributes to openness.

2.36 The range of review mechanisms available contributes to the efficiency and accessibility of the administrative law system, by providing a range of avenues for people to hold government accountable for its conduct. In particular, complaints can be made to the Ombudsman free of charge, and applications for merits review can be made to the Information Commissioner without any cost. Internal review usually involves no cost and provides an accessible means of having a decision reviewed.

**Review of government decisions**

2.37 There are four main mechanisms for review and oversight of administrative government decision making:

- internal merits review
- external merits review (including tribunals and the new Office of the Australian Information Commissioner)
- administrative investigation (for example the Ombudsman), and
- judicial review.

2.38 These mechanisms all play different roles in terms of achieving the purposes of the administrative law system. Both internal and external merits review allow people to test the merits of a decision, and also have a normative effect on primary decision making, thus improving the quality and effectiveness of government decision making. Administrative investigation by the Ombudsman allows people to test the merits and legality of a decision, but also plays a significant role in improving the quality, efficiency and effectiveness of government decision making generally. Judicial review is directed at allowing people to test the legality of a decision.

*Merits review*

2.39 Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the ‘correct or preferable decision’. In merits review, a new decision can be made after review of the facts. This is different from judicial review, where only the legality of the decision-making process is considered. Judicial review usually consists of a review of only the procedures followed in making the decision.

2.40 The objective of merits review is to ensure administrative decisions are correct or preferable — that is, they are made according to law and/or are the best decision that could have been made on the basis of the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making.<sup>57</sup>

2.41 *Internal review* occurs where a decision made by an officer of an agency is reviewed by another person in the agency. Many agencies have some formal system of internal review; others have more ad hoc systems. Internal review can be sought by requesting reconsideration of a decision or by following set procedures where more formal mechanisms exist. Internal review may be stipulated in legislation or may be available through administrative processes in an agency.

2.42 *External review* involves a fresh consideration of a case by an external body. This body is often a tribunal, but may also be a regulator reviewing the decision of a private body given decision-making power by legislation, or an independent officer from another agency. External merits review has to be provided for by legislation; it is not available without specific prescription.

*Administrative investigation*

2.43 The Commonwealth Ombudsman has wide powers to investigate complaints about the administrative actions and decisions of most Australian Government agencies to consider if they are wrong, unlawful or discriminatory. Under the *Ombudsman Act*, the Ombudsman can also investigate complaints about government contractors providing goods and services to the public under a contract with a government agency. Ombudsman investigation and review is automatically available for all administrative and decision-making processes of agencies within the Ombudsman’s jurisdiction and does not have to be specified in legislation. The Ombudsman has the discretion not to investigate a complaint. The Ombudsman can also conduct ‘own motion’ investigations. The remedies offered by the

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<sup>57</sup> Administrative Review Council, *What decisions should be subject to merits review?* (Commonwealth of Australia, 1999).

Ombudsman are: recommendations to departments; specific reports to government; or broader reports making recommendations to government about systematic problems.<sup>58</sup>

2.44 Other Australian Government agencies may have an investigative function that is comparable to that of the Ombudsman. For instance, whether Commonwealth administrative activity complies with human rights, anti-discrimination or privacy standards can be the subject of investigation by a Commissioner, under the aegis of the Human Rights and Equal Opportunity Commission (HREOC). HREOC largely resolves complaints through conciliation. Commissioners may make reports to the relevant Minister or body recommending action, including the payment of compensation.<sup>59</sup> After a complaint has been finalised by HREOC, applicants may have the right to apply to the Federal Court, which has the power to make a variety of orders in relation to the complaint if the court finds discrimination has occurred.<sup>60</sup>

#### *Judicial review*

2.45 Judicial review occurs when a court reviews a decision to make sure that the decision maker used the correct legal reasoning or followed the correct legal procedures. It is not the re-hearing of the merits of a particular case. Judicial review in Australia is discussed in detail below.

#### **Accessing and protecting information**

2.46 Other aspects of administrative law operate in a different way to protect individuals and to ensure the lawfulness and accountability of decision making, helping to fulfil one of the purposes of the administrative law system by improving the quality of government decision making. There are, in particular, a number of mechanisms that enable members of the public to obtain documents and information about government administrative processes. These mechanisms are complemented by requirements placed on administrators to make, maintain and store records, and to protect personal information, including: the *Freedom of Information Act 1982*; the *Archives Act 1983*; the *Privacy Act 1988*; and the right to request reasons in the *ADJR Act* or in relation to decisions subject to review in the AAT. These aspects of administrative law assist in ensuring the integrity of government, and enable people affected by government decisions to ascertain why they have been dealt with in a particular way.

2.47 The *Freedom of Information Act* has recently been the subject of major reforms,<sup>61</sup> implementing recommendations made by the Australian Law Reform Commission (ALRC)

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<sup>58</sup> *Ombudsman Act 1976* (Cth) s 15.

<sup>59</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 29 and 35.

<sup>60</sup> *Ibid* s 46PO.

<sup>61</sup> *Freedom of Information Amendment (Reform) Act 2010* (Cth); *Australian Information Commissioner Act 2010* (Cth).

and the Administrative Review Council in their joint report: *Open Government: A review of the federal Freedom of Information Act 1982*.<sup>62</sup> The reforms have established a new statutory office of the Australian Information Commissioner.<sup>63</sup> The government is also working on major reforms to the *Privacy Act* in response to the Australian Law Reform Commission's report, *For Your Information: Australian Privacy Law and Practice*.<sup>64</sup> On 1 November 2010, the Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner (OAIC).<sup>65</sup> The Exposure Drafts of Australian Privacy Amendment Legislation and companion guides are currently before the Senate Finance and Public Administration Committees.<sup>66</sup>

2.48 The Australian Information Commissioner, supported by the Freedom of Information Commissioner, works to promote awareness and understanding of the Freedom of Information legislation among both agencies and the public.<sup>67</sup> The Australian Information Commissioner has significant merits review and investigation powers, as well as a significant role in developing information policy in the Australian Government.<sup>68</sup> Individuals can access information or records held by the Government by making applications under the *Freedom of Information Act*, and apply for external review of these decisions by the Information Commissioner<sup>69</sup> and the AAT.<sup>70</sup>

2.49 A person may complain to the Australian Privacy Commissioner if he or she is concerned about how the Government collects and handles personal information.<sup>71</sup> There are Information Privacy Principles which set out how the Government is to treat this information and the circumstances in which agencies can pass the information to someone else.<sup>72</sup>

### **Other accountability mechanisms**

2.50 There are a variety of other agencies, policies and legal remedies which are not part of the administrative law system, but which also serve to keep government accountable

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<sup>62</sup> Australian Law Reform Commission, Report No 77 (1995); Administrative Review Council, Report No 40 (1995).

<sup>63</sup> *Australian Information Commissioner Act 2010* (Cth).

<sup>64</sup> Report 108 (2008).

<sup>65</sup> *Australian Information Commissioner Act 2010* (Cth) ss 6, 7, 9, 12 and 14.

<sup>66</sup> Australian Government, *Australian Privacy Principles — Exposure Draft, Australian Privacy Principles — Companion Guide, Credit Reporting — Exposure Draft, Credit Reporting — Companion Guide* (2010). Available at Senate Finance and Administration Committees, *Exposure Drafts of Australian Privacy Amendment Legislation* (17 March 2011) Senate of the Parliament of Australia <[www.aph.gov.au/Senate/committee/fapa\\_ctte/priv\\_exp\\_drafts/index.htm](http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/index.htm)>.

<sup>67</sup> *Australian Information Commissioner Act 2010* (Cth) s 8.

<sup>68</sup> *Australian Information Commissioner Act 2010* (Cth) s 7.

<sup>69</sup> *Freedom of Information Act* (Cth) pt VII.

<sup>70</sup> *Freedom of Information Act* (Cth) pt VIII. Section 57A gives the AAT the power to review either decisions made by the Information Commissioner or agency decisions which the Information Commissioner declares inappropriate for Information Commissioner review.

<sup>71</sup> *Privacy Act 1988* (Cth) s 36.

<sup>72</sup> *Privacy Act 1988* (Cth) s 14.

for its conduct and decision making. The Council does not propose to recommend reforms to these broader elements of the system, but it is important to recognise the role these mechanisms play when considering what judicial review can — and should — achieve in relation to ensuring government accountability. These include: agencies which provide accountability for executive conduct; mechanisms which provide accountability for legislative frameworks; other compensation mechanisms; and private legal action.

*Accountability for executive conduct*

2.51 There are a number of agencies which seek to improve government decision making which are not considered a part of the administrative law system. Rather they form a part of what the broader ‘administrative justice’ system. The Auditor-General, for example, conducts independent assessments of selected areas of public administration for Parliament.<sup>73</sup> The Auditor-General also provides government agencies with objective assessments of areas where improvements can be made in public administration and service delivery.<sup>74</sup> These reports are made public, and agencies report progress in annual reports.

*Accountability for executive rule making*

2.52 The *Legislative Instruments Act 2003* is designed to ensure accountability for the exercise of delegated legislative power by the executive through a regime which requires:

- consultation during the making of instruments<sup>75</sup>
- public accessibility through registration on the Federal Register of Legislative Instruments<sup>76</sup>
- parliamentary scrutiny through the disallowance process.<sup>77</sup> Parliament has 15 sitting days to consider a legislative instrument and members can move to have the instrument ‘disallowed’ during this period, invalidating the instrument, and
- sunseting — a process by which all legislative instruments automatically cease after 10 years.<sup>78</sup>

2.53 Parliamentary committees also play an important role in scrutinising legislation that is before Parliament. Both the Senate Standing Committee on the Scrutiny of Bills and

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<sup>73</sup> For example, beginning in 2007–08, an annual program was established in conjunction with the Defence Materiel Organisation (DMO) to enable the ANAO to review and report to the Parliament on the status of major Defence acquisition projects:

<sup>74</sup> See for example Australian National Audit Office, *Centrelink's Role in the Process of Appeal to the Social Security Appeals Tribunal and to the Administrative Appeals Tribunal*, Report No 16 (2010); Australian National Audit Office, *Northern Territory Night Patrols*, Report No 32 (2011).

<sup>75</sup> *Legislative Instruments Act 2003* (Cth) pt 3.

<sup>76</sup> *Ibid* pt 4.

<sup>77</sup> *Ibid* pt 5.

<sup>78</sup> *Ibid* pt 6.

the Senate Standing Committee on Regulations and Ordinances scrutinise all bills and instruments which Parliament is considering but has not yet passed into law, to see if they comply with general administrative law principles.

*Other compensation mechanisms*

2.54 There are also discretionary compensation mechanisms which government can use to provide compensation where a person suffers some loss or detriment because of government administration. There are three main schemes for providing discretionary compensation: the Scheme for Compensation for Detriment caused by Defective Administration (CDDA); act of grace payments; and ex gratia payments.<sup>79</sup> The Finance Minister, or delegate, also has the power to waive an amount owing to the Commonwealth.<sup>80</sup>

2.55 The authority to make CDDA payments comes from the executive power of the Commonwealth under s 61 of the *Constitution*. Under the CDDA, ministers and other authorised officials in agencies governed by the *Financial Management and Accountability Act 1997* (Cth) may compensate individuals or other bodies who have experienced losses caused by an agency's defective administration.<sup>81</sup>

2.56 'Act of grace' payments may be made under s 33 of the *Financial Management and Accountability Act 1997*. Section 33 allows the Finance Minister or delegate to authorise one-off and periodic payments to people if considered appropriate because of special circumstances, such as where government legislation or policy has had unintended and unacceptable consequences in a particular person's circumstances.<sup>82</sup> Act of grace payments are generally available where the government has a moral rather than a legal obligation to provide compensation for some harm caused by government administration.<sup>83</sup> For example, act of grace payments may be appropriate where the application of Commonwealth legislation or policy has resulted in an unintended, inequitable or anomalous effect on the applicant's particular circumstances.

2.57 Ex gratia payments may be made by the Prime Minister and/or Cabinet under the authority of s 61 of the *Constitution*. Usually, ex gratia payments are used to deliver financial assistance at short notice, often to groups of people rather than individuals.<sup>84</sup> The payments

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<sup>79</sup> Department of Finance, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09 (Commonwealth of Australia, 2009).

<sup>80</sup> *Financial Management and Accountability Act 1997* (Cth) sub-s 34(1)(a).

<sup>81</sup> Department of Finance, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09 (Commonwealth of Australia, 2009) 2.

<sup>82</sup> *Ibid* 23–24.

<sup>83</sup> *Ibid* 3.

<sup>84</sup> *Ibid* 4.

made to persons affected by the Bali bombing in October 2002 are an example of ex gratia payments made by the Commonwealth.<sup>85</sup>

2.58 The Senate Legal and Constitutional Affairs References Committee recently published a review of Australian Government compensation payments.<sup>86</sup> The review recommended that the Department of Finance should investigate the extension, in appropriate circumstances, of the CDDA to agencies governed by the *Commonwealth Authorities and Corporations Act 1997* and to third parties performing functions or providing services on behalf of the Australian Government.<sup>87</sup>

#### *Private legal action*

2.59 Private law remedies are usually directed at compensating an individual for loss suffered as a result of a particular wrong. Remedies may be available in contract where a person has a contractual relationship with the government. Public officials have long been held responsible for exceeding their lawful authority, by payment of damages under the torts of negligence, breach of statutory duty or misfeasance in public office.

2.60 Tort law has ‘an ancient lineage for abuse of power’.<sup>88</sup> Damages are available for negligence on the part of public authorities if a plaintiff can show that the authority owed the plaintiff a duty of care, breached that duty and caused the plaintiff damage. Whether liability will arise usually depends upon the nature of the activity.<sup>89</sup> For example, discretionary questions of policy are unlikely to give rise to liability, whereas the careless application of a policy may give rise to liability.<sup>90</sup> To show a breach of statutory duty, the claimant must show that Parliament intended a private action to be available for breach of the duty. Under the tort of misfeasance in public office, damages are available where the official acts in excess of their lawful power maliciously,<sup>91</sup> either with knowledge, or where the official ‘recklessly disregards the means of ascertaining the extent of his or her power’.<sup>92</sup>

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<sup>85</sup> Australian National Audit Office, *Compensation Payments and Debt Relief in Special Circumstances*, Audit Report No 35 (2004).

<sup>86</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010).

<sup>87</sup> *Ibid* 53.

<sup>88</sup> Carol Harlow, ‘A Punitive Role for Tort Law?’ in Michael Taggart, Linda Pearson and Carol Harlow (eds), *Administrative Law in a Changing State* (Hart Publishing, 2008) 247, 248.

<sup>89</sup> John C P Goldberg, ‘Tort’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 21, 37. For a general discussion and critique of the current legal tests — common law and legislative — for determining whether government entities owe a duty of care see Mark Aronson, ‘Government Liability in Negligence’ (2008) 32 *Melbourne University Law Review* 44.

<sup>90</sup> John C P Goldberg, ‘Tort’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 21, 37.

<sup>91</sup> *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 370 (Deane J).

<sup>92</sup> *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

## 3 THE CURRENT SYSTEM OF JUDICIAL REVIEW IN AUSTRALIA

### INTRODUCTION

3.1 There are a number of sources for judicial review in the Australian federal jurisdiction: constitutional judicial review under s 75(v) of the *Constitution* in the High Court which is mirrored in s 39B(1) of the *Judiciary Act 1903* (Cth) (*'Judiciary Act'*) for the Federal Court; alternative sources of judicial review under the *Constitution* (s 75(iii)) and the *Judiciary Act* (s 39B(1A)(c)); the *ADJR Act*; and various statutory appeal mechanisms. All of these mechanisms share origins in the common law of judicial review both in terms of the grounds of review and remedies, and the underlying principles of judicial review such as the rule of law and the principle of legality. This Part looks at the various sources of judicial review in the Australian federal jurisdiction and for each constitutional and statutory source describes: the scope of the jurisdiction; the grounds of review; standing to seek review and the remedies available.

### CONSTITUTIONAL JUDICIAL REVIEW

3.2 This section outlines what is often referred to as 'constitutional judicial review' — review under s 75(v) of the *Constitution* and s 39B(1) of the *Judiciary Act*.

#### Source

3.3 The source of constitutional judicial review is s 75(v) of the *Constitution*, which gives the High Court original jurisdiction in all matters 'in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.<sup>93</sup> These writs developed out of the common law concept of the 'prerogative writs' that were inherent in the jurisdiction of all superior courts of record. This jurisdiction is constitutionally guaranteed and cannot be excluded by legislation.

3.4 Section 39B(1) of the *Judiciary Act* provides a matching jurisdiction to s 75(v) that can be exercised by the Federal Court. Section 39B(1A) also confers broad additional jurisdiction on the Federal Court in any matter:<sup>94</sup>

- (a) in which the Commonwealth is seeking an injunction or a declaration; or
- (b) arising under the *Constitution*, or involving its interpretation; or

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<sup>93</sup> Mandamus — a writ compelling the exercise of a public power in accordance with a duty; prohibition — an order preventing particular conduct; injunction — an order restraining particular conduct. See below [3.13]–[3.16].

<sup>94</sup> Section 2 of the *Judiciary Act 1903* defines 'matter' to include 'any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter' and defines 'cause' to include 'any suit, and also includes criminal proceedings'.

- (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

3.5 Section 44 of the *Judiciary Act* allows the High Court to remit matters to the Federal Court, where the court has jurisdiction with respect to the subject matter and the parties. In most cases, s 75(v) matters can be remitted to the Federal Court; ss 39B(1) and (1A) also allow applications for judicial review to be lodged directly in the Federal Court.

### Scope

3.6 The scope of constitutional judicial review is related to the identity of the decision maker who must be ‘an officer of the Commonwealth’ — which includes: public servants; Ministers and their delegates; and federal judges (though not High Court judges). It does not include a state court or judge exercising federal jurisdiction.<sup>95</sup> The scope of review is also related to the availability of the constitutional remedies, discussed in more detail below. More significantly, the scope of constitutional judicial review is increasingly defined by reference to underlying constitutional concepts — in particular, the constitutional separation of powers. This section considers some of those underlying constitutional principles.

3.7 Judicial review is generally concerned with the lawfulness of an administrative decision. As Brennan J stated in *Church of Scientology v Woodward*:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>96</sup>

3.8 Stephen Gageler SC has observed that ‘the source of judicial review of both legislation and administrative action ‘can legitimately be labelled “the rule of law” [but] is more precisely identified as the constitutional separation of judicial power from legislative and executive power’.<sup>97</sup> Essentially, the separation of powers is based on the idea that power should not become too concentrated in the hands of any one branch of government.<sup>98</sup> In order to uphold the separation of powers, a body exercising powers should be subject to supervision by an institution independent of the holder of the power.

3.9 In the context of judicial review, the separation of powers defines what questions are appropriate for judicial consideration and therefore subject to judicial review remedies;

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<sup>95</sup> See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 36–39.

<sup>96</sup> (1982) 154 CLR 25, 70.

<sup>97</sup> Stephen Gageler, ‘The underpinnings of judicial review of administrative action: Common law or Constitution?’ (2000) 28 *Federal Law Review* 303, 309.

<sup>98</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009).

and what questions are appropriate for the executive government to answer. The courts have drawn on a distinction between the legality of a decision and the assessment of the merits of the particular case. In *Attorney-General v Quin*, Brennan J stated that:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. ... [T]he merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone. ... The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.<sup>99</sup>

3.10 Brennan J explains that 'the function of declaring and enforcing the law' is 'exclusively the function of the judicial power' and that it is 'the sole function of the judicial power'.<sup>100</sup> The separation of powers therefore becomes the basis of the distinction between 'legality' and 'merits' in judicial review matters, and the reason why judicial review looks only at the legality of the decision.<sup>101</sup> The distinction is significant because it effectively limits the power of the courts to supervise executive action, ensuring that the courts do not usurp the proper role of the executive. It is also possible that the wide availability of merits review by a specialist tribunal — the AAT — has contributed to the emphasis on the importance of the legality–merits distinction in Australia.

3.11 While in principle the distinction is easy to make, the line is often blurred in particular cases,<sup>102</sup> for example in relation to the application of particular principles of judicial review such as 'unreasonableness'.

3.12 The content of 'legality' in particular cases is usually defined by reference to the statutory grant of power from which, in most cases, executive authority to make decisions affecting individuals, derives:

While the legitimate scope of judicial review of administrative action in Australia is fixed its content is ultimately determinable by the legislature in formulating the law, which sets the limits and governs the exercise of the administrator's powers.<sup>103</sup>

Thus, the legislature plays a significant role in defining the content of legality in a particular case.

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<sup>99</sup> (1990) 170 CLR 1, 35–36.

<sup>100</sup> Stephen Gageler, 'The underpinnings of judicial review of administrative action: Common law or Constitution?' (2000) 28 *Federal Law Review* 303, 309.

<sup>101</sup> Sir Anthony Mason has suggested that such an approach reflects 'the limited Australian conception of the content of judicial power' which may be traced to the influence of Dixon CJ: Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 109.

<sup>102</sup> Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 280.

<sup>103</sup> *Ibid* 281.

## Remedies

3.13 Section 75(v) of the *Constitution* gives the High Court jurisdiction in any matter where a person is seeking mandamus, prohibition or an injunction against an officer of the Commonwealth. These writs are commonly referred to as the ‘constitutional writs’. Certiorari is available as an ancillary remedy where it is necessary for one of the constitutional writs to operate.<sup>104</sup> The court may also issue declarations.

3.14 A writ of prohibition orders a person not to make a particular unlawful decision or perform a particular unlawful action. A writ of mandamus orders a person to make a particular decision or perform a particular action required by law. A writ of certiorari quashes a decision, or deprives the decision of legal effect. Declarations and injunctions are equitable remedies. An injunction may either prohibit a particular act or require that an act be done. A declaration is simply a statement by the court that a decision is invalid, that a proposed decision would be invalid or that a particular action or duty should be performed. A declaration is not a coercive remedy.

3.15 Historically, it was necessary to show ‘jurisdictional error’ to obtain the common law writs of prohibition and mandamus, and the same rule still applies to the constitutional writs — which are only available where the decision maker has made a jurisdictional error or has failed to exercise jurisdiction when required to do so by law.<sup>105</sup> The concept of jurisdictional error is discussed in more detail below. Certiorari historically was only available for a jurisdictional error, unless the error was on the face of the record. However, in the constitutional jurisdiction, even an error on the face of the record must be a jurisdictional error, because certiorari is only available as an ancillary remedy, and the remedies to which it is ancillary are only available for a jurisdictional error.<sup>106</sup> In 2010, the High Court expanded what constitutes the record for these purposes in *Kirk v Industrial Court (NSW)* (*‘Kirk’*).<sup>107</sup>

3.16 The High Court has commented in obiter that injunctive relief may be available for a wider range of grounds than the constitutional writs, issuing even for non-jurisdictional errors.<sup>108</sup> Professor Peter Cane and Associate Professor Leighton McDonald suggest that this may mean that an injunction can be obtained under s 75(v) for a non-jurisdictional error, but only to have prospective operation.<sup>109</sup>

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<sup>104</sup> *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673.

<sup>105</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508.

<sup>106</sup> *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 393–4, 403, 440–1.

<sup>107</sup> (2010) 239 CLR 531, 577–78.

<sup>108</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508.

<sup>109</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 114.

### **Jurisdictional error and its significance to constitutional judicial review**

3.17 The term ‘jurisdictional error’ refers to errors made by a decision maker about the scope of the decision maker’s power.<sup>110</sup> In the United Kingdom and New Zealand the distinction between jurisdictional and non-jurisdictional errors has been rejected.<sup>111</sup> Some judges and commentators have argued that such a rejection is not possible in Australia because of Australia’s constitutional structure.<sup>112</sup> In Australia, the term has become increasingly significant due to the High Court’s identification of jurisdictional error as the unifying principle upon which constitutional judicial review is based.<sup>113</sup> The Court has also suggested that the jurisdictional error does not play the same central role in identification of legal error for proceedings under the *ADJR Act*.<sup>114</sup>

3.18 The High Court has linked the concept of jurisdictional error to the separation of powers in the Australian *Constitution*.<sup>115</sup> This has ‘anchored’ judicial review in the constitutional structure, ‘its existence mandated and its scope constrained by the separation of judicial power’.<sup>116</sup> Thus in the constitutional context, the concept of jurisdictional error is linked to the broader principle of legality, discussed above at [3.7]–[3.12]. Judicial review under s 75(v) is about ‘keeping administrative decision makers within the express or implied limits of the power conferred on them by statute’.<sup>117</sup>

3.19 The significance of review for jurisdictional error under s 75(v) emerged in 2001 in a High Court challenge to the *Migration Act 1958* (*Migration Act*). Section 474 of the *Migration Act* attempted to exclude ‘decisions ... made under [the *Migration Act*]’. In *Plaintiff S157 v Commonwealth*,<sup>118</sup> the High Court held that the clause did not apply to decisions affected by jurisdictional error because those decisions were not made ‘under the Act’.<sup>119</sup> Hence, the power of the High Court to grant judicial review remedies for jurisdictional errors was not excluded by s 474. The High Court stated that s 75(v) ‘introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of

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<sup>110</sup> *Craig v South Australia* (1995) 184 CLR 163.

<sup>111</sup> See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682.

<sup>112</sup> Chief Justice Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 83.

<sup>113</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 93; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

<sup>114</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 616 (Gummow ACJ and Kiefel J).

<sup>115</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23–24.

<sup>116</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104.

<sup>117</sup> *Ibid.*

<sup>118</sup> (2003) 211 CLR 476.

<sup>119</sup> *Ibid.* 506.

judicial review'.<sup>120</sup> The Australian Parliament could not therefore restrict judicial review for jurisdictional error through the use of privative clauses.

3.20 In 2010, in *Kirk*, the High Court held that state parliaments could not restrict the power of state supreme courts to review administrative decisions on the basis of jurisdictional error.<sup>121</sup> The High Court extended the 'entrenched minimum provision of judicial review' to state supreme courts.

3.21 How can jurisdictional error be defined? In *Craig v South Australia*<sup>122</sup> the High Court stated that an inferior court would fall into jurisdictional error if it 'mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist'.<sup>123</sup> The court stated that this includes:

- entertaining a matter which lies outside the limits of the court's powers
- acting in the absence of a jurisdictional fact
- failing to consider a matter that the relevant statute requires to be taken into account as a condition of jurisdiction, or considering an irrelevant matter, and
- misconstruing the relevant statute in a way that leads to the decision maker misconceiving the extent of its powers.<sup>124</sup>

3.22 In *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*')<sup>125</sup> the High Court indicated that whether or not an error was jurisdictional was a matter to be determined through a process of statutory interpretation. The courts have implied legislative conditions into statutes, most notably requirements to afford procedural fairness.<sup>126</sup>

3.23 This has extended the reach of review for jurisdictional error far beyond its historical ambit. The High Court made clear that the scope of jurisdictional error may continue to expand when it stated in *Kirk* that it was 'neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'.<sup>127</sup>

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<sup>120</sup> Ibid 513.

<sup>121</sup> (2010) 239 CLR 531.

<sup>122</sup> (1995) 184 CLR 163.

<sup>123</sup> Ibid 177.

<sup>124</sup> *Craig v South Australia* (1995) 184 CLR 163, 177–78.

<sup>125</sup> (1998) 194 CLR 355.

<sup>126</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

<sup>127</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

## Constitutional review and the common law grounds

### *Grounds and jurisdictional error*

3.24 Section 75(v) makes no reference to the grounds of review, and as a general proposition grounds will depend on interpretation of the statute governing the administrator's jurisdiction.<sup>128</sup> However, the concept of jurisdiction unifies the traditional grounds of review, and therefore the deployment of the concept of 'jurisdictional error' still leads to decisions based on the traditional grounds. As Gageler explains:

The legal rules giving rise to the traditional grounds of judicial review are ... not discrete or freestanding. They are all aspects of jurisdiction. They serve to identify the scope of a decision maker's power and the conditions of its valid exercise. But ultimately it is for the legislature to set the limits of any jurisdiction it confers. The scope of a decision maker's power and the conditions of its valid exercise can always be defined differently.

The traditional grounds are in truth no more than the default position to be applied in the absence of a contrary legislative intention to define the boundaries of a decision maker's jurisdiction differently. They are not always applicable. Where they are applicable they are not immutable but in large measure take their content from the particular statutory scheme. ... To the extent that it may apply, the common law can operate in relation to a statutory power only by supplying 'the omission of the legislature.'<sup>129</sup>

3.25 Gageler's argument is that the traditional grounds of review are a 'default position' for defining the boundaries of a decision maker's jurisdiction. Thus, the traditional grounds are a means of determining jurisdiction, but are themselves not 'free-standing' principles, the breach of which can invalidate any discretionary decision. In practice, the traditional grounds play a significant role in constitutional judicial review because of their 'default' status — courts will assume that Parliament intended those limits to jurisdiction to apply to decisions made under particular legislative provision unless there is an indication otherwise in the legislation.

### *Common law grounds*

3.26 In the United Kingdom, the grounds for review have been described as falling into three broad categories — illegality, irrationality, and procedural impropriety.<sup>130</sup> This division of the grounds of review has not been relied upon in Australia, but is a useful tool for summarising the grounds of review.

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<sup>128</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>129</sup> Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287.

<sup>130</sup> *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock). Lord Diplock also included 'possibly proportionality' on this list. Proportionality has been recognised as a ground in British cases but does not currently play a role in Australian judicial review. See below [4.68].

3.27 *Illegality* — The overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power.<sup>131</sup> There is an assumption that all public power has limits.<sup>132</sup> ‘Illegality’ is the end result of a breach of the limits of power, whether the breach is by way of act or omission. While all judicial review grounds are concerned with limits on executive power, many grounds focus on the limits placed by the legislation — for example errors of law, misinterpretation of the statute conferring decision making power and lack of jurisdiction.

3.28 *Irrationality* — Additional grounds of judicial review come into play where the decision maker has acted irrationally in reaching the decision. This could be due to improper influence in the decision-making process, consideration of irrelevant criteria, failure to consider relevant criteria or acting contrary to an overriding policy or purpose of an Act.<sup>133</sup>

3.29 The ground of *Wednesbury* unreasonableness, which is a decision ‘so unreasonable that no reasonable authority could ever have come to it’,<sup>134</sup> is an example of a ground of review which developed as a safety net to catch cases not demonstrating error on one of the more specific grounds of judicial review falling within this category.<sup>135</sup> Unreasonableness is a ground of review under the *ADJR Act*. *Wednesbury* unreasonableness has developed in the UK in 1990s to mean that, the graver the impact of the decision on the affected person, the more substantial the justification that will be required.<sup>136</sup> However, these developments toward ‘variable intensity unreasonableness review’ have not been accepted by the Federal Court because it may involve consideration of the merits of the decision.<sup>137</sup> Professor Michael Taggart has argued that, while some commentators consider it would be difficult to adopt without a bill of rights, the ground of review may be appropriate in view of Australia’s well-established ‘culture of justification’ through giving reasons for decisions.<sup>138</sup>

3.30 Closely related to *Wednesbury* unreasonableness, irrationality or illogicality in the reasoning for an administrative decision has been accepted as a common law ground of review in Australia, at least for jurisdictional facts.<sup>139</sup> The critical question is whether the

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<sup>131</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 93.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene).

<sup>135</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 180. Mark Aronson considers that a finding of *Wednesbury* unreasonableness is not a finding of irrationality or legal error *per se*, but rather evidence ‘that the decision-maker might well have misunderstood the relevant law or overlooked a critical and required criterion’: Mark Aronson, ‘Unreasonableness and Error of Law’ (2001) 24 *University of New South Wales Law Journal* 315, 320.

<sup>136</sup> Michael Taggart, ‘Australian “Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 12.

<sup>137</sup> See *SZADC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1497 (Unreported, Stone J, 16 December 2003).

<sup>138</sup> Michael Taggart, ‘Australian “Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 15–16.

<sup>139</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

determination was ‘irrational, illogical and not based on findings or inferences of fact supported by logical grounds’.<sup>140</sup>

3.31 *Procedural impropriety* is concerned with the procedure that the decision maker followed when making the decision and is usually based on failure to apply the rules of natural justice.<sup>141</sup> It focuses on matters such as notice provided, the opportunity to be heard and respond to the case and the impartiality of the decision maker. Natural justice is more often described as procedural fairness in the Australian administrative law context. Procedural fairness has two limbs — the fair hearing rule and the rule against bias.

3.32 The rule against bias covers both actual and apprehended bias — the decision maker must not only be free from bias but also appear to be free from bias.

3.33 The right to a fair hearing applies where a person has a legitimate expectation that they will be afforded procedural fairness in the making of a decision that affects them.<sup>142</sup> The right is subject to any clear contrary statutory intention and the individual’s rights, interest or legitimate interests must be affected in a direct and immediate way.<sup>143</sup>

3.34 Being afforded procedural fairness has been held to include a right to expect that a particular policy will be followed by a decision maker. There have been attempts to extend this to the human rights context so that a decision maker might be expected to act in conformity with an international convention to which Australia is a party.<sup>144</sup> There is considerable doubt about whether the view that legitimate expectations can arise out of the act of entry into a treaty would be able to be relied upon if tested in the High Court.<sup>145</sup> In *Minister for Immigration and Indigenous Affairs; Ex parte Lam* (‘*Lam*’),<sup>146</sup> the High Court, in obiter, expressed doubt about the High Court’s decision in *Minister for Immigration and Ethnic Affairs v Teoh* (‘*Teoh*’)<sup>147</sup> that the ratification of a treaty by the executive raised a legitimate expectation that that treaty would be taken into account by the decision maker.

3.35 Gleeson J in *Lam* also suggested that there needed to be some ‘practical injustice’ resulting from the disappointment of a legitimate expectation for the court to issue judicial

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<sup>140</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 625 (Gummow ACJ and Kiefel J). The judges then proceeded to find that the RRT decision ‘by reasoning from the circumstances of the visits to the United Kingdom and Pakistan that the first respondent was not to be believed in his account of the life he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds’: [53].

<sup>141</sup> *Ridge v Baldwin* (1964) AC 40.

<sup>142</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>143</sup> *Ibid* 584.

<sup>144</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>145</sup> *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

<sup>146</sup> (2003) 214 CLR 1.

<sup>147</sup> (1995) 183 CLR 273.

review remedies.<sup>148</sup> Recently, the High Court in *Minister for Immigration and Citizenship v SZIZO* held that breach of a procedural obligation was not a jurisdictional error because no injustice or unfairness resulted from the breach of a ‘facilitative provision’ — a provision which ‘impose[s] obligations which facilitate the conduct of a procedurally fair hearing’.<sup>149</sup> These decisions indicate that, while procedural fairness still focuses on process rather than outcomes, the court will inquire into whether the process was actually unfair rather than applying strict procedural requirements.

## Standing

3.36 Generally, a person has standing to apply for judicial review if the court considers that the person has a sufficient connection to the proceedings. Standing is distinct from the merits of the proceeding, and does not necessarily relate to the subject matter of the application. A person will generally have standing to seek any of the constitutional remedies if he or she is adversely affected by executive action in the sense that the person has a special interest in the subject of the decision or would be adversely affected by the outcome.<sup>150</sup>

## ALTERNATIVE SOURCES OF JUDICIAL REVIEW UNDER THE *CONSTITUTION* AND THE *JUDICIARY ACT*

3.37 There are other sources of judicial review in the *Constitution* and the *Judiciary Act* which can also be used to seek judicial review. In the *Constitution*, s 75(iii) has the widest application, although s 75(i) could also potentially be used. In the *Judiciary Act* s 39B(1A)(c) is an additional source of review for the Federal Court. These sources, in particular s 39B(1A)(c) of the *Judiciary Act*, do not appear to be as widely used as the more traditional sources in s 75(v) and s 39B(1). This section discusses the availability of review and remedies under these sections and seeks further information about the use of these sections.

### Section 75(iii) of the *Constitution*

3.38 Section 75(iii) confers upon the High Court original jurisdiction ‘in all matters ... in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’. Section 75(iii) is an alternative means of engaging the High Court’s power to grant remedies, and is not subject to the same restrictions on the grant of remedies as under s 75(v).

3.39 Remedies including the constitutional writs, declaration and certiorari for jurisdictional error and non-jurisdictional error on the face of the record are available under

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<sup>148</sup> *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 12–13, (Gleeson J).

<sup>149</sup> (2009) 238 CLR 627, 640.

<sup>150</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

s 75(iii). In *Project Blue Sky* the High Court distinguished between decisions which are invalid because of a jurisdictional error, where retrospective remedies would issue, and decisions which are affected by a non-jurisdictional breach of the statute or some other legal required, where prospective remedies may issue.<sup>151</sup>

3.40 The High Court's jurisdiction under s 75(iii) is also engaged even where a party is not 'an officer of the Commonwealth', as long as the Commonwealth is one of the parties. This may be significant in cases involving government contractors. For example, in the 2010 case of *Plaintiff M61 v Commonwealth*<sup>152</sup> ('*Plaintiff M61*') the High Court stated that the court clearly had jurisdiction over decisions of government contractors because the Court had jurisdiction under ss 75(v), 75(iii) and possibly 75(i).<sup>153</sup> In *Plaintiff M61*, a declaration was granted as a remedy, even though none of the constitutional writs were available.

### **Section 75(i) of the *Constitution***

3.41 Section 75(i) gives the High Court jurisdiction in all matters 'arising under any treaty'. The potential to use this provision in judicial review applications was recognised by the High Court in *Plaintiff M61*.<sup>154</sup>

### **Section 39B(1A)(c) of the *Judiciary Act***

3.42 The jurisdiction of the Federal Court to undertake judicial review under s 39B(1A) is very broad and may address many of the restrictions on s 75(v) review. Section 39B(1A)(c) gives the Federal Court judicial review jurisdiction where at least part of a matter arises under a Commonwealth statute, even where *ADJR Act* review is excluded and remedies are not sought against 'an officer of the Commonwealth'.<sup>155</sup> Remedies under s 39B(1A)(c) are as the Court considers appropriate.<sup>156</sup>

### **Use of alternative sources of judicial review under the *Constitution* and the *Judiciary Act***

3.43 There is very little information available about the use of the alternative sources of review. While s 39B(1A)(c) is used reasonably frequently by applicants, there are few examples of applicants using s 39B(1A)(c) as a means of seeking judicial review. The availability of review under the above provisions and the potential difference in scope to other more traditional sources of review appears to be presently a matter of academic interest alone. The Council is interested in gathering information about whether practitioners utilise

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<sup>151</sup> (1998) 194 CLR 355, 388–89.

<sup>152</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14.

<sup>153</sup> *Ibid* [51].

<sup>154</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14.

<sup>155</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 43.

<sup>156</sup> *Federal Court of Australia Act 1976*, s 23.

these provisions, why these provisions are or are not being utilised, and whether they might offer a broader scope of review than review under s 75(v) and s 39B, or the *ADJR Act*.

**Question 1**

**How are applicants making use of review rights under s 39B(1A)(c) of the *Judiciary Act*, s 75(iii) and/or s 75(i) of the *Constitution*. In what way, if any, do these avenues offer a broader scope for judicial review than the other avenues of judicial review?**

***ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977***

3.44 The *ADJR Act* was intended to overcome many of the technical issues associated with obtaining writs under s 75(v). The *ADJR Act* sought to codify the principles of judicial review and reform the procedures, in order to provide a simple alternative to the traditional, complex judicial review processes under constitutional judicial review. It also introduced an obligation for decision makers to provide a written statement of reasons on request. The *ADJR Act* focuses less on the availability of remedies and shifts attention to whether a legal error could be established (a breach of a ground of review).<sup>157</sup>

3.45 The *ADJR Act* provides an automatic right to judicial review of the exercise of a statutory discretion, unless legislation specifically excludes decisions of that kind from ADJR review. Particular decisions which are exempt from the Act are listed in Sch 1, in the regulations and occasionally in the Act providing for the making of the decision.

**Jurisdiction**

3.46 The *ADJR Act* applies to ‘decisions of administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition)’ either ‘under an enactment’ or by an officer or authority of the Commonwealth under an enactment under certain state and territory schemes listed in Sch 3.<sup>158</sup> The second limb of this definition covers State and Territory legislation implementing national schemes, where Commonwealth authorities or officers are given powers under those Acts.

3.47 The phrase ‘administrative character’ is not defined in the *ADJR Act*. The Kerr Committee’s terms of reference related to ‘administrative decisions’ and the report contained little discussion of what was ‘administrative’.<sup>159</sup> The courts have taken a broad view of what

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<sup>157</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 53.

<sup>158</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

<sup>159</sup> *Kerr Committee Report*, above n 27, 78.

is administrative as being what is neither legislative nor judicial.<sup>160</sup> However, the distinction can be difficult, as courts have acknowledged the overlap between categories and that the characterisation of any function takes colour from the context in which it is exercised.<sup>161</sup>

3.48 The *ADJR Act* applies to decisions, and conduct engaged in for the purpose of making a decision.<sup>162</sup> The courts have held that decisions to which the *ADJR Act* applies must be final and operative, and that conduct refers to activity preceding a decision that reveals a flawed administrative process (rather than ‘decisions made along the way with a view to making the final determination’).<sup>163</sup> Further cases on the meaning of conduct are few, partly due to the prevailing view that ‘conduct overtaken by a subsequent decision is not independently reviewable but should be considered in the context of the review of the decision itself’.<sup>164</sup>

3.49 The *ADJR Act* also requires the decision to be made ‘under an enactment’. This excludes review of non-statutory decisions (for example, those made under executive or prerogative power). It may include an administrative instrument where it is made pursuant to statute.<sup>165</sup> The courts have interpreted the need for a decision to be made ‘under an enactment’ restrictively, requiring a link between the decision to be reviewed and a power conferred by an enactment to make that decision. The test has been expressed in many ways. In *Griffith University v Tang* the High Court held that a decision will only be made ‘under an enactment’ for *ADJR Act* purposes if it ‘derive[d] from the enactment the capacity to affect legal rights and obligations’<sup>166</sup> or ‘took its legal force or effect from statute’.<sup>167</sup>

### Grounds of review

3.50 A person aggrieved by a decision or conduct may apply for judicial review under the *ADJR Act* on the following grounds:

- breach of the rules of natural justice

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<sup>160</sup> See *ACT Health Authority v Berkeley* (1985) 60 ALR 284, 286: The Federal Court indicated that the word ‘administrative’ is not in the context of the Act to be distinguished from ‘executive’. See also *Griffith University v Tang* (2005) 221 CLR 99.

<sup>161</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 109. In *R v Toohey; Ex parte Northern Land Council* (1980) 151 CLR 170, 225, Mason J stated that ‘the classification of powers is not a sound criterion for the operation of precise rules of law’. In *Griffith University v Tang* (2005) 221 CLR 99, 123, Gummow, Callinan and Heydon JJ stated that ‘the instability of the distinctions which the statute thus preserves may be appreciated by regard to two Federal Court decisions’ — namely *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 and *Federal Airports Corporation v Aerolineas Argentinas* [1997] FCA 723.

<sup>162</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1).

<sup>163</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337–339, 341–342 (Mason CJ).

<sup>164</sup> *Minister for Immigration and Multicultural Affairs v Ozamanian* (1996) 71 FCR 1, 20.

<sup>165</sup> See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1); *Chittick v Ackland* (1984) 1 FCR 254.

<sup>166</sup> *Griffith University v Tang* (2005) 221 CLR 99, 128 (Gummow, Callinan and Heydon JJ).

<sup>167</sup> *Ibid* 110 (Gleeson CJ).

- failure to follow procedures required by law
- lack of jurisdiction
- lack of authorisation by the enactment
- error of law, whether or not on the face of the record
- fraud
- no evidence or other material to justify decision
- decision or conduct that is otherwise contrary to law
- improper exercise of power, including:
  - taking into account an irrelevant consideration
  - failing to take into account a relevant consideration
  - unauthorised purpose
  - bad faith
  - acting under dictation
  - acting on the basis of a rule or policy without regard to the merits of the case
  - an exercise of a power so unreasonable that no reasonable person could have so exercised the power
  - uncertainty, and
  - abuse of power.<sup>168</sup>

3.51 Review under the *ADJR Act* extends beyond the common law's requirement for a jurisdictional error in three respects. First, review under the Act is available for any error of law, whether or not that error is jurisdictional and whether or not the error appears on the face of the record.<sup>169</sup> Secondly, review is available where the decision maker has based the decision on a particular fact, and that fact did not exist — the 'no evidence' ground.<sup>170</sup> This factual error does not have to be a jurisdictional fact or an error of law.<sup>171</sup> Thirdly, review is

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<sup>168</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5 and 6. Section 5 applies to 'decisions' and s 6 to 'conduct'.

<sup>169</sup> *Ibid* s 5(1)(f).

<sup>170</sup> *Ibid* s 5(2)(h) and s 5(3)(b).

<sup>171</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009).

available where the procedures required by law were not observed.<sup>172</sup> This ground appears not to be confined to jurisdictional errors,<sup>173</sup> unlike the common law.<sup>174</sup>

## Remedies

3.52 One of the main features of the *ADJR Act* is that it removes some of the remedial complexities still associated with constitutional review. The *ADJR Act* structure means that if an applicant establishes that the court has jurisdiction under the Act and that there has been some error in the decision making, the court can issue any of the remedies listed in s 16.

3.53 The Act confers on the Federal Court and the FMC wide powers to make orders for substantive relief.<sup>175</sup> Remedies are generally the same as those available for constitutional judicial review, regardless of the court handling the matter, without any restrictions relating to the nature of the error or whether it appears on the record or not. In particular, under s 16, the court may grant an order:

- quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies
- referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit
- declaring the rights of the parties in respect of any matter to which the decision relates, or in relation to the making of a decision, or
- directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

The Court also has power to make, in relation to matters in which it has jurisdiction, orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the court thinks appropriate.<sup>176</sup>

## Standing

3.54 To apply for review under the *ADJR Act*, a person must be one ‘who is aggrieved by’ a decision, conduct or failure to make a decision.<sup>177</sup> This is considered to be no narrower than standing rules applying for constitutional judicial review.<sup>178</sup>

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<sup>172</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(b).

<sup>173</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 352–53.

<sup>174</sup> *Ibid* 354; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>175</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16.

<sup>176</sup> *Federal Court of Australia Act 1976* (Cth) s 23.

### **The provision of reasons**

3.55 There is no common law obligation upon an administrative decision maker to provide reasons for an adverse administrative decision.<sup>179</sup> However, s 13 of the ADJR Act provides that where there is a right of judicial review by the Federal Court under the Act, there is also a right to request and obtain from a decision maker a written statement of reasons for a decision. Schedule 2 sets out class exclusions from this right.

### **OTHER STATUTORY APPEALS**

3.56 Some statutory and executive schemes for Commonwealth decision making, particularly those with large volumes of, or special environments for, decisions, have specific statutory appeal or review mechanisms which, in many cases, replace the need to rely on other general avenues of judicial review.

#### ***Migration Act 1958* — Part 8**

3.57 Part 8 of the *Migration Act* provides a separate scheme for judicial review of migration decisions, which mirrors the constitutional review jurisdiction. Migration decisions are governed by this separate scheme as a result of government policy and court decisions particular to the migration jurisdiction.

3.58 In 1992, in response to significant rises in the number of applications for review of migration decisions in the Federal Court, a separate judicial review scheme was enacted in pt 8 of the *Migration Act* for entry decisions and refugee claims, in substitution for the provisions of *ADJR Act* and the *Judiciary Act*.<sup>180</sup> This constituted a restricted scheme, involving fewer grounds under which review could be sought, mandatory merits review before judicial review could be sought and stricter time limits for applications. However, this led to cases being brought in the original jurisdiction of the High Court, significantly increasing its workload. Over time, however, the more restrictive scheme in pt 8 was broadened by the courts through statutory interpretation of its provisions.

3.59 In 2001, further changes were made to this scheme, most notably to introduce a ‘privative clause’, intending to further limit judicial review in migration matters.<sup>181</sup> As noted above at [3.19], this attempt to limit judicial review has not been successful, with the High

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<sup>177</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–7.

<sup>178</sup> *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73, 81 (Gummow J).

<sup>179</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. See Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (2002).

<sup>180</sup> *Migration Reform Act 1992* (Cth).

<sup>181</sup> *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

Court allowing judicial review in relation to decisions that involve jurisdictional error.<sup>182</sup> Other amendments in 2001 also introduced a bar on class actions in both the Federal and High Courts, following concerns that such actions were being used to encourage large numbers of people to litigate to prolong their stay in Australia.<sup>183</sup> Further amendments were made in 2002 to exclude the operation of common law rules in relation to procedural fairness and to codify the procedure for migration decision making.<sup>184</sup>

3.60 In 2005, to ensure that the FMC deals with the majority of migration matters involving judicial review,<sup>185</sup> pt 8 of the *Migration Act* was amended. Section 476 now provides that the ‘Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the *Constitution*’ (with some exceptions). The Federal Court still has some first instance jurisdiction over certain migration decisions listed specifically in pt 8.

## Taxation

3.61 The *Taxation Administration Act 1953* (Cth) provides for several appeal or review processes, depending on the provision under which the decision is made.<sup>186</sup> Under the provisions set out in Part IVC of the *Taxation Administration Act*, a taxpayer who is dissatisfied with a decision by the Commissioner has a right to seek review of an assessment and recourse to the Federal Court against a decision on grounds such as that the taxation decision should not have been made or should have been made differently.<sup>187</sup> Under these provisions, the Commissioner is under a statutory duty to take whatever action is necessary to give effect to a decision by the AAT or Federal Court.

3.62 In some cases review can only be sought under Part IVC of the *Taxation Administration Act*. The *ADJR Act* does not apply to tax assessment decisions,<sup>188</sup> and only applies to a limited number of taxation decisions. Review under s 39B of the *Judiciary Act* of some taxation decision is restricted through the use of ‘no invalidity’ clauses—which state that a decision is not invalid because the provisions of the relevant Act have not been complied with. For example s 175 of the *Income Tax Assessment Act 1936* (Cth) provides that ‘the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with’. The High Court in *Commissioner of Taxation v Futuris Corporation* held that s 175 had the effect that a breach of the requirements of the

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<sup>182</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 the High Court held that it was unconstitutional to restrict the time in which an application under s 75(v) could be brought in the High Court.

<sup>183</sup> *Migration Legislation Amendment Act (No 1) 2001* (Cth).

<sup>184</sup> *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

<sup>185</sup> *Migration Litigation Reform Act 2005* (Cth).

<sup>186</sup> *Taxation Administration Act 1953* (Cth) pt IVC.

<sup>187</sup> *Ibid* s14ZZO.

<sup>188</sup> *ADJR Act 1977* (Cth) sch 1 paras (e), (f), (ga) and (gaa).

*Income Tax Assessment Act* was not a jurisdictional error, and therefore not subject to review under s 39B(1) or s 75(v).

### **Appeal from AAT on questions of law**

3.63 Under s 44 of the *AAT Act*, a party to a merits review proceeding may appeal to the Federal Court, on a question of law, from any decision of the AAT. The distinction between questions of law and errors of law is not clear but would have significant overlap.<sup>189</sup>

Applicants do not usually seek both s 44 review and judicial review. While there is no clear prohibition upon applicants using both avenues, it is likely that simultaneous applications of review and appeal could provoke the Federal Court to exercise its inherent discretion to stay any judicial review application until an appeal under the *AAT Act* was determined. Section 44 is considered to be the ordinary basis for appeal of decisions, with applications for judicial review under the *ADJR Act* or *Judiciary Act* generally concerning *conduct* falling outside the scope of the *decision*.<sup>190</sup> The AAT website, in its information for the public about ‘what do I do if I disagree with the Tribunal decision’, points to the ability to appeal under s 44 but not under the *ADJR Act* or the *Judiciary Act*.

### **Further statutory sources**

3.64 The Council is interested in information about other sources of statutory judicial review in specific legislation. This information will provide evidence of the overall significance of general review mechanisms in the judicial review system. The Council is particularly interested in obtaining responses from government agencies with responsibility for legislation that includes a specific statutory appeal or review mechanism for certain decisions.

### **Question 2**

**What are other examples of statutory judicial review? What are the appropriate policy reasons for having a statutory appeal or review mechanism as opposed to relying on general judicial review mechanisms? What characteristics should such a scheme have?**

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<sup>189</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997). The High Court has also made clear that the scope of a right of appeal on the ground of error of law from a tribunal decision is a limited one that does not grant the court jurisdiction to review the entire matter argued in the tribunal. The appellate jurisdiction covers only as much as is impugned for error of law: *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528, [20] French CJ, Gummow and Bell JJ, [78] (Hayne and Kiefel JJ).

<sup>190</sup> *Ibid* 21.

## ADMINISTRATIVE REVIEW SYSTEM STATISTICS

### Judicial review: *ADJR Act* and s 39B of the *Judiciary Act*

3.65 The Federal Court of Australia provided the Council with statistics on numbers of filings and finalisations by subject matter for the financial years 2001–02 to 2009–10 for all *ADJR Act* and s 39B applications for both the Federal Court and the Federal Magistrates Court. Prior to this period, statistical information on *ADJR Act* filings is available in annual reports. The Court also provided information on the outcomes of matters finalised. These figures do not include applications under pt 8 of the *Migration Act*.

3.66 In the eight year period covered by these statistics, there were: 134 *ADJR Act* and 1 675 s 39B applications filed in the FMC; and 445 *ADJR Act* and 846 s 39B applications filed in the Federal Court (see **Figures 1 & 2** for breakdown). Of these applications in the Federal Court, 70 *ADJR Act* (15.7%) and 53 s 39B (6.6%), were on appeal to the Full Court from a single judge.

Figure 1: Judicial review filings in the Federal Court of Australia

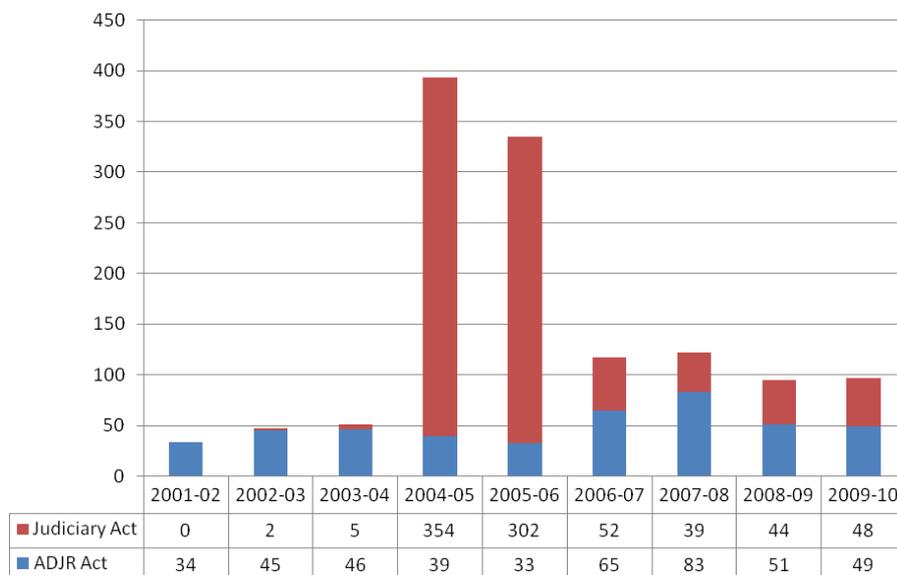
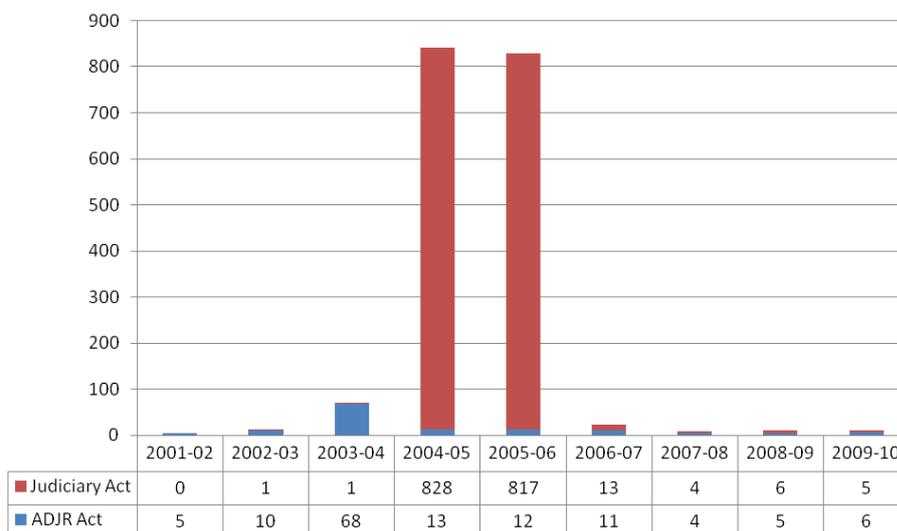


Figure 2: Judicial review filings in the Federal Magistrates Court of Australia



3.67 Between 2004 and 2006 there was a distinct spike in s 39B applications in both the Federal Court and the FMC. This represents migration-related litigation prior to the commencement of pt 8 of the *Migration Act* at the end of 2005. Since that time, the numbers of both *ADJR Act* and s 39B applications in both the Federal Court and the FMC have been much lower and have become close to equal.

3.68 For *ADJR Act* matters finalised in this period:

- 66 (15%) in the Federal Court, and
- 22 (17%) in the FMC

were allowed in full or part, or set aside and remitted back to the decision maker.

3.69 For s 39B matters finalised in this period:

- 111 (13.9%) in the Federal Court, and
- 389 (23.5%) in the FMC

were allowed in full or part, or set aside and remitted back to the decision maker, and

- 53 (6.6%) in the Federal Court were transferred to another jurisdiction.

#### *Other statutory appeals mechanisms*

3.70 As discussed above at [3.56]–[3.64], there are a number of other statutory avenues for review of administrative decision making apart from s 39B and the *ADJR Act*. The most significant of these are the statutory appeal rights under pt 8 the *Migration Act* (equivalent to review under s 75(v) of the *Constitution*), div 5 of the *Taxation Administration Act* and s 44 of the *AAT Act*.

3.71 A large proportion of applications are made under these statutory appeal provisions. In 2009–10, 880 migration matters were filed in the Federal Magistrates Court, under pt 8 of the *Migration Act* (mirroring the High Court’s s 75(v) jurisdiction), with 376 appeals lodged with the Federal Court and 20 matters filed in the Federal Court. The Federal Court can only review decisions under a limited number of provisions of the *Migration Act*. In the past, the number of migration applications lodged in the Federal Court or Federal Magistrates Court has been much higher. In 2003–04, 2591 migration applications were filed in the Federal Court and 3031 in the Federal Magistrates Court.

3.72 There were 171 taxation matters filed in the Federal Court in 2009–10, most of which are appeals against decisions of the Commissioner under the statutory review scheme in the *Taxation Administration Act*.

3.73 Appeals on questions of law from the AAT are far more common than judicial review of Tribunal decisions. There were 83 appeals from decisions of the AAT under s 44 of the *AAT Act* in 2009–10 and 19 applications for judicial review under other statutes (including ADJR, s 39B and Pt 8 of the *Migration Act*).<sup>191</sup> In 2008–09, there were 95 appeals across all jurisdictions under s 44, and 15 applications for judicial review under other statutes.<sup>192</sup> In 2007–08, there were 121 appeals on questions of law and 21 applications for judicial review.<sup>193</sup> In 2006–07, there were 127 appeals on questions of law, and 7 applications for judicial review.<sup>194</sup>

### **Other avenues of review**

3.74 Disputes and complaints about administrative decision making are usually resolved by means other than judicial review. This includes agency resolution of complaints, merits review and administrative investigation. The figures below show that the proportion of issues that go to judicial review for resolution is small in comparison with other methods of resolution.

#### *External merits review: AAT*

3.75 There were 5 787 applications for review lodged with the AAT in 2009–10, contrasted with 83 appeals under s 44 of the *AAT Act* and 19 judicial review applications.<sup>195</sup>

#### *Administrative investigation: Ombudsman*

3.76 The Ombudsman received 37 468 approaches and complaints in 2009–10. Of these, 18 313 were about agencies within the Ombudsman's jurisdiction.<sup>196</sup> The Ombudsman investigated 4 489 separate complaints and identified some agency error or deficiency in 10% of complaints investigated.<sup>197</sup>

#### *Review of taxation decisions*

3.77 At an agency level, in 2009–10, the ATO internally dealt with 19 349 objections, disputes and reviews in relation to revenue collections, and 2 256 objections, disputes and reviews in relation to transfers and regulation of superannuation funds.<sup>198</sup> The AAT recorded

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<sup>191</sup> Administrative Appeals Tribunal, *Annual Report 2009–10*.

<sup>192</sup> Administrative Appeals Tribunal, *Annual Report 2008–09*.

<sup>193</sup> Administrative Appeals Tribunal, *Annual Report 2007–08*.

<sup>194</sup> Administrative Appeals Tribunal, *Annual Report 2006–07*.

<sup>195</sup> Administrative Appeals Tribunal, *Annual Report 2009–10*.

<sup>196</sup> Commonwealth Ombudsman, *Annual Report 2009–10*.

<sup>197</sup> *Ibid.*

<sup>198</sup> Australian Taxation Office, *Annual Report 2009–10*.

994 applications lodged for review of taxation decisions and 18 appeals under s 44 to the Federal Court.<sup>199</sup>

*Review of social security decisions*

3.78 Centrelink granted 2.78 million new claims in 2009–10.<sup>200</sup> It conducted 3.5 million eligibility and entitlement reviews.<sup>201</sup> It had 7.02 million customers, and handled 32.7 million phone calls in that year. Of the Centrelink decisions that were challenged in the reporting year there were:

- 186 718 applications for internal review (66.7% unchanged)
- 12 617 applications to the Social Security Appeals Tribunal (SSAT) (70.5% unchanged)
- 467 customer applications to the AAT<sup>202</sup> (72.5% unchanged), and
- 79 Secretary applications to the AAT<sup>203</sup> (36.4% unchanged).<sup>204</sup>

3.79 The AAT recorded 16 appeals from social security decisions under s 44 of the *AAT Act*.<sup>205</sup>

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<sup>199</sup> Administrative Appeals Tribunal, *Annual Report 2009–10*.

<sup>200</sup> Centrelink, *Annual Report 2009–10*.

<sup>201</sup> *Ibid.*

<sup>202</sup> These are applications for review of the SSAT's decisions.

<sup>203</sup> These are applications for review of the SSAT's decisions.

<sup>204</sup> Centrelink, *Annual Report 2009–10*.

<sup>205</sup> Administrative Appeals Tribunal, *Annual Report 2009–10*.

## 4 ISSUES WITH THE CURRENT SYSTEM OF JUDICIAL REVIEW

### INTRODUCTION

4.1 Judicial review in Australia has been described as an ‘extremely dense and complex patchwork’, which is ‘daunting to an outsider peeking into Australian judicial review law’.<sup>206</sup> The current system of judicial review comprises a variety of sources, some of which overlap. The main sources, discussed above in Part 3, are: constitutional judicial review under s 75(v) of the *Constitution* and its equivalent in s 39B of the *Judiciary Act*; the *ADJR Act*; and a variety of statutes which grant particular review rights in relation to decisions under that statute.

4.2 The statistics show that the *ADJR Act* is no longer the primary source used in judicial review applications in the Federal Court and most judicial review litigation is based on specific statutory review rights.

4.3 Any future direction for judicial review will need to take into account Australia’s constitutional structure, which guarantees a right of judicial review that cannot be excluded by legislation.<sup>207</sup> The Parliament has power to legislate to provide for judicial review of government decision making. However, where Parliament chooses to legislate for judicial review, there will be two avenues available — one under the legislated path and one under the *Constitution*. The extent to which jurisdiction is conferred on the Federal Court and the FMC is determined by statute, whereas the High Court’s jurisdiction under the *Constitution* could only be removed through constitutional amendment following a referendum.

4.4 Possible future directions could involve rationalising the sources of judicial review. In Part 5, consideration is given to the possible options for reform of the existing system to achieve this. The options for future directions for judicial review in the Australian context which are canvassed in this paper are:

- a less restrictive *ADJR Act*
- a new general statute to align constitutional and statutory review
- a minimalist statutory scheme based on section 39B of the *Judiciary Act*, or
- retaining the variety of statutory review mechanisms and providing policy guidance to apply to all statutory mechanisms.

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<sup>206</sup> Michael Taggart, ‘Australian “Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 6.

<sup>207</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

4.5 The approach taken by the Council in this part is to break judicial review down into its component elements — the ambit of review, the grounds of review, remedies, standing, reasons and court procedures — and to examine the issues with each element. This part also considers whether specific statutory review mechanisms should be replaced by a general judicial review mechanism.

4.6 The discussion which the Council hopes to generate through this paper will focus on how the elements of judicial review should be formulated in any proposed new direction for judicial review and what consequences might flow from any rationalisation of the current available sources of judicial review. This will enable the Council to develop a view on what direction judicial review should take in the future.

## **AMBIT OR SCOPE OF REVIEW**

### **Introduction**

4.7 This section examines a number of issues with the scope or ambit of judicial review, which fall into three broad categories:

- whether the court’s jurisdiction should be based on the identity of the decision maker, the nature of the decision made or decisions where a decision maker is under an obligation to observe the rules of natural justice
- whether review should extend to non-government bodies, and to what extent, and
- whether there are some decisions which are made by government that are unsuitable for review and should be excluded.

### **The basis for the court’s jurisdiction**

4.8 Constitutional judicial review and the *ADJR Act* represent two different approaches to the basis of the court’s jurisdiction to review an administrative decision, as described in Part 3. The jurisdiction granted by s 75(v) is based on the identity of the decision maker — ‘an officer of the Commonwealth’. The *ADJR Act* focuses on the nature of the decision made. The *Administrative Law Act 1978 (Vic)* might provide an additional basis for jurisdiction in applying to decisions of tribunals which are required to observe the rules of natural justice. This section canvasses these three models as a possible basis for the court’s jurisdiction in a statutory model for judicial review.

#### *Focus on the decision*

4.9 The *ADJR Act* was intended to allow the Court to exercise a general supervisory jurisdiction over administrative action, including action by Ministers, public servants,

statutory authorities and administrative tribunals (with the Governor-General a specific exclusion).<sup>208</sup> However, the tests which courts have applied to what amounts to a ‘decision’ and whether a decision was made ‘under an enactment’, discussed in Part 2, have restricted the application of the Act.<sup>209</sup> As a result, the *ADJR Act* has been criticised for being too narrow, and not covering areas where other avenues of judicial review do (including both the s 75(v) test and statutory models at state level).<sup>210</sup> For example, Professor Mark Aronson has recommended ‘severing ADJR’s tether to “decisions under an enactment” and replacing it with ‘decisions, conduct, acts or omissions in breach of Commonwealth law imposing restraints on or requirements for the exercise of public power’.<sup>211</sup> The various aspects of Aronson’s test are considered below.

#### Decisions of ‘an administrative character’

4.10 The current *ADJR Act* is restricted to decisions which are of an administrative character.<sup>212</sup> It is possible that this restriction was based on concerns about courts reviewing policy decisions.<sup>213</sup> Courts have defined ‘administrative’ decisions as those that are not legislative or judicial.<sup>214</sup> The *ADJR Act* does not cover the making of subordinate legislation, as this represents a decision that is legislative rather than administrative in character.<sup>215</sup> Section 5 of the *Legislative Instruments Act 2003* defines a ‘legislative instrument’ as an instrument in writing that is of legislative character that is or was made in the exercise of a power delegated by the Parliament. Examples include instruments that determine the law and alter the content of the law, or affect a privilege or interest, impose an obligation, or create a right.

4.11 Aronson proposes that the *ADJR Act* should directly cover subordinate legislation, with an exemption for legislative acts from the requirement to give reasons.<sup>216</sup> The existing accountability mechanisms for the exercise of a rule making power recognise that legislative actions may have broad and enduring application. The *Legislative Instruments Act* provides

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<sup>208</sup> *Kerr Committee Report*, above n 27, 76.

<sup>209</sup> See *ACT Health Authority v Berkeley* (1985) 60 ALR 284, 286: The Federal Court indicated that the word ‘administrative’ is not in the context of the Act to be distinguished from ‘executive’. See also *Griffith University v Tang* (2005) 221 CLR 99.

<sup>210</sup> Mark Aronson, ‘Is the ADJR Act hampering the development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 207.

<sup>211</sup> *Ibid* 212.

<sup>212</sup> See Part 3.

<sup>213</sup> Mark Aronson, ‘Is the ADJR Act hampering the development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 202–03.

<sup>214</sup> *Griffith University v Tang* (2005) 221 CLR 99, 123.

<sup>215</sup> *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451

<sup>216</sup> Mark Aronson, ‘Is the ADJR Act hampering the development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 205.

this accountability regime for legislative instruments through requirements for consultation, registration, disallowance and sunseting.<sup>217</sup>

4.12 The distinction between legislative and administrative action is not always clear and there are many examples of executive action that are hybrids of the two. In some cases, legislative action is preceded by consideration of criteria as a precondition for the exercise of a power.<sup>218</sup> In other cases, an instrument may contain provisions of a legislative character as well as provisions of an administrative character. The *Legislative Instruments Act* provides that such an instrument is a legislative instrument for the purposes of the Act.<sup>219</sup> Although the *ADJR Act* does not allow judicial review of the actions of rule makers in making legislative instruments, these decisions may be reviewed under s 39B of the *Judiciary Act*.<sup>220</sup> An administrative decision can also be challenged under the *ADJR Act* on the ground that it has no legislative support — including because the decision was made under an invalid instrument.<sup>221</sup>

4.13 The availability of statutory judicial review of legislative actions of the executive should be considered as part of ensuring government accountability for the legality of legislative instruments and achieving consistency with constitutional judicial review.

### Question 3

**How should statutory judicial review cover subordinate legislation, particularly where an instrument can be characterised as including an administrative decision?**

#### Anticipatory relief or review of preliminary decisions not available

4.14 There have been a number of criticisms about the extent to which the *ADJR Act* requirement for a ‘final and operative’ decision operates, and the line between final decisions and preliminary steps or views.<sup>222</sup> In particular, the finality requirement may restrict the time at which judicial review proceedings can be instituted.<sup>223</sup>

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<sup>217</sup> See [2.52].

<sup>218</sup> For example s 37A of the *Environment and Biodiversity Protection Act 1999* (Cth) requires consideration of certain prerequisites before the Minister may make a declaration under that section, which is a legislative instrument.

<sup>219</sup> *Legislative Instruments Act 2003* (Cth) s 5(4).

<sup>220</sup> *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

<sup>221</sup> *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235.

<sup>222</sup> Robin Creyke & John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 98. See, for example, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services, Health* (1995) 56 FCR 50.

<sup>223</sup> Robin Creyke & John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009).

4.15 Aronson has suggested that, where finality applies, it excludes resort under the *ADJR Act* to anticipatory relief by way of declaratory order.<sup>224</sup> In this way, the *ADJR Act* can be ‘outflanked’ by resort to the *Judiciary Act* or s 75(v) of the *Constitution*. Aronson argues that the *ADJR Act* should be ‘freed’ from this jurisdictional restriction and criteria should be strengthened for judicial restraint in the case of decisions which are neither final nor operative if they do not threaten an applicant’s interests.<sup>225</sup>

4.16 The Council, in its 1989 report, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, made specific recommendations to make reports and recommendations by bodies other than the final decision maker judicially reviewable prior to the final decision being made.<sup>226</sup> In Council consultations, this was strongly criticised on the basis that it may frustrate the workings of government.<sup>227</sup> However, the Council suggested it would do no more than mirror the situation at common law.<sup>228</sup> Courts would still have the discretion not to hear a matter if they did not consider it to be appropriate.

#### Question 4

**Should judicial review extend to reports and recommendations by bodies other than the final decision maker, as previously recommended by the Council, or should review extend more broadly? If so, by what means should review be extended?**

#### No review for decisions made pursuant to executive schemes

4.17 The requirement in the *ADJR Act* that a decision be made ‘under an enactment’ excludes review of non-statutory decisions. Executive schemes are now widely used for purposes such as emergency financial aid, drought relief, health payments, industry incentives and administrative compensation.<sup>229</sup> A large proportion of Commonwealth schemes fall into one of two categories: schemes that allow the government to provide discretionary compensation payments, and schemes that provide government grants.<sup>230</sup> The Commonwealth Ombudsman is the only administrative law agency that can review decisions made under executive schemes, and has noted the lack of effective review described as a fundamental issue because ‘decisions made under these schemes are often just as important

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<sup>224</sup> See Mark Aronson ‘Is the ADJR Act hampering the development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 207.

<sup>225</sup> Ibid.

<sup>226</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 90, rec 17.

<sup>227</sup> Ibid 91.

<sup>228</sup> Ibid 92.

<sup>229</sup> Professor John McMillan, ‘Can administrative law foster good administration’ (The Whitmore Lecture, Sydney, 16 September 2009) <[http://www.ombudsman.gov.au/docs/speeches/whitmore\\_lecture.pdf](http://www.ombudsman.gov.au/docs/speeches/whitmore_lecture.pdf)>.

<sup>230</sup> Commonwealth Ombudsman, *Executive Schemes*, Report 12/2009 (2009). The report draws on the Office’s examination of complaints about various executive schemes in the past six years.

and can affect people's rights and interests just as much as decisions made under legislative schemes'.<sup>231</sup>

4.18 Aronson has argued for removal of the requirement, or to rephrase the restriction 'so that it better articulates ADJR's original policy', which was to allow for review for the breach of enactments, not for decisions made under an enactment and therefore according to law.<sup>232</sup> Other statutes, modelled on the *ADJR Act*, have removed the need for a decision to be made under an enactment, because the qualification was seen as being unnecessarily restrictive. This includes South Africa's *Promotion of Administrative Justice Act 2001*.

4.19 The Council has recommended that the *ADJR Act* should extend to certain non-statutory decisions made by officers of the Commonwealth.<sup>233</sup> The Council's proposed definition of a decision to which the *ADJR Act* applies ought to be amended to include a 'decision of an administrative character made, or proposed to be made, by an officer of the Commonwealth under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program'.<sup>234</sup> The Council considered that an appropriation act would form the necessary public interest link that would suggest review of decisions should be allowed.

4.20 A provision of this type was adopted in the *Judicial Review Act 1991* (Qld). Section 4(b) of that Act enables judicial review of decisions made by public officers or employees under a non-statutory 'scheme or program' which are supported by funds appropriated by Parliament or taxes, charges, fees or levies collected by statute.<sup>235</sup> The few applications that have sought to use the provision to support an application for judicial review suggest that there is uncertainty about what might constitute a 'scheme or program'.<sup>236</sup> Dr Matthew Groves suggests that the small number of cases that have used the provision and the lack of clear principles in those cases indicate that the provision has not provided a significant extension to the Queensland version of the *ADJR Act*.<sup>237</sup>

4.21 There may be a question of whether Parliament would have constitutional power to legislate for judicial review of non-statutory decisions. Section 76(ii) of the *Constitution* allows the Parliament to make laws conferring original jurisdiction on the High Court in any

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<sup>231</sup> Commonwealth Ombudsman, *Executive Schemes*, Report 12/2009 (2009)..

<sup>232</sup> Mark Aronson 'Is the ADJR Act hampering the development of Australian Administrative Law' (2004) 15 *Public Law Review* 202, 209.

<sup>233</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 1.

<sup>234</sup> *Ibid*.

<sup>235</sup> Section 4(b) of the *Judicial Review Act 1991* (Qld) was based on the wording suggested by the Administrative Review Council in *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 1.

<sup>236</sup> *Bituminous Products Pty Ltd v General Manager (Road System and Engineering)*, Dept of Main Roads [2005] 2 Qd R 344, [24] (Holmes J).

<sup>237</sup> Matthew Groves, 'Should we follow the gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 452.

matter ‘arising under laws made by the Parliament.’ This provides a constitutional basis for the *ADJR Act*. In its Report No 32, the Council suggested s 76(i) in combination with s 77 would be sufficient to achieve this purpose, or s 51(xxxix).<sup>238</sup>

### Question 5

**Should the *ADJR Act* be amended to include a statutory right to review decisions made under executive schemes for which financial or other assistance is provided to individuals? What examples are there of such schemes which are currently not subject to a statutory right of review? What are the reasons for making them or not making them subject to statutory review?**

#### *Focus on the decision maker*

4.22 Constitutional judicial review focuses on the actions of ‘an officer of the Commonwealth’. The jurisdiction in s 75(v) ensures that the High Court can supervise all public officials, which is central to the rule of law, and entrenches judicial power to protect people from unlawful official action.<sup>239</sup>

4.23 The major limitation with focusing on whether the decision maker is an officer of the Commonwealth is the potential for this to exclude from review decisions of an essentially ‘public’ nature made by non-government bodies. This issue is discussed in greater detail below. In the constitutional jurisdiction, the High Court has not resolved the issue of whether s 75(v) applies to government contractors.<sup>240</sup> The High Court’s decision in *NEAT Domestic Trading v AWB Ltd*<sup>241</sup> indicates that constitutional judicial review will not cover private bodies making decisions which are given force by an enactment.<sup>242</sup>

4.24 It is also not clear whether corporate bodies established by the government will be officers of the Commonwealth.<sup>243</sup> There are a number of cases which indicate that bodies corporate are not officers of the Commonwealth.<sup>244</sup> On the other hand, the High Court has held that tribunals established by legislation, but not given corporate status, are officers of the

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<sup>238</sup> *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 45–46.

<sup>239</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4<sup>th</sup> ed, 2009) 32–33.

<sup>240</sup> In the case of *Plaintiff M61/2010E v Commonwealth of Australia*; (2010) 272 ALR 14, the High Court stated at [51] that this was a question for another day, suggesting that the Court does not consider the issue resolved.

<sup>241</sup> (2003) 216 CLR 277.

<sup>242</sup> See above [4.30]–[4.32] for summary of the case.

<sup>243</sup> See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 38–39.

<sup>244</sup> See for example *Clarkson v Commonwealth* [2006] FCA 1348. See also discussion in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 38.

Commonwealth.<sup>245</sup> Commentators have argued that, though restrictive cases may not be consistent with later decisions, the Parliament should not have the ability to remove its agencies from the reach of s 75(v) simply by corporatising them.<sup>246</sup> Ultimately, however, in relation to constitutional judicial review, these questions can only be settled by the courts.

*'Natural justice' test*

4.25 One of the options canvassed by the NSW Department of Justice and Attorney General in its recent discussion paper — *Reform of Judicial Review in NSW* — is a jurisdictional test that would permit judicial review of decisions in respect of which a decision maker is already required to observe the rules of natural justice.<sup>247</sup>

4.26 Groves proposed a test along these lines in a recent study of judicial review in Victoria.<sup>248</sup> Groves proposed a slightly amended version of the current jurisdictional test in the *Administrative Law Act 1978* (Vic), which applies to decisions of tribunals which are required to observe the rules of natural justice.<sup>249</sup> Groves' proposed test would provide for review of 'decisions or conduct of an official'.<sup>250</sup> 'Decisions or conduct' would include 'decisions or conduct or failure to make a decision or engage in conduct which affected the rights, interests or legitimate expectations of a person'.<sup>251</sup> This test ties the description of the official to the common law test for whether there is an obligation to afford natural justice.<sup>252</sup>

4.27 'Officials' would be defined as:

a person or body authorised by statute, prerogative or other government power to make, alter or refuse to make or alter any decision or action and when doing so or refusing to do so is required to observe one or more of the rules of natural justice.<sup>253</sup>

The definition of an official is therefore also tied to natural justice.

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<sup>245</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 135; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

<sup>246</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4<sup>th</sup> ed, 2009) 39.

<sup>247</sup> NSW Department of Justice and Attorney General, *Reform of Judicial Review in NSW* (2011).

<sup>248</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451.

<sup>249</sup> *Administrative Law Act 1978* (Vic) ss 2 and 3.

<sup>250</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 459.

<sup>251</sup> *Ibid* 459–60.

<sup>252</sup> *Kioa v West* (1985) 159 CLR 550, 582 (Mason J): 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it'.

<sup>253</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 464.

*What is the preferable focus of a judicial review jurisdictional test?*

4.28 Since the constitutional jurisdiction, which cannot be excluded, focuses on the decision maker, this question is ultimately directed towards an assessment of the value of a separate statutory basis for judicial review. However, the Council is also interested in views on whether a general statutory review scheme could be based on the ‘officer of the Commonwealth’ test, or a modified version of the test that addressed some of the criticisms identified above, rather than a test which focuses on the decision. Other possibilities include a ‘public power’ test based on the nature of the decision under review — discussed in more detail below at [4.37]–[4.39] — or a test based on whether the decision-maker is required to observe any of the rules of natural justice. Any advantages of a judicial review system which bases jurisdiction on the decision — or some other criteria — rather than the decision maker support the case for retaining a separate statutory scheme for review.

#### **Question 6**

**What is the preferable focus of a test for judicial review jurisdiction — focus on the decision maker, the decision or another criteria — and why?**

### **Decisions of non-government bodies**

#### *Issue*

4.29 As mentioned earlier, there has been debate about whether judicial review should extend to decisions of all bodies exercising public power, rather than just public bodies. While the *ADJR Act* appears to be sufficiently broad by applying to ‘decisions under an enactment’, the courts to date have not supported the application of the *ADJR Act* to decisions of bodies outside government even if those bodies are exercising public power.<sup>254</sup> While developments in the United Kingdom in extending judicial review to private sector bodies have been noted, they have not at this stage been followed in Australia.

#### *Possible extensions of review of non-government bodies*

4.30 There are several formulations for the test on scope of judicial review applying to private bodies. The Council has suggested that a decision made by a private body which is given statutory effect ought, in principle, to be subject to judicial review.<sup>255</sup>

4.31 The case of *NEAT Domestic Trading v AWB Ltd*<sup>256</sup> is an example of why decisions made by private bodies that are given statutory effect raise issues for judicial review. In that

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<sup>254</sup> *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

<sup>255</sup> Administrative Review Council, *Scope of Judicial Review*, Report No 47 (2006) 27.

<sup>256</sup> (2003) 216 CLR 277.

case, the appellant, NEAT, was a wheat grower who sought permission to export wheat. Under s 57 of the *Wheat Marketing Act 1989* (Cth), bulk export of wheat was unlawful without the consent of the Wheat Export Authority. In addition, in keeping with s 57(3B) of the Act, the Wheat Export Authority could not give its consent without consulting a corporation owned by wheat growers, AWB International Ltd (AWBI), and without AWBI's approval.

4.32 McHugh, Hayne and Callinan JJ found that AWBI's decision to give or withhold its approval was not a decision 'under an enactment', because AWBI's capacity to provide an approval in writing was not conferred by the Act.<sup>257</sup> The approval was a condition precedent to the Wheat Export Authority considering whether to give its consent to export.<sup>258</sup> Their Honours also determined that AWBI had no duty to consider an application for consent to export and that, as a consequence, mandamus could not lie against AWBI for any failure to consider the application.<sup>259</sup> McHugh, Hayne and Callinan JJ emphasised the AWBI's power derived from the company's 'incorporation and the applicable companies legislation',<sup>260</sup> and that AWBI therefore did not have to consider any 'public' considerations when exercising that power.<sup>261</sup>

4.33 Kirby J dissented and would have allowed the appeal by NEAT.<sup>262</sup> Gleeson CJ found that the conduct of AWBI did not establish the ground of review relied on under the *ADJR Act*.<sup>263</sup> However, he also observed — in obiter dicta — that he considered AWBI's refusal to approve the export a decision of an administrative character made under an enactment.<sup>264</sup>

4.34 The structure adopted in the *Wheat Marketing Act*, in which special legal significance is attached to decisions made by private bodies, is not unique; the questions raised therefore have broader significance. For example, there are instances where the criteria for the grant of a visa turn on some form of assessment by a private body — such as assessment of a visa applicant's work experience or qualifications. The judgments in the case NEAT suggest that the law in this area is not entirely settled. At the very least, attempts to exclude judicial review in this way may potentially be the subject of judicial challenge.

4.35 To ensure accountability for decision making by these private bodies, the Council agreed with suggestions by the Victorian Bar that judicial review should include review of a decision of an administrative character made by a person other than under an enactment where both the following criteria apply:

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<sup>257</sup> Ibid 298.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid 298–99.

<sup>260</sup> Ibid 298.

<sup>261</sup> Ibid 299.

<sup>262</sup> Ibid 326.

<sup>263</sup> Ibid 289–90.

<sup>264</sup> Ibid 290–91.

- the decision is, by or under an enactment, given authoritative effect for the purposes of a decision made or to be made under an enactment, and
- review of the latter decision could not, in the absence of review of the former decision, lead to the latter decision being set aside by the court.<sup>265</sup>

4.36 Specific activities could be excluded from review on a case-by-case basis if it was probable that the availability of public law remedies would thwart the proper delivery of services.<sup>266</sup>

4.37 Aronson’s proposed jurisdictional test for statutory judicial review would allow for review of ‘decisions, conduct, acts or omissions in breach of Commonwealth law imposing restraints on or requirements for the exercise of public power’.<sup>267</sup>

4.38 A test of public power may have merit in ‘focusing on judicial review’s core mission, which is all about the legal control of public power, whether or not that be vested in bodies we can readily recognise as “belonging” to our core idea of government’.<sup>268</sup> It may have greater explanatory and descriptive force where indeterminacy is ultimately unavoidable.<sup>269</sup> This is particularly important in a modern environment where many government functions are outsourced to private bodies. In *Plaintiff M61* the High Court pointedly left open the question of whether people appointed as part of outsourcing arrangements might attract relief under s 75(v) of the *Constitution*.<sup>270</sup> The powers of the Commonwealth Ombudsman and access to government information under freedom of information legislation both extend to Commonwealth service providers.<sup>271</sup>

4.39 However, this test will need to determine clearly where public power begins and ends. The Ombudsman power and freedom of information coverage rely on contracts and grants arrangements. The Queensland legislation covers non-statutory bodies that are funded by government. Any test would need to consider how far judicial review should extend to private bodies and in what circumstances. An area of uncertainty may be where a decision maker relies on advice from a private third party, such as the opinion of a foreign doctor in the migration context.

4.40 The Council has commented that, where there is a change in the way in which a service is delivered, either from a statutory to a non-statutory basis or from a government agency to a contractor, existing rights of access to judicial review or merits review should not

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<sup>265</sup> Administrative Review Council, *Scope of Judicial Review*, Report No 47 (2006) 27.

<sup>266</sup> *Ibid.*

<sup>267</sup> Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 212.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid.*

<sup>270</sup> *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 131, [51]. The issue is considered in Matthew Groves, ‘Outsourcing and s 75(v) of the *Constitution*’ (2011) 22 *Public Law Review* 3.

<sup>271</sup> *Ombudsman Act 1976* (Cth) s 3(4B); *Freedom of Information Act 1982* (Cth) s 4.

be lost or diminished.<sup>272</sup> The Council considered that an appropriate test may be to link decision making to appropriation acts as the link to the public interest.<sup>273</sup> The test is discussed in more detail in the earlier section relating to extension of the *ADJR Act* to non-statutory schemes.<sup>274</sup>

*Should review extend to non-government bodies?*

4.41 The Council is interested in views on whether judicial review should extend to decisions of private bodies and in what circumstances. There are different ways in which review can be extended to private bodies, and the Council is also interested in the best way to extend review.

#### **Question 7**

**In what circumstances should judicial review apply to private bodies exercising public power? What is the best method of extending review? What are other accountability mechanisms which might more effectively ensure accountability of private bodies?**

#### **Matters that are not suitable for review**

4.42 There are a number of decisions that potentially may not be amenable to judicial review. The Council has considered how review may be restricted by the executive in its Report No 47, *The Scope of Judicial Review*, and when such restrictions may be justified. This section focuses on the means of restricting review more generally, through legal principles, in particular justiciability, or through exclusions in a specific statute, and seeks views on whether these restrictions on review are appropriate.

#### *Justiciability*

4.43 Under s 75(v) and the similar jurisdiction under s 39B, a claim must involve ‘a matter’ in order to obtain a remedy. The definition of a ‘matter’ is quite broad, requiring that there be a justiciable controversy and a claim which arises under federal law.<sup>275</sup>

4.44 Courts have developed the concept of justiciability in judicial review to signify areas of executive action or legislation that are not appropriate or fit for judicial

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<sup>272</sup> Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998) vii.

<sup>273</sup> *Ibid* rec 22.

<sup>274</sup> See above [4.17]–[4.21].

<sup>275</sup> *Fencott v Muller* (1983) 152 CLR 570, 606.

determination.<sup>276</sup> In so doing, courts require that an appropriate balance be struck between the concepts of the rule of law and the separation of powers.

4.45 Justiciability can be a difficult and uncertain concept.<sup>277</sup> The boundaries move over time on a case-by-case basis, and have often moved to expand the range of government decisions that are subjected to judicial scrutiny.<sup>278</sup> For example, in *R v Toohey; Ex parte Northern Land Council*, the High Court resolved lingering doubt to hold that vice-regal decisions under statute will be reviewable.<sup>279</sup> Questions have arisen whether a government decision is justiciable if: it involves an exercise of prerogative power; was made by Cabinet; has a close relationship to national security; or was made in the conduct of international relations.<sup>280</sup>

4.46 The *ADJR Act* replaces the concept of justiciability with another test for what decisions are appropriate for review. However, justiciability is part of the common law, and will apply to matters brought under the *ADJR Act*.

4.47 In 1989, the Council recommended amendments to the *ADJR Act* to draw attention to the requirement for justiciability.<sup>281</sup> The Council suggested that the Act require the Federal Court not to grant an application for a review of a decision, or of conduct engaged in for the purpose of making a decision, if it is satisfied that the decision or conduct is not justiciable.

4.48 The question of justiciability should be considered at the outset where appropriate.<sup>282</sup> While the 1989 report considered developing an indicative list of factors for justiciability in the legislation would be ‘well nigh impossible’, because of the embryonic state of non-justiciability,<sup>283</sup> case law clarifying the concept may lessen the difficulty of doing so today.

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<sup>276</sup> Robin Creyke & John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 65. There are views as to whether justiciability is a free-standing concept, an amalgamation of other public law concepts, or a representation of other legal concepts (eg justiciability for grounds of review).

<sup>277</sup> See Sir Anthony Mason, ‘The High Court as Gatekeeper’ (2000) 24 *Melbourne University Law Review* 784, 787. Justiciability is ‘like its close relations, ‘political questions’, judicial power and judicial process (method) — so far it has not been susceptible to definition’.

<sup>278</sup> Robin Creyke & John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 66–67.

<sup>279</sup> *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

<sup>280</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274. For discussion of the tentative principles formulated by the courts, see Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 66.

<sup>281</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 16.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid* 87.

4.49 Justiciability is already an element of the common law. The Council is therefore interested in whether justiciability should be an element of a general statutory review scheme, and whether an indicative list of factors should also be included.

**Question 8**

**In 1989, the Council recommended including the concept of justiciability in the *ADJR Act*. Would this improve accessibility under a general statutory review scheme? What guidance on the concept of justiciability could be given in a general statutory judicial review scheme?**

*Statutory exclusions*

4.50 Section 39B of the *Judiciary Act* excludes certain decisions which are reviewable by the High Court under s 75(v):

- decisions by officers of the Commonwealth to prosecute a person for an offence where it is proposed that the prosecution be initiated in a State or Territory court<sup>284</sup>
- situations where a prosecution or criminal appeal before a State or Territory court concerns decisions of officers of the Commonwealth made in the criminal justice process associated with that offence<sup>285</sup>
- decisions by Judges of the Family Court, and<sup>286</sup>
- decisions by Justices of the Federal Court.<sup>287</sup>

4.51 The exclusions relating to judges ensure that judges' decisions are only ever reviewed by the High Court. The other exclusions ensure that the Federal Court does not become involved in criminal proceedings in State and Territory courts. Limited exclusions to s 38B(1) may therefore be justified in particular cases.

4.52 Schedule 1 of the *ADJR Act* excludes from its scope a number of decisions to which the Act would otherwise apply. Given that review under s 75(v) cannot be excluded by legislation, the question arises as to whether any exclusions from a general statutory review scheme are justified.

4.53 In its detailed analysis of the *ADJR Act* exclusions, the Council suggested they fell into five categories:<sup>288</sup>

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<sup>284</sup> *Judiciary Act 1903* (Cth) s 39B(1B).

<sup>285</sup> *Ibid* s 39B(1C).

<sup>286</sup> *Ibid* s 39B(2).

<sup>287</sup> *Re Jarman; Ex parte Cook (No 1)* (1997) 188 CLR 595.

- decisions which are also excluded from s 39B of the *Judiciary Act*, notably where the nature of the decision is such that it is appropriate for review to take place only at the level of the High Court — for example, decisions of the Australian Industrial Relations Commission and the Coal Industry Tribunal
- decisions in which the Commonwealth has an involvement but which are not reviewable in the Federal Court under s 39B because they are not officer decisions — for example, decisions taken under the inter-governmental companies and securities scheme
- decisions for which the Parliament has provided a comprehensive or nearly comprehensive system of review on the merits in the Federal Court — for example, taxation assessment decisions
- decisions presently provided for in Sch 1 due to their national interest issues — for example, security and intelligence decisions, and
- all other decisions presently listed in Sch 1.

4.54 A majority of the Council considered that only the first two categories of decisions were justified exclusions from the *ADJR Act*. The Council recommended removing most of these exclusions, and stated these changes would

not extend in any way the areas of judicial review presently available in the Commonwealth. They will simply allow the reforms of judicial review brought about by the Act to apply to areas currently reviewable under the general law in accordance with procedures which the Act was intended to simplify.<sup>289</sup>

4.55 Depending on the broad scope of the Act, exclusions from statute may still be required to ensure consistency with the common law. The *ADJR Act* was enacted in 1977, and it may be time to reassess whether each of the present exclusions are relevant. The Council has developed a framework of indicative principles that could be considered in reassessing exclusions from the Act, and used on an ongoing basis by government when considering exclusions from judicial review in the future.<sup>290</sup>

4.56 Another concern raised by the Council in Report No 32 was exclusions from the *ADJR Act* that were not clear from the face of the Act. In particular, the Council pointed to regulations made under the Act and privative clauses introduced after commencement of the *ADJR Act*.<sup>291</sup> The Council recommended that regulations made under the *ADJR Act* to

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<sup>288</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 51–52.

<sup>289</sup> *Ibid.*

<sup>290</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003) 55–58.

<sup>291</sup> See Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 72. Section 4 of the *ADJR Act* overrode eight privative provisions in

exclude review should contain a sunset clause which ceases their effect after 12 months.<sup>292</sup> The Council also recommended that an Act which excludes the operation of the *ADJR Act* should specifically amend the *ADJR Act*.<sup>293</sup> This would ensure exclusions could not be ‘hidden’.

### Question 9

**In 1989, the Council recommended that limited categories of decision should be excluded from the *ADJR Act*, and that any exclusions should be listed in the *ADJR Act*. When and for what categories of decision are exclusions from general statutory review schemes justified? What is the relationship between general review schemes and specific statutory exclusions, and what restrictions should there be on including exclusions in other statutes?**

#### *Decisions of the Governor-General*

4.57 Under Commonwealth law, the Governor-General makes a variety of decisions, for example dismissal of statutory office holders who cannot be removed without cause. However, decisions of the Governor-General are excluded from the scope of the *ADJR Act*. In exercising power under statute, the Governor-General must act with the advice of the Executive Council and Ministers.<sup>294</sup> Decisions of Ministers under statute are susceptible to review under *ADJR Act*, and the exclusion has led to distinctions of form being made in the courts.

4.58 Vice-regal immunity has been removed at common law,<sup>295</sup> and this is also the approach in South Africa.<sup>296</sup> Decisions of the Governor are subject to statutory judicial review in Queensland<sup>297</sup> and Tasmania.<sup>298</sup>

4.59 While decisions made by the Governor-General exercising prerogative power may be a non-justiciable issue, the Council has recommended that the Act apply to statutory

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existence when the Act was enacted but privative clauses introduced since then remain in force. See also Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977 — Exclusions under Section 19*, Report No 1 (1978).

<sup>292</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 13.

<sup>293</sup> Ibid.

<sup>294</sup> See *Acts Interpretation Act 1901*, s 16A.

<sup>295</sup> *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. For later cases, see Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2004) 15 *Public Law Review* 202, 206.

<sup>296</sup> *Promotion of Administrative Justice Act 2000* (South Africa) s 1.

<sup>297</sup> *Judicial Review Act 1991* (Qld).

<sup>298</sup> *Judicial Review Act 2000* (Tas).

decisions of the Governor-General.<sup>299</sup> The Council suggested that the definition of decision to which the *ADJR Act* applies be amended to remove the present exclusion of decisions of the Governor-General made under an enactment, and the Minister responsible for the advice tendered to the Governor-General be named as respondent.<sup>300</sup>

#### **Question 10**

**What decisions of the Governor-General — statutory and non-statutory — should be subject to judicial review?**

#### *Commercial decisions of government*

4.60 Not all government decisions are ‘public’ decisions. Review of tender and contracting decisions has been a particularly contentious area as they lie at the fringe of administrative decision making and may be regarded as falling more readily into the private law areas (with private law remedies more appropriate).<sup>301</sup>

4.61 Generally, the *ADJR Act* and the common law deny review of contract decisions — the *ADJR Act* because of its restriction to decisions made ‘under an enactment’; and the common law because such decisions do not involve carrying out a public function.

4.62 There have been concerns that widening the ambit of judicial review on the basis of the decision made, without the restriction of ‘under an enactment’, would cover commercial decisions and lead to judicial review litigation in relation to general commercial activities. Aronson argues that the public power test, discussed above at [4.37]–[4.39], would still exclude these decisions from judicial review.

#### **Question 11**

**What commercial decisions of government should lie outside the scope of judicial review and how is this best achieved?**

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<sup>299</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 2.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid* 37.

## GROUNDS OF REVIEW

### Introduction

4.63 Judicial review principles set standards for the lawfulness of government decisions. The grounds of review often include standards of ‘fairness’ and ‘rationality’ for administrative action. For example, the rules of natural justice or procedural fairness set out certain procedures which must be followed in order to afford a person a fair hearing in particular cases. Other grounds of judicial review require a decision maker to follow rational reasoning processes, for example the requirement to consider relevant considerations and not take into account irrelevant considerations when making a decision. In this way, the grounds of review are to some degree an expression of the underlying principles of the administrative law system.

### Common law or codification

4.64 The grounds of review under the *ADJR Act* and the common law are extremely similar. The question is whether it is preferable to have a list of grounds in statute or to leave the development of grounds to the common law. An alternative is to codify the general principles underlying the grounds, either in conjunction with a list of grounds of review or the principles alone.

#### *Constitutional review grounds and the restriction to jurisdictional error*

4.65 The remedies available in the original jurisdiction of the High Court (prohibition, mandamus and injunction) only issue where there has been a jurisdictional error.<sup>302</sup> As discussed above, the High Court has asserted the primacy of jurisdictional error in constitutional review.<sup>303</sup> As noted in [3.51], the *ADJR Act* allows for review for a number of errors which are not jurisdictional errors. If there was no general statutory review scheme, then jurisdictional error would become the unifying principle of all judicial review grounds in the federal jurisdiction, until the courts decided otherwise.

4.66 Jurisdictional error is a complex concept, and reliance on jurisdictional error as the basis for review of decisions may be confusing and therefore impede access to review. A broad statutory review scheme could potentially move away from the emphasis on jurisdictional error in constitutional judicial review and, following *Kirk*, state judicial review, potentially increasing accessibility to review.

4.67 However, many of the debates about judicial review and its appropriate ambit focus on the appropriate roles for the judiciary, Parliament and the executive.<sup>304</sup> Judicial

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<sup>302</sup> See above [3.15].

<sup>303</sup> See above [3.18]–[3.20]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<sup>304</sup> The literature on this topic both in Australia and overseas is extensive. In the Australian context see for example: Peter Bayne, ‘The Court, the Parliament and the government — Reflections on the Scope of Judicial

review may be criticised when commentators or politicians consider that the court has stepped beyond the bounds of ‘legality’ and considered the merits or policy of a particular case. The then Justice Brennan noted a tension between the courts’ focus on individual interests and the executive’s focus on ‘the broader scope of general policy’.<sup>305</sup> As Aronson points out, administrators do need ‘workable margins’ for their decision making.<sup>306</sup> The concept of jurisdiction, based on principles such as lawfulness and the separation of powers, is one means of describing those margins. However, it is not necessarily the only means.

4.68 When considering whether it is preferable to rely on the common law to develop the grounds of review, the current reliance on jurisdictional error to define those grounds for the purpose of s 75(v) must be taken into account. On the other hand — as discussed above at [3.37]–[3.38] and [3.42] — s 75(iii) and s 39B(1A)(c) are not as reliant on jurisdictional error. In the case of s 75(iii), for example, jurisdictional error may be relevant to the court determining whether a remedy should issue retrospectively or prospectively, as in the *Project Blue Sky* case,<sup>307</sup> but will not prevent the issue of remedies entirely. Therefore there is scope for these other provisions to fill any gap left by the abandonment of the grounds in the *ADJR Act* that extend beyond jurisdictional error.

#### *Codified grounds of review*

4.69 The grounds of review under the *ADJR Act* have been criticised for a number of reasons. Aronson, for example, has suggested that, while the list approach states the grounds, a person has always needed knowledge of the common law in order to understand them.<sup>308</sup> Kirby J has argued that the codification of the grounds of review in the *ADJR Act* has hampered the development of the common law of judicial review.<sup>309</sup> The grounds do not have any organising principles, which may make development of the law more difficult.

4.70 On the positive side, the listed grounds have had an educative role and support a simplified approach to applying for judicial review. In most cases, an application will be

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Review’ (1991) 20 *Federal Law Review* 1; Sir Anthony Mason, ‘The Tension Between Legislative Supremacy and Judicial Review’ (2003) 77 *Australian Law Journal* 803; John McMillan, ‘Federal Court v Minister for Immigration’ (1999) 22 *AIAL Forum* 1; Justice Ronald Sackville, ‘Judicial Review of Migration Decisions: An Institution in Peril?’ (2000) 23 *University of New South Wales Law Journal* 190; Katherine Reimers, ‘How Should Courts Construe Privative Clauses’ (2008) 56 *AIAL Forum* 29.

<sup>305</sup> Justice Brennan, ‘Reflections’ (1989) 58 *Canberra Bulletin of Public Administration* 32, 33.

<sup>306</sup> Mark Aronson ‘Is the ADJR Act hampering the development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 216.

<sup>307</sup> (1998) 194 CLR 355.

<sup>308</sup> Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202.

<sup>309</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94.

supported by more than one ground. The courts have not engaged in technical discussion on the meaning of individual grounds and their precise boundaries.<sup>310</sup>

4.71 It has been suggested that the *ADJR Act* allows for the adoption of developments in the common law by the inclusion of two novel grounds of review, which enable review on the grounds that decisions that are ‘otherwise contrary to law’<sup>311</sup> or amount to ‘an exercise of power in a way that constitutes an abuse of the power’.<sup>312</sup> It has been suggested that these grounds acknowledge the capacity of the common law to develop new grounds of review.<sup>313</sup> At the same time, however, the almost total lack of applications which have sought to use these provisions has led to the suggestion that these novel grounds of review are ‘dead letters’.<sup>314</sup> If the apparent purpose of these grounds is to enable the *ADJR Act* to accommodate any grounds of judicial review that may arise in the common law, perhaps the grounds could be amended to more clearly acknowledge that possibility. They might instead be replaced by a ground that enables review under the *ADJR Act* on any ground of review that may be available at common law.

4.72 The grounds for constitutional judicial review can only be developed by the courts. However, a general statutory review scheme could include expanded grounds of review.

4.73 For example, proportionality is a ground of review that originated in civil law countries in Europe, but has made its way into the common law of the UK. However, proportionality is not regarded as a separate ground for review in the Australian context,<sup>315</sup> and most Australian courts and commentators regard it as a ‘bridge too far’,<sup>316</sup> largely because of its perceived incursion into the merits of a particular case. In the UK, proportionality is established when executive action interferes with a recognised right, interest or freedom in a manner which is disproportionate to the objective to be achieved.<sup>317</sup> It is a ground often applied in the UK in cases involving human rights, supported by the *Human Rights Act 1998* (UK), and arguably owes much of its ‘much-admired analytic and structuring qualities’ as a methodology to an enumerated list of rights.<sup>318</sup> Australia does not have a statutory list of human rights, meaning that proportionality would not have the same certainty in terms of what rights, interests or freedoms would give rise to a consideration of the proportionality of an executive action.

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<sup>310</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 126.

<sup>311</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(j) and 6(1)(j).

<sup>312</sup> *Ibid* ss 5(2)(j) and 6(2)(j).

<sup>313</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 123.

<sup>314</sup> Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 518.

<sup>315</sup> See Sir Anthony Mason, ‘The Scope of Judicial Review’ (2001) 31 *AIAL Forum* 21.

<sup>316</sup> Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1, 24.

<sup>317</sup> See Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 993.

<sup>318</sup> Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1, 25.

4.74 Kirby J has suggested that the grounds of judicial review may need to develop in order for judicial review to correct ‘clear injustices’ or ‘serious administrative injustice’.<sup>319</sup> His Honour’s mention of ‘fundamental flaws of logic and reasoning’<sup>320</sup> indicate a focus on grave errors. This suggestion echoes many English cases which have allowed relief for ‘conspicuous unfairness’.<sup>321</sup> An additional ground based on serious administrative injustice is in the nature of a residual common law ground to be available to correct administrative error with serious consequences for the individual. This raises questions about what sort of decision involving administrative error requires judicial review as a means of correction that would not be reviewable on any other existing ground. It also raises questions about whether some other remedy, such as a possible claim under the CDDA,<sup>322</sup> might be more suitable for some kinds of administrative injustice than seeking judicial review.

4.75 A less comprehensive and prescriptive list of grounds may not hamper the common law in the manner which Kirby J suggested the *ADJR Act* has done. In Canada, the general power of federal courts to issue judicial review remedies is granted by s 18(1) of the *Federal Courts Act*, RSC 1985.

4.76 Section 18.1(4) lists the grounds upon which the court may grant relief — if it is satisfied that the federal board, commission or other tribunal:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe
- erred in law in making a decision or an order, whether or not the error appears on the face of the record
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it
- acted, or failed to act, by reason of fraud or perjured evidence, or
- acted in any other way that was contrary to law.

This more basic approach to codifying the grounds may allow more room for judicial development of the grounds and address some of the criticisms of codification while retaining the benefits.

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<sup>319</sup> *Re Minister for Immigration and Multicultural Affairs: Ex parte Applicant S20/2002* (2003) 198 ALR 59, 96, 98.

<sup>320</sup> *Ibid* 98.

<sup>321</sup> See Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 487–89.

<sup>322</sup> See [2.54]–[2.58].

### *General principles*

4.77 There might be a case for some general principles to give direction for the particularised grounds.<sup>323</sup> While the *ADJR Act* grounds allow an applicant to specify clearly why they are seeking review, general principles may be more helpful for decision makers.

4.78 It may be that general principles of fairness, lawfulness and rationality, as adapted by the English courts, could be used in Australia as a way of influencing the behaviour of decision makers to make the initial decision according to law. By moving the focus away from specific errors in decision making, more general principles could assist decision makers to focus on the way they make decisions, rather than focusing on technical procedural requirements. This may improve decision making and reduce the need for review.

4.79 If general principles were listed alongside a list of grounds similar to those in the *ADJR Act*, the principles might help the courts to develop the more general grounds in the *ADJR Act* that allow for the development of the law: ‘otherwise contrary to law’<sup>324</sup> and ‘any other exercise of a power in a way that constitutes abuse of the power’.<sup>325</sup> General principles may also overcome criticisms such as Kirby J’s that the codification of grounds is hampering the development of administrative law.

4.80 There are examples of objects clauses that provide overarching principles. The *Freedom of Information Act 1982* has stated objects of providing public access to government held information through publication requirements and rights to access documents.<sup>326</sup> These objects are intended to promote Australia’s representative democracy. They replace the Act’s previous objects, which were directed at balancing the competing interests of openness and privacy and were criticised by the courts as not being useful.<sup>327</sup> However, Aronson has suggested that objects clauses are often of little practical utility if all they do is list the competing factors which need to be balanced in particular cases.<sup>328</sup>

### *The best approach to the grounds of review*

4.81 A number of options emerge from this discussion in terms of an approach to the grounds of review:

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<sup>323</sup> Stephen Gageler ‘The Underpinnings of Judicial Review of Administrative Action: Common law or Constitution?’ (2000) 28 *Federal Law Review* 303.

<sup>324</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(j) and 6(1)(j).

<sup>325</sup> *Ibid* ss 5(2)(j) and 6(2)(j).

<sup>326</sup> *Freedom of Information Act 1982* (Cth) s 3. The objects clause in s 3 was amended by the *Freedom of Information Reform (Amendment) Act 2010* (Cth).

<sup>327</sup> *News Corporation Ltd v National Companies and Securities Corporation* (1984) 1 FLR 64, 66; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) FCR 111, 115. See Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202.

<sup>328</sup> Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 218.

- the codification of the grounds in the *ADJR Act* could be abandoned and the development of grounds left to the common law
- general principles of review could be codified
- the grounds of review could be codified, and
- general principles coupled with specific grounds could be codified.

The Council seeks views on which of these options would be the best approach to the grounds of review.

4.82 If the listed grounds were maintained, it may be time for the grounds as listed in the *ADJR Act* to be updated. There may be simpler ways of expressing the grounds — for example the Canadian model, which lists only five general grounds, leaving more room for the common law to develop. There may be new grounds to be added, as discussed above. The Council is interested in submissions as to whether additional grounds should be included.

#### **Question 12**

**What are the advantages and disadvantages of different approaches to the grounds of judicial review — common law or codification of grounds and/or general principles? Which approach is to be preferred and why? What grounds should be included in a codified list?**

#### **Restricting the grounds of review**

4.83 One of the early streamlining measures in the separate judicial review scheme for migration decisions contained in Pt 8 of the *Migration Act* was the introduction of reduced grounds for review compared with those which were available, under the *ADJR Act*.<sup>329</sup> The ground of ‘failure to take into account a relevant consideration’ was not included. Part 8 did not include a ground of ‘so unreasonable that no reasonable person could have made it’ and any claim of bias was required to be actual bias rather than just an apprehension of bias. Over time, the courts’ interpretation of these restrictions broadened the grounds of review once more.<sup>330</sup> These grounds of review were repealed with the introduction of the privative clause in 2001 and the resulting restriction on judicial review of most migration decisions.<sup>331</sup>

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<sup>329</sup> As well as restricting the grounds of review, the *Migration Reform Act 1992* (Cth) included the Code of Procedure.

<sup>330</sup> See discussion of cases in Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 98–100.

<sup>331</sup> *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) s 474.

4.84 The experience in the migration jurisdiction suggests that courts may resist legislative restrictions on the grounds of review. However, given that the courts look to the particular statute under which a decision was made, to establish whether an error was jurisdictional, it seems that the legislature may be able explicitly to restrict the grounds of review in specific statutes.

4.85 Restricting the grounds of review ultimately restricts the availability of review. Such restrictions should perhaps be subject to similar considerations as more general restrictions on review. The policy guidance set out in the Council's Report No 47, *The Scope of Judicial Review*, could also be applied to restrictions on grounds of review.

### **Codification of procedural fairness**

4.86 A further issue relating to grounds is the codification of procedural fairness, and in what circumstances, if any, such codes are desirable. It is common for statutes to include procedural steps that a decision maker needs to comply with when making a decision, in order to codify the rules of natural justice. However, even a stated intention to 'replace the uncodified principles of natural justice with clear and fixed procedures' has not been regarded by the High Court as successfully excluding procedural fairness or the application of natural justice.<sup>332</sup> The Court has also made clear that natural justice is a fundamental principle that may only be overturned by legislation with 'irresistible clearness'.<sup>333</sup> Such statements may indicate the increasingly rigorous scrutiny to which the High Court subjects legislative attempts to limit or exclude the requirements of natural justice.

4.87 In the migration jurisdiction, a Code of Procedure was introduced in 1994 in pt 7 of the *Migration Act*, to codify the principles of procedural fairness, provide certainty and identify the procedural obligations which decision makers must meet. However, while such procedures can provide an indication of what might be regarded as procedural fairness, it would not preclude the courts' consideration of whether procedural fairness has been accorded. As the decision in *Minister for Immigration and Citizenship v SZIZO* indicates,<sup>334</sup> a failure to comply with a statutory procedure will not automatically give rise to a breach of procedural fairness if there have been no adverse consequences for the individual. This will depend upon whether the provision is merely designed to 'facilitate' a fair hearing.<sup>335</sup>

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<sup>332</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 84–85 (Gaudron J), 95–98 (McHugh J), 111–115 (Kirby J), 73–75 (Gleeson CJ and Hayne J) cited in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 486.

<sup>333</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>334</sup> (2009) 238 CLR 627.

<sup>335</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, 639–40. See also discussion of 'practical injustice' in *Lam* above [3.35].

4.88 The Council seeks views on whether such codes of procedure are desirable and in what circumstances, and whether policy directions could be provided to government on when such codes are appropriate.

**Question 13**

**What is the role, if any, for statutory codes of procedure, given that they may not provide certainty about what will amount to procedural fairness in a particular case?**

## **RIGHT TO SEEK JUDICIAL REVIEW**

### **Introduction**

4.89 ‘Standing’ refers to the right to commence legal proceedings. The purpose of standing requirements is to prevent those without an interest from applying for judicial review. Standing is fundamental to access to justice, because it allows parties with an interest in proceedings to access the court while preventing court resources being occupied by parties with no real interest in the outcome of a dispute. The rules related to standing are complex and still evolving.<sup>336</sup> Current standing rules for judicial review are discussed above at [3.36] and [3.54], in relation to constitutional review and *ADJR Act* matters respectively.

4.90 Roger Douglas’ empirical analysis of standing suggested that, while it is only at issue in two or three cases a year, the cases often have profound implications for sizeable sections of the community who have shared interests with the plaintiff, and ‘standing decisions have implications whose importance is disproportionate to their frequency’.<sup>337</sup>

4.91 This section considers criticisms of the current standing arrangements for judicial review and outlines possible changes to standing rules. Some of the criticisms and suggestions for reform have been directed at public interest litigation more generally. The Council is only considering these issues in relation to judicial review proceedings.

### **Alteration of standing rules by statute**

4.92 General judicial review standing rules may be altered by specific statutes. There are examples of statutes both expanding and restricting general standing rules.

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<sup>336</sup> See *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263, 279–80; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 599–600, 611, 627–8, 652–3, 670.

<sup>337</sup> Roger Douglas, ‘Use of standing rules 1980–2006’ (2006) 14 *Australian Journal of Administrative Law* 22, 34–35.

4.93 The *Environment Protection and Biodiversity Conservation Act 1999* extends standing in ADJR applications to include:

- an individual, organisation or association who has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment, and
- an organisation, where the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.<sup>338</sup>

4.94 The *Migration Act* limits applications under pt 8 to a person who is the applicant/sponsor the subject of the relevant decision.<sup>339</sup> Standing is further limited through a statutory bar on class actions for judicial review of migration decisions brought in both the Federal and the High Court.<sup>340</sup> Section 486C further limits standing in the Federal Court to when there has been a decision in the particular case that calls into question the issue(s) being litigated.

### **Broader standing test for judicial review proceedings**

#### *Issue*

4.95 The view of judicial review as a ‘public’ law proceeding — as distinct from a ‘private’ law proceeding — gives rise to a number of questions about appropriate standing rules. Judicial review may have implications for sections of the community or the public as a whole (especially where the decision is a broad issue of policy). This means that standing rules sometimes need to be balanced between the public’s interest in certain proceedings and the ability of an individual to protect his or her private interests. The question is whether there is a justification for having broader standing rules in judicial review proceedings than other civil actions.

#### *Arguments for a broader standing test*

4.96 Groves has observed that ‘although standing rules have relaxed in recent times, representative associations often still struggle to establish standing’.<sup>341</sup> Groves argues that the requirement of the current judicial review standing rules — for a complainant to show a special interest or be aggrieved by a decision — does not equate with even the strong views or commitments of representative groups, and these restrictive elements make it difficult for representative groups to challenge government decisions. He considers this has led to uneven

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<sup>338</sup> *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 487.

<sup>339</sup> *Migration Act 1958* (Cth) s 479.

<sup>340</sup> Class actions are not considered appropriate in the migration context and are effectively prohibited by *Migration Act 1958* (Cth) s 486B.

<sup>341</sup> Matthew Groves, ‘Should the *Administrative Law Act 1978* (Vic) be Repealed?’ (2010) 34 *Melbourne University Law Review* 451, 470.

results in environmental cases.<sup>342</sup> The problem arises because of the common law principle that the objects of a particular representative organisation are not alone sufficient to demonstrate an interest in proceedings which can give an organisation standing. Groves notes that cases on the standing of representative associations have been inconsistent,<sup>343</sup> and at this stage the matter remains unresolved by the High Court.

4.97 The rules of standing in public interest matters were the subject of detailed analysis by the Australian Law Reform Commission (ALRC), in 1985 and 1996.<sup>344</sup> In its 1996 report, the ALRC recommended broadening the rules of standing, and removing restrictive rules of standing in cases that have a public element so as to ensure accountability and compliance to the law in decision making. The ALRC argued that '[t]he primary function of any standing test must be to ensure that public law proceedings are able to be commenced when it is in the public interest to do so', and the test for standing should be broader than that where private interests are involved (and the players' interests are clear).<sup>345</sup>

4.98 In particular, the ALRC considered that current complex restrictions, on who is entitled to commence litigation that has a public element, should be removed in favour of 'open standing': a standing test that allowed any person to commence 'public' proceedings unless existing legislation provides otherwise; and the commencement of an action would unreasonably interfere with a private interest. This would be regulated by a single statutory framework giving the courts a general power to allow intervention on terms and conditions that it specifies.

4.99 There is, however, a difficulty in defining the 'bright-line' distinction between public and private law.<sup>346</sup> While the ALRC noted the argument that more liberal standing laws may encourage people to use litigation rather than alternative dispute resolution, it did not find this convincing because of incentives to use alternative dispute resolution, and discretions of the courts where alternative dispute resolution is preferable.<sup>347</sup>

4.100 Groves has suggested, in relation to judicial review in Victoria, that the *AAT Act* standing provisions provide a useful model for dealing with the standing of representative organisations.<sup>348</sup> The *AAT Act* provides that organisations are 'taken to have interests that

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<sup>342</sup> Matthew Groves, 'Standing and related matters' (2010) 59 *Admin Review* 86.

<sup>343</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 470.

<sup>344</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996); Australian Law Reform Commission, *Standing in public interest litigation*, Report No 27 (1985).

<sup>345</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996) 38.

<sup>346</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009).

<sup>347</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996) 18–19.

<sup>348</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 470–71.

are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association.<sup>349</sup> Groves argues that the *AAT Act* approach as a number of advantages:

- first, simplicity—the provision does not require applicant organisations to put forward evidence beyond their objectives, allowing the Tribunal to focus on substantive issues
- secondly, it aligns the approach to standing for organisations with the broader approach to standing taken for individuals
- thirdly, it would prevent different rules developing with regards to organisations with interests in different areas — for example, environmental litigation
- fourthly, the provision focuses on the ‘substantive activities’ of the body rather than whether it is incorporated or not
- finally, the *AAT Act* provision does not give standing to organisations whose objects were formulated after the proceeding commenced, preventing abuse of process.

#### *Intervention and amicus curiae*

4.101 This section considers means other than standing for parties being heard in court proceedings. If a person does not have standing in proceedings, the person may be joined as an intervener or heard as amicus curiae (or ‘friend of the court’). The idea of intervention is to allow a third party to become a party to the proceedings to protect his or her interests. An intervener becomes a party to the proceedings. The role of amicus curiae is traditionally limited to assisting the court on points of law which may not otherwise have been brought to its attention.<sup>350</sup> However, in some public interest cases, the courts have considered it appropriate to permit friends of the court to put the views of a concerned individual or organisation that may simply support the arguments of one of the parties.<sup>351</sup>

#### *Should there be a broader standing test for judicial review?*

4.102 The Council is interested in whether a broader standing test, along the lines of the ALRC recommendations, would be appropriate for judicial review proceedings. A broader test could be introduced solely in relation to judicial review proceedings under a general statutory model, or in other appropriate legislation if review under the *Constitution* and the *Judiciary Act* became the sole means for seeking review. There may also be other ways of achieving greater recognition of public interest in judicial review proceedings.

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<sup>349</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 27(2).

<sup>350</sup> *Bropho v Tickner* (1993) 40 FCR 165, 172.

<sup>351</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996) 64. The ALRC used the example of the Tasmanian Wilderness Society, which was allowed to present oral submissions to the High Court that supported the Commonwealth's case in *Commonwealth v Tasmania* (1983) 158 CLR 1.

4.103 In Report No 78, the ALRC also recommended a statutory framework for intervention in public law proceedings to replace the current categories of intervener and friends of the court.<sup>352</sup> Under the framework, a court may give leave to a person to intervene in proceedings, subject to such terms and conditions, and with such rights, privileges and liabilities (including liability for costs), as the court determines.<sup>353</sup> Leave should not be refused solely because the person does not have a personal or ‘special’ interest in the litigation.<sup>354</sup>

**Question 14**

**What is the appropriate test for standing in judicial review proceedings, particularly in relation to representative organisations? What are the arguments for making standing in judicial review consistent with standing under s 27(2) of the AAT Act, which gives organisations standing if a decision relates to a matter included in the objects or purposes of the organisation? What are other ways to achieve greater recognition of the public interest in judicial review proceedings?**

**Class actions in judicial review proceedings**

4.104 Part IVA of the *Federal Court of Australia Act 1976* (Cth) allows ‘class actions’ to be brought before the Federal Court, where seven or more people have a claim that arises out of similar circumstances and gives rise to a substantial issue of law or fact.

4.105 The Access to Justice Report recommended that the Attorney-General should commission a review of the class action provisions to ensure they are operating in a manner consistent with the objectives of improving access to justice, improving judicial economy and contributing to behaviour modification.<sup>355</sup>

4.106 Class actions are restricted in judicial review applications under pt 8 of the *Migration Act*. It is unclear whether class actions are utilised at all in judicial review matters, or whether there are any potential issues in such cases. The Council is seeking further information on this issue, including factual information about judicial review class actions and potential issues with such actions.

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<sup>352</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996) 6469–73, recs 4–9.

<sup>353</sup> *Ibid* rec 4.

<sup>354</sup> *Ibid* rec 5.

<sup>355</sup> Australian Government Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009) rec 8.11.

## JUDICIAL REVIEW AND REASONS FOR DECISIONS

### Introduction

4.107 Reasons are an important element of the administrative process, and there are issues relating to reasons which cannot be addressed at the level of judicial review. This section discusses the importance of reasons to administrative law generally, focusing on the points at which reasons and judicial review intersect, most importantly in the right to request reasons in the *ADJR Act*, and the common law principles relating to reasons.

### The significance of reasons to administrative law

4.108 Informing people about their rights and responsibilities can prevent disputes from occurring and escalating. The earlier a dispute is resolved, the less risk of adverse impact on the applicant and the less cost to the taxpayer is likely to occur.

4.109 A statement of reasons is an important way for a person subject to an administrative decision to understand the reasons behind the decision, both to satisfy the requirements of justice and to assist in considering whether to apply for review or appeal.<sup>356</sup> It is also an important tool for improving the system of administrative law as a whole, by providing evidence about a decision to assist tribunals and courts in performing merits and judicial review; improving the quality and consistency of primary decision making; and promoting public confidence in the administrative process through transparency.<sup>357</sup>

4.110 While there is some administrative burden associated with the provision of statements of reasons and development of systems to record the reasons for decisions made, there is limited evidence of high costs even where there are large numbers of requests.<sup>358</sup> In any case, the benefits of the obligation to provide reasons mean that the costs should be regarded as part of the ordinary costs of good administration.<sup>359</sup>

4.111 As discussed above at [3.55], there is no general obligation to give reasons at common law. That said, the common law may yet develop such a general obligation, as has occurred in Canada and arguably is underway in the UK and New Zealand.<sup>360</sup> In the

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<sup>356</sup> See *Ibid*; Administrative Review Council, *Commentary on the Practical Guidelines* (revised 2002); *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 676 (Gibbs CJ), 676 (Deane J).

<sup>357</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009).

<sup>358</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) 36.

<sup>359</sup> *Ibid*.

<sup>360</sup> Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 15. Mark Elliott states that while English law requires public bodies to give reasons, the scope of the duty is narrower than the scope of the application of other principles of good administration, and the legal and remedial consequences of a breach of the duty is ambiguous: Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet' (2011) *Public Law* 56.

meantime, where an Act states that a person adversely affected by an administrative decision can request a statement of reasons for that decision, a statutory obligation arises.

4.112 There are existing alternatives to the *ADJR Act* as an avenue for accessing statements of reasons. Section 15 of the *Ombudsman Act* provides for the Ombudsman to request information and report to the Minister if an agency declines to give reasons for a decision, and this can be used as a significant incentive to provide reasons. The *AAT Act*<sup>361</sup> and some other legislation<sup>362</sup> provide for a right to reasons for a decision. In other cases, reasons must automatically be given along with the notification of an adverse decision — for example, certain decisions of the Minister under the *Migration Act*,<sup>363</sup> and decisions by the Australian Competition and Consumer Commission<sup>364</sup> and Commissioner of Taxation.<sup>365</sup> An agency may also be required to provide notification of a proposed decision that includes reasons, in order to accord procedural fairness by allowing a person to respond to any adverse information or inferences.<sup>366</sup>

### **A general obligation to provide reasons**

4.113 The statutory requirement in the *ADJR Act* only applies to decisions to which the Act applies, and is subject to various exemptions. There are a number of arguments in support of a general requirement to provide reasons. This section considers those arguments and suggestions for how such an obligation could be incorporated into the law.

#### *Arguments for and against a general obligation*

4.114 The Access to Justice Taskforce recommended that, given the benefits of requiring decision makers to provide reasons for their decisions, the entitlement to reasons should be generally available for all administrative decisions, not just those for which review is available or a statutory obligation exists.<sup>367</sup>

4.115 Creyke and McMillan group the arguments in support of a general obligation into three categories.<sup>368</sup> First, the argument that the requirement to give reasons improves decision making.<sup>369</sup> Second, that an obligation to give reasons enhances government

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<sup>361</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

<sup>362</sup> For example, specified decisions under the *Environmental Protection and Biodiversity Act 1999* (Cth) s 77.

<sup>363</sup> *Migration Act 1958* (Cth) s 501G.

<sup>364</sup> *Trade Practices Act 1974* (Cth) s 151BD, s 151BM.

<sup>365</sup> *Taxation Administration Act 1953* (Cth) s 8AAG, sch 1 item 280-165.

<sup>366</sup> *Defence (Personnel) Regulations 2002* (Cth) regs 73, 76, 85; *Air Navigation Regulations 1947* (Cth) reg 18D; *National Measurement Regulations 1999* (Cth) reg 82; *Airports (Control of On-Airport Activities) Regulations 1997* (Cth) regs 4AS, 4AX, 4BH and 4BR.

<sup>367</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009) rec 10.2.

<sup>368</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 1261–62.

<sup>369</sup> *Ibid* 1261.

transparency and accountability, and gives legitimacy to government decisions.<sup>370</sup> Third, that as a matter of fairness, reasons should be provided so that people can decide whether or not there has been an error in the decision and whether they should seek review.<sup>371</sup>

4.116 There are a number of countervailing arguments. First, there is no evidence that reasons actually improves decision making. In fact, Aronson, Dyer and Groves point out that a requirement to provide reasons may lead to decision makers basing their reasons on previously accepted justifications, often in standardised formats.<sup>372</sup> The political legitimacy argument must be balanced against other political arguments, including the protection of national security, confidential information, personal information and some commercial interests.<sup>373</sup> In relation to the third argument, the courts have indicated that procedural fairness only applies to the process leading up to the decision, in particular the hearing rule which requires decision makers to let a person know the case against them and have an opportunity to respond.<sup>374</sup> A further argument against a general obligation to provide reasons for a decision is that it may impose a significant burden on those officials who take the obligation seriously and draft careful and considered reasons.

4.117 The courts have intimated that the case-by-case approach of the common law is appropriate, given the many different contexts (and public interest considerations) of administrative decision making.<sup>375</sup> For example, large and complex Australian Competition and Consumer Commission competition rulings may warrant protection from disclosure for reasons of market integrity. However, there is no obvious reason why procedural decisions affecting a single applicant's rights should not normally be disclosed.

4.118 Where the right to reasons is not legally available, agencies may nonetheless choose to provide reasons upon request. Indeed, the Council has stated that, even if there is a prima facie exemption from the obligation to give reasons under an Act, it is good administrative practice to provide reasons unless there are good grounds for not doing so.<sup>376</sup>

4.119 In the absence of a legal obligation to provide reasons, government agencies themselves may choose to provide notification of an adverse decision that includes enough information to enable the applicant to understand and discuss the decision and its reasons. The Access to Justice Taskforce recommended that this practice be generally adopted by

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<sup>370</sup> Ibid.

<sup>371</sup> Ibid 1261–62.

<sup>372</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 628.

<sup>373</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 1261.

<sup>374</sup> Ibid 1262.

<sup>375</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

<sup>376</sup> Administrative Review Council, *Commentary on the Practical Guidelines* (Commonwealth of Australia, 2002).

Commonwealth agencies.<sup>377</sup> Alternatively, a notification of an adverse decision could include information about the applicant's right to request a statement of reasons, as required in the *AAT Act — Code of Practice for Notification of Reviewable Decisions and Rights of Review 1994* (Cth).

*Models for a general obligation to provide reasons*

4.120 A right to reasons for all decisions might be located in a separate Act or an existing Act, such as the *Acts Interpretation Act 1901*. Another option would be to incorporate the right to reasons with the record-keeping requirements and access to information rights of the *Archives Act* and *Freedom of Information Act*. New Zealand provides for a right to reasons in their *Official Information Act 1982*.

4.121 There is also a question about the time at which the obligation should be engaged. Currently, reasons requested under statute need only be prepared at the time of request, though appropriate records should have been kept by the decision maker as required by the *Archives Act*. Statements of reasons are therefore generally provided in contemplation of external review of the decision, often with the benefit of legal or other advice and possibly when the original decision maker is no longer available. Decisions may also be the result of an automated process or consideration by a group. They may be made by a senior decision maker after consideration of submissions to them, making it difficult to determine the actual reasons for the decision. These are all factors that may reduce the value of the statement of reasons which is provided.

4.122 Any model for a general obligation to provide reasons could also allow for exemptions from that requirement. General criteria could be developed for when an exemption is appropriate and specific exemptions would be statutory. Some categories of decisions, such as those relating to national security, could be exempted.

4.123 Many of the arguments in support of providing statements of reasons would also support the provision of reasons at the time the decision is made, for example accompanying notification. Some statutory regimes already require this. Would it therefore be more appropriate for a general obligation to provide reasons to be more contemporaneous to the decision, and not rely on a request? Is judicial review legislation the appropriate place to achieve these goals?

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<sup>377</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009) rec 10.3.

**Question 15**

**Should there be a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions?**

**Question 16**

**One of the objectives of this examination of judicial review is to identify all examples of legislation or subordinate legislation that include a specific right to reasons. Are there examples of provisions giving a right to reasons which provide useful illustrations of effective content, timing and form of reasons?**

**Exemption from the obligation to provide reasons**

4.124 In Report No 33, the Council recommended repealing — with certain safeguards — the Sch 2 exceptions to the obligation to provide a statement of reasons, as ‘the requirements of justice can be met only by ensuring that in every case where judicial review under the [ADJR] Act is available there is also an entitlement to reasons’.<sup>378</sup> This is primarily because the availability of a statement of reasons is a de facto precondition to accessing judicial review — without it, the applicant is unlikely to be able to understand whether the decision was made lawfully.<sup>379</sup> The Council considered that, to the extent that reasons for certain decisions should be protected from disclosure, the exemptions in ss 13A and 14 provide adequate protection.<sup>380</sup>

4.125 If the jurisdiction of a general statutory review mechanism extended to decisions made by non-government bodies, it may not be appropriate for these bodies to have an obligation to provide reasons.

**Question 17**

**What, if any, exemptions should there be from any obligation to provide reasons?**

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<sup>378</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) 47.

<sup>379</sup> Ibid 48.

<sup>380</sup> Ibid 48.

### **The appropriate content of a statement of reasons**

4.126 When reasons are sought under a specific statute, they usually have to include certain information. Where a statement of reasons is required, the statement generally must:<sup>381</sup>

- set out the decision
- list the findings on material facts (those facts on which the decision turns)
- refer to the evidence for the findings, and
- give the reasons for the decision (including any legal principles relied on).

4.127 The Council also recommended that statements set out the appeal rights available to the applicant.<sup>382</sup> Some statutory schemes already require this.<sup>383</sup>

4.128 In relation to a statutory requirement to give reasons for a decision, the main issue is the appropriate content for such a statement. The Council is interested in whether the requirements for a statement of reasons in the *ADJR Act* are too legalistic or whether there needs to be any other requirements. There are other statutory provisions which set out the content of a statement of reasons, and some of these may be preferable to the *ADJR Act* model.

#### **Question 18**

**What form should a statement of reasons take when provided on request under a general statutory scheme? What other forms do statements of reasons take?**

### **The consequences of a failure to provide adequate reasons**

4.129 A failure to provide reasons where required, or the provision of inadequate reasons, is an error of law.<sup>384</sup> This does not necessarily justify the setting aside of a decision. However, the court may order the provision of a statement of reasons or amended reasons in such a case. Reasons may be held to be inadequate if they are insufficient to assist the person affected to decide whether to challenge the decision or to assist the process of review of the

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<sup>381</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(1); *Acts Interpretation Act 1901* (Cth) s 25D.

<sup>382</sup> Administrative Review Council, *Best Practice Guide 4: Decision Making: Reasons* (2007) 9.

<sup>383</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 244A .

<sup>384</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009); Administrative Review Council, *Commentary on the Practical Guidelines* (revised 2002) 43.

decision.<sup>385</sup> If the reasons for the decision are inaccurate, wrong, need other reasons or evidence or have to be supplemented, the original decision may be found to be unlawful by a court or tribunal.<sup>386</sup> The applicant may also be eligible for discretionary compensation under the CDDA.<sup>387</sup>

4.130 Even if there is no formal requirement to give reasons, in certain circumstances the courts may infer that a decision maker who has not given reasons had no good reasons for that decision, and thus the decision is reviewable as an error of law or on other grounds.<sup>388</sup> A failure to mention a relevant consideration in a statement of reasons may also be used by the court as the basis of an inference that the matter was not taken into account.

4.131 If there was a general obligation to provide reasons, there may be a need for other consequences to follow from a failure to provide those reasons in order to ensure the obligation was complied with.

### **Question 19**

**What other consequences, if any, should there be for of a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons?**

## **AVAILABILITY OF REMEDIES IN JUDICIAL REVIEW PROCEEDINGS**

4.132 As discussed in Part 3, judicial review remedies do not involve the *de novo* consideration of the facts of a particular case, and the court cannot grant damages. Judicial review remedies typically involve the invalidation of a decision, remitting a decision back to the original decision maker or a declaration of invalidity. However, if an applicant seeks damages for a particular decision, private law remedies may be sought through a tort action. This section considers whether there are advantages to having judicial review remedies set out in statute.

### **Remedies available under constitutional judicial review**

4.133 The main issue with the availability of remedies in the constitutional jurisdiction is whether the need to show that an error is jurisdictional unnecessarily restricts the availability of remedies.

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<sup>385</sup> Administrative Review Council, *Commentary on the Practical Guidelines* (2002) 41.

<sup>386</sup> *Ibid.*

<sup>387</sup> Department of Finance and Deregulation, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09.

<sup>388</sup> Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009); Administrative Review Council, *Commentary on the Practical Guidelines* (2002) 8.

4.134 It is important to note that remedies are not restricted in this way under s 75(iii) of the *Constitution* or under s 39B(1A)(c) of the *Judiciary Act*. Therefore remedies may be available in a wider range of circumstances than under s 75(v). For example, in the 2010 High Court decision of *Plaintiff M61*, the Court issued a declaration even though there the decision maker had no legal duty capable of being compelled through mandamus or prohibition.<sup>389</sup> In that case, the Court had jurisdiction under both s 75(v) and s 75(iii), and therefore a declaration could issue without needing to show entitlement to the constitutional writs.

4.135 While the declaration is not a coercive remedy, it is still a powerful one. The Australian Government complies with declarations, and will remake those decisions according to law. If a court makes a declaration and the Government proceeded to take further actions, such as deportation, on the basis of a decision a court has declared invalid, the individuals affected could potentially apply for an injunction to prevent those further actions.

#### **Question 20**

**What are the potential restrictions on the availability of remedies under the *Constitution* and the *Judiciary Act*? Do these restrictions, if any, mean a statutory remedial scheme is desirable, and why?**

#### **Remedies available under a statutory scheme**

4.136 The *ADJR Act* lists remedies which are substantially similar to those available for constitutional judicial review. The *ADJR Act* does not provide for damages as a remedy. The Law Commission has considered the introduction of damages as an ancillary judicial review remedy.

#### *Law Commission report on administrative redress*

4.137 The 2008 consultation paper released by the Law Commission, *Administrative Redress: Public Bodies and the Citizen*,<sup>390</sup> proposed the creation of a damages remedy as an ancillary remedy to be claimed alongside the prerogative writs available at common law, or for private law claims against public bodies. The Law Commission considered that a damages remedy would fill a gap in the current law, as damages can only be claimed against a public body where there is a private law right to damages, where there has been a breach of a European Union law or under the *Human Rights Act 1998* (UK).

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<sup>389</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14.

<sup>390</sup> Consultation Paper No 187 (2008).

4.138 The Law Commission proposed, in relation to judicial review, that courts could grant a claimant damages if the claimant could show that:

- the legal regime in which the public body acted was intended to confer a benefit on individuals and that the harm suffered by the individual was of a similar nature to the benefit that the regime conferred<sup>391</sup>
- the public body had committed a ‘serious fault’ — it fell far below the standard expected in the circumstances,<sup>392</sup> and
- the defendant’s conduct did in fact result in the damage complained of and the damage is not, in law, too remote a consequence of the defendant’s wrongdoing.<sup>393</sup>

4.139 The Law Commission suggested a number of factors which might indicate that there had been a serious fault, such as:

- the risk or likelihood of harm involved in the conduct of the public body
- the seriousness of the harm caused
- the knowledge of the public body, at the time that the harm occurred that its conduct could cause harm; and whether it knew or should have known about vulnerable potential victims
- the cost and practicability of avoiding the harm
- the social utility of the activity in which the public body was engaged when it caused the harm — this would include factors such as preventing an undue administrative burden on the public body
- the extent and duration of departures from well-established good practice, and
- the extent to which senior administrators had made possible or facilitated the failure or failures in question.<sup>394</sup>

4.140 The Law Commission also asked for views on whether the discretionary nature of the prerogative writs should be retained for the damages remedy. Some responses to the consultation paper supported this position.

4.141 There was substantial opposition, particularly from government bodies, to both the public law and private law aspects of the proposal to allow damages for serious fault.<sup>395</sup> The main criticisms of the proposal were that:

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<sup>391</sup> Ibid 83.

<sup>392</sup> Ibid 85.

<sup>393</sup> Ibid 86.

<sup>394</sup> Ibid 85.

- monetary remedies were inconsistent with the nature of public law<sup>396</sup>
- there was a risk of increased delays to judicial review proceedings,<sup>397</sup> and
- providing for damages would place an increased financial burden on public authorities.<sup>398</sup>

4.142 In its final report, the Law Commission noted that there was a lack of available data on the compensation liability of public bodies to enable assessment of potential benefits from the proposed reforms. The Law Commission considered that there was no evidence available to support or refute criticisms of the proposal. Therefore, while the Law Commission considered that the proposals had merit, it decided not to pursue them any further.

4.143 The Law Commission argued that in some cases damages were necessary to avoid injustice to individuals, for example where a licence had been revoked invalidly and a person has lost earnings as a result.<sup>399</sup> The Law Commission considered that sometimes damages were appropriate in the interests of justice in individual cases and to improve government service delivery.<sup>400</sup>

*Damages as a remedy in the Australian context*

4.144 Damages in Australia, as in the United Kingdom, are available in private law action based on contractual relationships or tort action for negligence, breach of statutory duty or misfeasance in public office.<sup>401</sup> In Australia, the injustices which the Law Commission seeks to address may be compensated through other schemes which are not dependent upon a finding of legal error in a decision making process. The government has the discretion to make compensation payments, either in the form of payments under the CDDA or act of grace payments, to people adversely affected by government administration.<sup>402</sup> These discretionary compensation schemes are available where there may have been defective administration or where government administration has inequitable consequences for a particular individual. Compensation under these schemes is often granted where no other remedies are available. As a result, discretionary compensation will not usually be available in conjunction with judicial review remedies. The Law Commission's proposal sought to have damages available as an ancillary remedy in judicial review proceedings.

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<sup>395</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen* (2010) 2.

<sup>396</sup> *Ibid* 8–9.

<sup>397</sup> *Ibid* 10.

<sup>398</sup> *Ibid* 10–11.

<sup>399</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen* (2010) 15.

<sup>400</sup> *Ibid* 22.

<sup>401</sup> See above [2.59]–[2.60].

<sup>402</sup> See above [2.54]–[2.58].

A major concern with providing for the courts to grant damages in relation to an unlawful decision would be that the court either was, or would appear to be, deciding the correctness of the decision on the merits. In Australian judicial review proceedings, a court can decide whether a decision maker has made an error of law, but not what the correct decision should have been.

## COURT PROCEDURES

### Introduction

4.145 Any reform of judicial review requires consideration of the involvement of the courts and the processes that apply in cases of judicial review of administrative action. This section considers various reforms which have been implemented in the migration litigation jurisdiction and seeks views on whether any of these reforms may be suitable for judicial review proceedings more generally.

4.146 While judicial review focuses on addressing an individual grievance, court procedures and other non-legal mechanisms can be utilised to ensure that grievances are being resolved in the most effective and appropriate manner. Access and efficiency are not opposing forces. Judicial review is often not the most appropriate forum for resolving a dispute between the government and the individual. Rather, judicial review is appropriate where the dispute between the government and the individual is about the legality of the decision — either the legal reasoning or the procedures followed in making the decision — and the individual wants the decision overturned and remitted back to the original decision maker.

4.147 Migration litigation forms the largest administrative law judicial review caseload across the Commonwealth. The litigation process which has been developed in pt 8 of the *Migration Act* has some distinctive features that facilitate efficient handling of litigation and ensure removal of unnecessary delays in the review process. This section considers the different features of the migration litigation process, and seeks views on whether those processes could be applied to judicial review proceedings more generally.

### Role of the Federal Magistrates Court and the Federal Court

4.148 Most applications for judicial review of migration decisions are dealt with in the first instance by the FMC.<sup>403</sup> The major exception is that character cases decided by either the Minister or the AAT are determined by the Federal Court. While the original jurisdiction of the High Court cannot be excluded, the incentive to commence matters in the High Court is reduced, as the grounds of review in the FMC and the Federal Court are the same as those in the High Court under section 75(v) of the *Constitution*, as discussed above in Part 3.

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<sup>403</sup> *Migration Act 1958* (Cth) s 476.

4.149 Appeals from the FMC are made to a single judge of the Federal Court. This contrasts with applications under the *ADJR Act* which are heard by a single judge of the Federal Court in the first instance and which must be appealed to a full court comprising three judges. The possibility of a three-member bench in migration cases is still available in appropriate cases, as determined by the court.

4.150 The numbers of general judicial review applications are small, and do not appear to place an unnecessary burden on the resources of the Federal Court. Therefore there appears to be little reason to have all judicial review matters go to the FMC rather than the Federal Court. Applicants can currently apply to the FMC directly under the *ADJR Act* if they wish. Similarly, there does not appear to be particular justification for restricting review to a single judge of the Federal Court. Migration matters raise similar legal issues which can therefore often be dealt with expeditiously on appeal. General judicial review proceedings could potentially raise a variety of issues, and there appears to be a benefit in having appeals considered by a full court on appeal.

### **Time Limits**

4.151 Time limits encourage litigation to proceed in a timely way, and discourage repeat litigation. Current time limits under the *ADJR Act* are more flexible than those under the *Migration Act*, because the court has more discretion as to when it may entertain an application for extension.

4.152 An aggrieved person has 28 days from receipt of the decision to commence Federal Court proceedings under the *ADJR Act*. The Federal Court may extend this time limit in appropriate cases. The principles governing time limits under the *ADJR Act* have also been fairly well settled though a long line of cases on the point.<sup>404</sup>

4.153 The initial time limit for applications for judicial review of migration decisions is 28 days from the applicant having received actual notice of the decision under the *Migration Act*. The court may extend the 28 day time limit by a further period of up to 56 days, if the applicant requests an extension of time within 84 days of actual notification of the decision by the tribunal, delegate or Minister, and the court is satisfied that it is in the interests of the administration of justice to extend the time limit. Section 477 of the *Migration Act* gives 35 days for FMC appeals and s 477A gives 35 days for Federal Court appeals. For visa-related applications to the High Court in its original jurisdiction under section 75(v), a 35 day (from actual notification) time limit applies.<sup>405</sup>

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<sup>404</sup> The rules governing time limits under the *ADJR Act* are explained in Enid Campbell and Matthew Groves, 'Time Limitations in Applications for Judicial Review' (2004) 32 *Federal Law Review* 29.

<sup>405</sup> *Migration Act 1958* (Cth) s 486A.

### General mechanisms for discouraging unmeritorious litigation

4.154 There are a number of mechanisms for discouraging unmeritorious litigation in migration matters. These include an obligation not to encourage litigation proceedings where there are no reasonable prospects of success,<sup>406</sup> the ability for the court to make a personal costs order against a person who encourages unmeritorious litigation,<sup>407</sup> and a requirement that any lawyer filing a document to commence migration litigation certify that there are reasonable prospects of success.<sup>408</sup>

4.155 Applicants are required to disclose any previous applications for judicial review of the same migration decision. This information might suggest that there is some doubt about the prospects of success in the subsequent application. In addition to these deterrents, the court has power to dismiss unmeritorious proceedings summarily in cases where it is satisfied that there is no prospect of success, even if the case is not considered to be hopeless.

#### Question 21

**What would be the benefits, if any, from extending the various streamlining measures relating to courts — such as time limits and discouraging unmeritorious litigation — that apply to judicial review of migration decisions to all avenues for judicial review?**

### Discretion of the court to hear judicial review

4.156 Granting relief in the form of constitutional writs is said to be discretionary. While it is not possible exhaustively to list the factors that might attend a court's exercise of discretion, there is some guidance about when the writs of mandamus, prohibition and certiorari might be issued. This includes when a more convenient and satisfactory remedy exists.<sup>409</sup>

4.157 Under the *ADJR Act*, the court may refuse to grant an application for review where a person has sought a review by the court, or by another court, of a decision otherwise than under the Act; or where adequate provision is made by another law under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of the decision.<sup>410</sup>

4.158 There have been attempts to strengthen the court's discretion not to hear judicial review applications at an early stage where alternatives to judicial review exist. The *ADJR*

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<sup>406</sup> Ibid s 486E.

<sup>407</sup> Ibid s 486F.

<sup>408</sup> Ibid s 486I.

<sup>409</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres* (1949) 78 CLR 389; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 108 (Gaudron and Gummow JJ).

<sup>410</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10(2)(b).

Amendment Bill 1986 (Cth) sought to amend the *ADJR Act* to restrict the right to seek the review of administrative decisions by:

- altering the statutory provisions enabling the Federal Court to dismiss an application for review where alternative remedies are available, and
- requiring the Federal Court to consider whether it should exercise its discretion to dismiss applications at the earliest opportunity.

4.159 The Bill would have provided for the near automatic refusal of relief under the Act where there were either alternate means of review or where the proceeding challenged was not complete, unless the applicant satisfied the court that the interests of justice required otherwise.

4.160 The Explanatory Memorandum suggested that the aim was to reduce delay and increase administrative efficiency, as proceedings were increasingly fragmented by interlocutory *ADJR Act* applications. The Senate Committee noted in its report the problems caused by significant amounts of litigation relating to the decision regarding allocation of television licenses in Perth.<sup>411</sup>

4.161 In considering the Bill, the Senate Committee recognised that applicants should be encouraged to use merits review before judicial review. However, they did not wish to recommend restricting judicial review for all applicants because of a few unmeritorious or vexatious cases. The Committee recommended the Bill not be enacted and it was ultimately blocked.

4.162 A factor in the Committee's consideration appears to have been the insignificant difference in costs between the Federal Court and the AAT at that time (typical AAT hearing at \$11 000 and the Federal Court matter \$12 000 in costs to the Commonwealth). The discrepancy in costs appears to be greater now, which may be due to the increasing and successful use of Alternative Dispute Resolution in AAT proceedings. The Access to Justice Taskforce Report cited an Australian Law Reform Commission survey conducted in 1999, which suggested that the average cost of legal professional fees for an applicant in the Federal Court was \$62 124, and this would have increased over the last decade. In relation to the cost of using the court, fees paid in the Federal Court amounted to 9.3% of the Government's expenditure on the Court.<sup>412</sup>

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<sup>411</sup>Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *ADJR Amendment Bill 1986* (1987).

<sup>412</sup>Australian Government Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce (September 2009).

4.163 In the United Kingdom, a person needs ‘permission’ to apply for judicial review.<sup>413</sup> Judicial review is considered a remedy of last resort, and the permission stage is designed to filter out those claims which have no prospect of success. Parties are expected to have exhausted all other remedies, before commencing a claim — including alternative remedies such as statutory appeals and appeals to relevant tribunals. A judge in the Administrative Court will consider the claim on the papers.<sup>414</sup> If permission is granted, the matter will go to full hearing. There is also a pre-action protocol, designed to allow parties to avoid litigation.

4.164 While federal courts currently have a wide discretion to dismiss applications in judicial review proceedings, a further obligation could be placed on the courts requiring them to consider whether an application should be dismissed without an application from the parties involved.

### **Question 22**

**What further requirements, if any, should be placed on the courts to consider whether they should exercise discretion to dismiss applications at the earliest opportunity?**

## **ADDITIONAL STATUTORY REVIEW MECHANISMS**

4.165 As discussed above in Part 3, there are a number of statutory review mechanisms which operate in particular decision making jurisdictions as well as appeals from AAT decisions. These mechanisms add another layer to the multiple avenues of review, and their role could be reconsidered as part of the development of a new general statutory review scheme.

### **Statutory review mechanisms in particular jurisdictions**

4.166 The advantages of having a simpler system of judicial review could include:

- an approach to judicial review which is capable of applying across the board and which does not seek to exclude the largest part of administrative law litigation, and
- a system which might be simpler to understand for applicants and other users.

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<sup>413</sup> United Kingdom procedure which governs making a claim for judicial review is set out in the *Civil Procedure Rules* (UK) pt 54.

<sup>414</sup> If the judge refuses permission, the claimant is entitled to seek (within seven days) that the matter be reconsidered at an oral hearing (*Civil Procedure Rules* (UK) r 54.12). If at the oral hearing the judge again refuses permission, the claimant will have a right to apply for permission to appeal to the Court of Appeal against that refusal pursuant to *Civil Procedure Rules* (UK) r 52.15.

4.167 These advantages need to be balanced against costs that may arise during transition to any new regime. There are a number of potential issues that might arise if the existing specific statutory review mechanisms were replaced by a general judicial review scheme. These might include:

- a short-term spike in litigation, as the new legal regime is tested in the courts
- uncertain outcomes which might be a result of adjustment to the new regime, and
- increased costs due to increased caseloads or uncertain outcomes.

**Question 23**

**What are the benefits of specific statutory appeals as compared to general judicial review?**

**Question 24**

**What benefits do government agencies responsible for statutory review schemes find that those statutory schemes give? Do agencies believe these benefits could also be achieved through a general statutory review scheme and why, or why not?**

**Section 44 of the AAT Act**

4.168 As the AAT is the peak Commonwealth merits review tribunal, appeals on questions of law from Tribunal decisions have attracted particular interest. In its Report No 41 of 1997, the Council accepted that there is very considerable overlap between the scope of Federal Court review under s 44 and *ADJR Act*, but suggested s 44 should be retained.<sup>415</sup> The Council argued that it is not clear that repeal of s 44 would resolve the identified defects, and the narrower s 44 formulation is consistent with the Court's more limited role in fact finding where the Court is reviewing a decision of the Tribunal under s 44, as compared to the *ADJR Act*.

4.169 The primary reason for removing s 44 would simply be to eliminate one statutory appeal right which operates alongside judicial review. Because the AAT is a generalist tribunal with varied jurisdictions, there do not seem to be any strong reasons to have it subject to a separate statutory appeal, except for some of the positive aspects discussed above. It would also eliminate the situation where for questions of law appeals are made under s 44, while for procedural issues, an application must be made for judicial review.

4.170 Under s 45 of the *AAT Act*, the Tribunal could still refer a question of law to the Federal Court of its own motion or at the request of a party while a proceeding is underway.

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<sup>415</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997).

4.171 It is unclear what benefits flow from imposing greater discipline on parties in terms of form of application. If this is slowing court proceedings, a practice note, clearer guidance in forms or assistance from the Registry could assist applicants.

4.172 Both the Kerr Committee and the Council in its *Better Decisions* report<sup>416</sup> considered that the peak merits review tribunal should be subject to judicial review by the Federal Court.

**Question 25**

**Section 44 of the *AAT Act* establishes a statutory appeal right which applies to decisions in many jurisdictions. Are there any examples of cases where an applicant has been unsuccessful in an application for review because of discrepancies between the jurisdiction of the Federal Court under s 44 of the *AAT Act* and under the *ADJR Act*?**

**Question 26**

**The Council has previously recommended that s 44 be retained. What reasons are there for retaining or removing s 44 of the *AAT Act*?**

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<sup>416</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995).

## 5 MODELS FOR REFORM OF JUDICIAL REVIEW

5.1 This Part sets out existing judicial review models from Australian and international jurisdictions and then suggest possible options for reform of the Australian federal judicial review system.

### COMPARATIVE MODELS OF JUDICIAL REVIEW

5.2 The two main categories into which models for judicial review fall are ‘common law’ models and statutory models. Constitutional judicial review is essentially a common law model of judicial review, as it relies primarily on case law, though influenced by constitutional text and principles.

5.3 Civil law systems have a different model altogether with a separate system of administrative courts and tribunals handling all administrative law matters. Civil law systems typically include review of the substance (or merit) of decisions as an element of legality.<sup>417</sup>

5.4 Some features of other systems which are not present in either *ADJR Act* or constitutional review models are:

- obligations placed on how a decision is made and the form in which it is delivered
- requirement to exhaust other internal procedures first, and
- review on the basis of proportionality.<sup>418</sup>

### Common law model

5.5 The judicial review jurisdiction of the Supreme Courts in NSW, Victoria, Western Australia, South Australia and the Northern Territory derives from the common law. In all of these jurisdictions, there have been reforms to simplify procedure for bringing judicial review applications in the courts.<sup>419</sup>

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<sup>417</sup> See for example the French system, Lionel Neville Brown, *French Administrative Law* (Oxford University Press, 4<sup>th</sup> ed, 1993).

<sup>418</sup> For summary of the proportionality ground of review, see above [4.72].

<sup>419</sup> See Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 58–60. See *Supreme Court Act 1970* (NSW) ss 65, 66, 69, 69B, 70, 71; *Uniform Procedure Rules* (NSW) r 6.4; *Supreme Court Act 1986* (Vic) s 3(6); *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 56; *Supreme Court Act 1935* (WA) s 16; *Supreme Court Civil Rules 2006* (SA) rr 199–201; *Supreme Court Act* (NT) s 20; *Supreme Court Rules* (NT) O 56.

5.6 The common law model has led to significant expansion to the scope and grounds of judicial review since the 1950s, particularly in England.<sup>420</sup> Australia has been far less expansionist, arguably in part due to the prominence of general statutory measures and generalist review tribunals like the AAT — which have potentially removed much of the pressure for an expansionist common law.<sup>421</sup>

### Statutory model

#### *Australian states and territories*

5.7 In addition to the inherent jurisdiction of the Supreme Courts, three Australian states — Victoria,<sup>422</sup> Queensland<sup>423</sup> and Tasmania,<sup>424</sup> and the Australian Capital Territory<sup>425</sup> — have adopted statutory judicial review. The judicial review statutes in Queensland, Tasmania and the Australian Capital Territory are modelled on the *ADJR Act*, with some modifications. For example, Queensland's *Judicial Review Act 1991* applies to a slightly wider range of executive action than the *ADJR Act*. In addition to the 'decision under an enactment', it also applies to a decision:

proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)—

- (i) out of amounts appropriated by Parliament; or
- (ii) from a tax, charge, fee or levy authorised by or under an enactment.<sup>426</sup>

5.8 The *Administrative Law Act 1978* (Vic) is significantly different from the *ADJR Act* and other statutory schemes. The *Administrative Law Act* provides for procedures for seeking an 'order for review' of a 'decision' of a 'tribunal'. Tribunal is defined as a person or body of persons (not a court or a tribunal constituted of or presided over by a Judge of the Supreme Court) required to observe one or more of the rules of natural justice.<sup>427</sup>

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<sup>420</sup> *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, 526 (Lord Templeman): 'judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong'. For similar comments, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 106.

<sup>421</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 107.

<sup>422</sup> *Administrative Law Act 1978* (Vic).

<sup>423</sup> *Judicial Review Act 1991* (Qld).

<sup>424</sup> *Judicial Review Act 2000* (Tas).

<sup>425</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT).

<sup>426</sup> *Judicial Review Act 1991* (Qld) s 4.

<sup>427</sup> *Administrative Law Act 1978* (Vic) s 2.

5.9 The Western Australia Law Reform Commission recommended in 2002 that a statutory model similar to that of the *ADJR Act* should be adopted in that State.<sup>428</sup> This recommendation has not been implemented.

#### *South Africa*

5.10 South Africa's system, under the *Promotion of Administrative Justice Act 2000*, is also based on the *ADJR Act* with modifications. There are a number of key differences between the two Acts.

5.11 First, there is no requirement in the *Promotion of Administrative Justice Act* that the decision is made 'under an enactment.' The decision can be made 'under an empowering provision', which means 'a law, a rule of common law, customary law or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.'<sup>429</sup>

5.12 Secondly, the Act also applies to private persons exercising a public power or performing a public function in terms of an empowering provision.<sup>430</sup>

5.13 Thirdly, the Act has a list of decisions that are specifically excluded from its ambit.<sup>431</sup> The exclusions generally relate to certain legislative and judicial functions, and to actions taken according to certain executive powers and functions. These exclusions serve to ensure that a distinction is drawn between the administrative functions and significant policy making and political functions of government. Examples are included in the *Promotion of Administrative Justice Act 2000*, but the Courts may decide on a case-by-case basis whether a particular function is administrative or executive.

#### *Canada*

5.14 Section 18(1) of the *Federal Courts Act*, RSC 1985, provides for a minimalist statutory judicial review power which is similar to s 39B of the *Judiciary Act* in that it is a provision within another act which deals with court jurisdiction. Section 18(1) provides that:

the Federal Court has exclusive original jurisdiction

- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

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<sup>428</sup> Law Reform Commissioner of Western Australia, *Report on Judicial Review of Administrative Decisions: Options for Reform*, Project No 95 (2002).

<sup>429</sup> *Promotion of Administrative Justice Act 2000* (South Africa) s 1.

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

5.15 Section 18 has been interpreted as providing federal courts with power to review decisions and conduct of a wide range of administrators including Cabinet ministers.<sup>432</sup> It is therefore not limited in ambit or scope in the same way as the *ADJR Act* is. The five broad grounds of review<sup>433</sup> and remedies are similar to what is provided for in the *ADJR Act*, although dealt with more succinctly. Groves has suggested that this basic statutory framework leaves room for interpretation by the courts against a common law background.<sup>434</sup> Unlike the *ADJR Act*, the provision does not provide a statutory right to reasons. This may not be considered necessary in light of common law developments in Canada.

## OPTIONS FOR AUSTRALIA

### A less restrictive *ADJR Act*

5.16 One model for reform would be to amend the *ADJR Act* to address the restrictive application of the Act, without attempting to expand its scope to cover all aspects of constitutional judicial review. Possible features of a less restrictive *ADJR Act* are discussed below.

5.17 *Jurisdiction:* Many commentators have recognised that there are problems with the ambit or scope of the *ADJR Act*. As discussed in Part 4, the Council has previously recommended amendments to address the restrictive scope of the Act — for example, allowing for review of decisions under non-statutory schemes<sup>435</sup> and statutory decisions of the Governor-General.<sup>436</sup> The Council has also recommended that classes of decision should be exempt from the *ADJR Act* as a whole, if there is policy justification.<sup>437</sup>

5.18 The restrictive terms in the *ADJR Act* such as ‘decisions’ or ‘conduct’, ‘under an enactment’ and ‘administrative character’ could be replaced by more general terms — for example use of ‘empowering provision’, as in the *Promotion of Administrative Justice Act 2000* (South Africa), instead of ‘enactment’. An amended *ADJR Act* could also apply to

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<sup>432</sup> *Canada (Minister for Immigration and Citizenship) v Khosa* [2009] 1 SCR 339.

<sup>433</sup> Section 18.1(4) of the *Federal Courts Act* RSC 1985 is set out at [4.76].

<sup>434</sup> Matthew Groves, *Reforming Judicial Review at the State Level* (2010) 64 *AIAL Forum* 30, 40–41.

<sup>435</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 1. See above [4.17]–[4.21].

<sup>436</sup> See Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 2. See above [4.57]–[4.59].

<sup>437</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

legislative instruments<sup>438</sup> and to reports and recommendations by bodies other than the original decision maker.<sup>439</sup>

5.19 *Reasons:* The Council has previously recommended that the exemption of classes of decision from the s 13 obligation to give reasons should be removed.<sup>440</sup>

5.20 This model would not propose any amendments to the grounds, right to seek review or remedies under the *ADJR Act*.

5.21 The benefits of this model are:

- the *ADJR Act* would not change its procedure or grounds for review, and may lead to greater certainty in the short-term, and
- the proposed amendments have been contemplated for some time, and would provide a greater level of accountability and accessibility than the current *ADJR Act*.

5.22 The risks are that the model:

- may not address the key problem of overlapping sources of judicial review
- would not achieve the simplification of the system that would be possible if most applications go through one avenue, and
- does not seek to address the divergence of constitutional judicial review and *ADJR Act* review — the bifurcation issue.

### **A new general statutory review to align constitutional and statutory review**

5.23 The aim would be to create a new act or provision which applies to all government action currently covered by the *ADJR Act* and constitutional judicial review. One approach might be to include a judicial review provision in an existing act such as the *Federal Court Act 1976* similar to s 18 of the Canadian *Federal Courts Act*, RSC 1985. Possible elements of a new general statutory review mechanism are discussed below.

5.24 *Jurisdiction:* This model would create a new jurisdictional test. A number of models are discussed in Part 4, and above at [5.10]–[5.15] in relation to South Africa and Canada. The new statutory model would need to address the bifurcation issue, while also considering other jurisdictional or ‘scope’ issues raised in Part 4, such as the reviewability of decisions by non-government officers, in particular the reviewability of service delivery

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<sup>438</sup> See above [4.10]–[4.13].

<sup>439</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 17. See above [4.14]–[4.16].

<sup>440</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977: Statement of Reasons for Decisions*, Report No 33 (1991) rec 1. See above [4.124]–[4.125].

under contract. Development of this model could also consider the reasons for, and continuing relevance of, the restrictions on review in ss 9,<sup>441</sup> 9A<sup>442</sup> and 9B<sup>443</sup> of the *ADJR Act*. In drafting a new Act, all exclusions listed in Sch 1 would need to be reviewed and justified, noting that most are inconsistent with the right of review under s 75(v) or s 39B.

5.25 *Grounds:* The statutory grounds of review set out in s 5 of the *ADJR Act* were designed to distil the common law grounds of review. Under this model, new grounds could be added, existing grounds could be reworded or stated more succinctly similar to s 18.1(4) of the *Federal Courts Act*, RSC 1985. The possibility of including overarching principles could also be considered, as could the replacement of the listed grounds with overarching principles.

5.26 *Right to seek review:* This model could include an expanded standing test for organisations, based on s 27(2) of the *AAT Act*, which gives organisations standing if a decision relates to a matter included in the objects or purposes of the organisation.

5.27 *Reasons:* A new Act could address practical issues that have arisen with the provision of statements of reasons. These include the extent of reliance that a decision maker can place on others in framing or explaining the reasons for a decision, where the responsibility lies if a decisions maker is no longer available, and the position where there is computer-aided decision making.

5.28 *Remedies:* The *ADJR Act* remedies are substantially similar to those available for constitutional judicial review. While there may be no need to provide for additional remedies there would be an opportunity to ensure clarity and to avoid any restrictions relating to the nature of the error or whether the error appears on the record or not.

5.29 The benefits of this model are that it:

- seeks to address bifurcation problems
- would maintain the advantages of a simple statutory regime where the grounds and procedure are contained in one Act
- does not restrict review to jurisdictional errors, and
- would allow future amendments where the legislature considers that judicial review should be extended or restricted in the future.

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<sup>441</sup> Limitation of jurisdiction of State courts in relation to decisions to which the *ADJR Act* applies.

<sup>442</sup> Limitation of jurisdiction of any court hear an application from a defendant in criminal justice process decisions.

<sup>443</sup> Limitation of jurisdiction of any court to hear applications from parties in related civil proceedings decisions.

5.30 The risks are that:

- a broader scheme may not be compatible with the policy behind statutory review and appeal schemes (such as migration decisions), meaning a significant proportion of review would continue to occur under separate statutory schemes
- the courts may interpret the Act in a manner which restricts review and paves the way for inconsistencies between constitutional review and statutory review to expand in the future, and
- there will always be separate systems under this option because the High Court's jurisdiction cannot be excluded by legislation.

**Question 27**

**Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future?**

**A minimalist statutory scheme**

5.31 Under this model, the *ADJR Act* would be repealed and replaced with a minimalist statutory scheme based on s 39B of the *Judiciary Act*. Procedural simplifications and clarifications, including application provisions, may support this model.

5.32 *Jurisdiction:* The operation of s 39B might be made clearer, in particular, to clarify that s 39B(1A)(c) is also a means of challenging government decisions.

5.33 *Grounds:* A minimalist statutory model could include a succinct statement of grounds of review like the Canadian model<sup>444</sup> or no statutory grounds of review. The latter approach could be supported by educative material, such as fact sheets like those provided by the UK Public Law Centre which set out the grounds for review at common law and the procedure for bringing a judicial review application.<sup>445</sup>

5.34 *Right to seek review:* Standing would be dependent upon the common law and would be available to any person with a special interest in the subject of the decision who would be adversely affected by it.<sup>446</sup>

5.35 *Reasons:* The requirement to give reasons could be added to this minimalist model.

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<sup>444</sup> See s 18.1(4) of the *Federal Courts Act*, RSC 1985.

<sup>445</sup> Her Majesty's Court Service, *Administrative Court Guidance, Notes for guidance on applying for judicial review* (11 October 2010) <[www.hmcourts-service.gov.uk/cms/1220.htm](http://www.hmcourts-service.gov.uk/cms/1220.htm)>.

<sup>446</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

5.36 *Remedies*: A minimalist statutory approach based on s 39B would encompass the ‘constitutional writs’ of mandamus, prohibition or an injunction as well as the ancillary remedy of certiorari and the equitable remedy of a declaration.<sup>447</sup>

5.37 The benefits of this model are that it:

- would address, to a great extent, the overlapping sources of review — if remedies are only available for jurisdictional errors, then statutory review schemes (such as for migration decisions) may be more likely to return to the general scheme, and
- could maintain the requirement for reasons but does not attempt to codify grounds of review — this may allow greater flexibility for the courts.

5.38 The risks are that:

- since remedies would only issue where there was a jurisdictional error, narrowing the availability of review slightly as compared to the current *ADJR Act*, this model could be criticised for restricting the availability of review, and
- there may be less certainty about remedies than the *ADJR Act* currently provides.

#### **Question 28**

**What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review?**

#### **Question 29**

**What information should be provided to applicants about constitutional judicial review in the Australian federal jurisdiction if there is no general statutory review scheme? Which bodies are most appropriate to provide this information?**

### **Non-legislative option**

#### *Background*

5.39 Rather than proposing a major legislative reform to judicial review and recognising the variety of different review and statutory appeals available, the Council could provide policy guidance on the key elements of any system for review of government decisions.

5.40 There are a number of factors which suggest that a comprehensive judicial review system may not be achievable. The increase in the number of statutory appeal schemes

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<sup>447</sup> The circumstances in which these remedies would be available are discussed at [3.13–3.16].

offering alternatives to judicial review under the *ADJR Act* means that it may be difficult to create a comprehensive statutory review scheme which covers all government decisions. In addition, s 75(v) review is available under the *Constitution*, therefore a separate statutory scheme can never be completely comprehensive. Judicial review is only one element of the broader administrative justice system, and for the most part people's issues with government decisions are addressed through internal review, complaints mechanisms, the Ombudsman or merits review tribunals.

5.41 The Council has provided policy guidance in the 2006 with Report No 47, *The Scope of Judicial Review*. The report includes a framework of indicative principles which provide guidance to policy makers about the circumstances when restriction on judicial review is justified and the various ways in which review can be restricted.

#### *Proposal*

5.42 The Council could, taking into account comments on the current system of judicial review made in response to this paper, develop key policy principles for the design of any system for judicial review of government decisions.

5.43 The policy principles could address issues such as:

- decisions and decision makers which should be subject to review
- grounds and restrictions on the grounds of review
- appropriate remedies
- codes of procedure
- standing
- access to review, and
- reasons.

The resulting policy principles would be publicly available, and agencies could consult with the Council when developing new review schemes. Existing review schemes could also be assessed against the principles.

5.44 The benefits of this model are that:

- it would maintain the status quo in terms of numbers of applications for review and would therefore avoid any spike in litigation which usually follows statutory change, and
- it could provide some degree of consistency in approach if new specific statutory review mechanisms are to be implemented.

5.45 The risks of this model are that:

- there would be no reduction in the complexity and overlapping nature of the existing system of judicial review, and
- it may be perceived as avoiding difficult and sensitive issues that might arise from any change to existing statutory regimes.

**Question 30**

**Given the proliferation of statutory appeals and the declining use of general judicial review mechanisms, what are the advantages, if any, of the Council preparing policy principles to guide a variety of statutory judicial review mechanism, rather than attempting to streamline the range of existing judicial review mechanisms?**