Judicial Review in Australia

Submission to the Administrative Review Council

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Introduction

The following submission is based on our academic experience teaching public law courses at universities in the United Kingdom\(^2\) and Australia\(^3\) over many years. As our experience is academic, we will focus our submission on the doctrinal rather than the empirical questions raised by the Administrative Review Council (“the Council”) in the Consultation Paper.

We would like to begin by commending the Council for the thorough review of Federal administrative law provided in the Consultation Paper. For example, the statistical information collected at paragraphs 3.66 to 3.79 is particularly valuable. We were struck by the sharp contrast between this statistical information and the information collected by the Council in the 1980s. A comparison between the statistics collected in the Council’s Report No 32\(^4\) and those set out in the Consultation Paper expose a relative decline in reliance on the Administrative Decisions (Judicial Review) Act 1977 (“ADJR Act”) and a relative rise in reliance on the remedies provided by section 39B of Judiciary Act 1903. The analysis provided by the Council of the more recent statistical information, including the identification of the role of changes to migration related review mechanisms between 2004 and 2006 and the expansion of other alternative appeal mechanisms, makes an important contribution to the existing scholarship on administrative law in Australia.

Responses to Particular Questions Raised by the Council

Question 3

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

We can see no principled justification for excluding subordinate legislation from the scope of judicial review legislation (\textit{a fortiori} where subordinate legislation includes an administrative decision). Judicial review of subordinate legislation at common law has long been available, principally by way of injunctive and declaratory relief\(^5\) although particular grounds of review may not apply.\(^6\) Plainly, for statutory judicial review on the ADJR Act model to extend to subordinate legislation, it would be necessary to remove the “administrative character” requirement from the definition of “decision to which [the ADJR Act] applies”. As noted in the Consultation Paper,\(^7\) section 39B of the Judiciary Act, already allows for judicial review of subordinate legislation. Alternatively, statutory incorporation of the general jurisdiction to issue injunctive and declaratory relief, for example, on the model of Part 5 of the \textit{Judicial Review Act 1991} (Qld) (“QJR Act”) would achieve the same result.\(^8\)

\(^2\) Dr Billings has taught courses on Public Law in the UK beginning in the 1990s up until 2007. He commenced teaching Administrative Law at the University of Queensland in 2008. Dr Billings has also taught refugee and migration law in both the UK and Australia.

\(^3\) Dr Cassimatis has taught Administrative Law at the University of Queensland since the early 1990s.

\(^4\) At p18.

\(^5\) See, for example, Creyke and McMillan, \textit{Control of Government Action}, 2\textsuperscript{nd} ed, LexisNexis, 2009, 532-558; Australian Alliance Assurance Co Ltd v A-G for Queensland [1916] St R Qd 135; and Kwiksnax Mobile Industrial and General Caterers Pty Ltd v Logan City Council [1994] 1 QdR 291. The prerogative/constitutional writs may be unavailable – see \textit{R v Wright ex parte Waterside Workers Federation of Australia} (1955) 93 CLR 528.

\(^6\) It appears unlikely, for example, that the natural justice hearing rule applies to the making of subordinate legislation.

\(^7\) Consultation Paper, [4.12].

\(^8\) See, for example, Kwiksnax Mobile Industrial and General Caterers Pty Ltd v Logan City Council [1994] 1 QdR 291.
The potential for challenges to subordinate legislation appears to be undermined by relative lack of public familiarity with the remedies enshrined in section 39B of the *Judiciary Act* and the practical impediment, created by time limits restricting applications for judicial review, in cases where the impact of subordinate legislation upon a potential applicant for review only becomes apparent long after the promulgation of the instrument.

**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?*

The writ of prohibition already extends to preliminary reports and recommendations.9 *Ainsworth v Criminal Justice Commission*10 illustrates the importance of allowing judicial review of a report having reputational effects even though the report does not infringe any formal legal rights.

In our submission, the important role, identified by Aronson, Dyer and Groves,11 of discretionary grounds for restricting premature applications for judicial review, also has relevance to applications to review reports and recommendations. As suggested by Professor Aronson, and noted in the Consultation Paper,12 concerns regarding the risk of fragmenting and frustrating government decision–making processes appear most appropriately addressed by enshrining the discretionary grounds for dismissing premature applications in statutory form.13

**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?*

We support the amendment of the *ADJR Act* to incorporate an entitlement to review decisions made under non statutory schemes or programs that are publicly funded. The Council’s past recommendations in this regard, as noted in the Consultation Paper,14 were adopted by the Queensland Parliament and find expression in sections 4(b) and 9 of the *QJR Act*. As Dr Groves has perceptively noted,15 the small number of cases in which these provisions have been raised suggests that they have not significantly extended the scope of judicial review beyond the *ADJR Act*. We

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10 (1992) 175 CLR 564.
12 Consultation Paper, [4.15].
13 See, for example, section 14 of the *QJR Act*.
14 Consultation Paper, [4.19]-[4.20].
15 Dr Groves’ views are noted in the Consultation Paper at [4.20].
would note additionally that the potential utility of these provisions has not been realised in a number of cases where the provisions have not been raised in judicial review proceedings, in circumstances where one might have expected them to be relied upon by applicants. Empirical analysis would need to be undertaken to assess why the provisions were no raised, but initial indications suggest that legal advisors have not fully appreciated the potential of these provisions.

Examples of schemes that are not subject to statutory judicial review are provided by Federal and State decisions in which review under, or modelled on, the ADR Act has failed. The reasons for extending statutory review in such cases include the significant public dimension in each of the cases, the expenditure of public funds and the impact of the particular decisions on the rights or interests of members of the public.

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?

We favour a functional focus for the jurisdictional scope of judicial review. We therefore have a preference for the English approach of allowing review of the exercise of public powers and the performance of public functions. We note, however, that any statutory attempt to embody a more functional approach to judicial review jurisdiction should be sensitive to an important issue raised by Professor Aronson, namely the increasing reliance on mixed public and private powers and functions. That public and private powers and functions are mixed in particular decision-making contexts is no reason, in our view, to automatically exclude judicial review of the public dimension.

As to why we favour a functional approach to jurisdiction to judicially review, we would adopt Professor Mullan’s criteria for successful reform of jurisdiction to judicially review. Commenting on reforms to judicial review in the Canadian Province of Ontario, Professor Mullan observed in 2001:

16 See, for example, Concord Data Solutions Pty Ltd v Director-General of Education [1994] 1 QdR 343; and Blizzard v O’Sullivan [1994] 1 QdR 112.
17 See generally Lane and Young, Administrative Law in Australia, Law Book Co, 2007, at pp 93-96.
18 In addition to the examples provided by the Council in Chapter 4 of its report No 32, see also Ex-Christmas Islanders Association Inc v Attorney General’s Department (Commonwealth) (2005) 149 FCR 170.
19 See, for example, Wide Bay Helicopter Rescue Service v Minister for Emergency Services (1999) 5 QAR 1; Medtek v Chief Health Officer for Queensland (1998) 4 QAR 570 at 583-4; and Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads [2005] 2 QdR 344, 351-353 [24]-[29]. In our submission, the approach taken by Holmes J in this case was unduly restrictive on the issue of whether a scheme or program was capable of being “non-statutory” when the scheme or program is specifically required and regulated by statute.
20 We consider it important that any jurisdictional test focus both on public powers and public functions. In terms of the existing jurisdiction to review (non-) performance of public functions, important considerations in this regard were addressed by Brennan J in this judgment in Ainsworth v Criminal Justice Commission (1992) 175 CLR 564. We have a number of concerns regarding the Victorian approach of employing the test for natural justice as a jurisdictional test. These include placing “legitimate expectations” at the heart of jurisdiction to review. We note criticism of that concept in judgements such as that of McHugh and Gummow JJ in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1, [47]-[49] and [61]-[102]. For a comprehensive assessment of the Victorian legislation, see Groves, Should the Administrative Law Act 1978 (Vic) be repealed? (2010) 34 Melbourne University Law Review 452.
“Probably the most reliable indicator of the success of any exercise in legislative reform is the extent to which it passes the test of time without the need for its parameters having to be established by resort to litigation. ... Ontario’s Judicial Review Procedure Act ... has been a success and, in particular, remedial technicalities seldom intrude in Ontario judicial review litigation so as to prevent the Divisional Court going immediately to the merits of an application for judicial review.”

Given the manner in which remedial technicalities appear to regularly intrude into review under the ADJR Act (and legislation modelled on the Federal Act), the case for departing from the “under an enactment” requirement appears strong.

**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?**

Where private bodies exercise public power, or equally, where private bodies perform public functions, a commitment to the rule of law supports the applicability of review mechanisms including independent judicial review. A presumption in favour of the existence or the creation of rights of judicial review increases where the performance of public functions or the exercise of public powers impact on the rights or interests of members of the public and also where the exercise of powers or performance of functions involve the expenditure of public funds.

Who precisely should be subjected to judicial review? Several prominent administrative lawyers have recommended that the ADJR Act be amended to permit its application to the exercise of public power and performance of public functions, mirroring developments overseas. We are in broad agreement with proposals to move away from jurisdictional requirements that speak to governmental repositories of public power. In our submission the supervisory jurisdiction of the courts ought to extend to private bodies when exercising public power and discharging public functions. This begs the questions, what is ‘public power’ or, ‘how do we determine when a private

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22 Mullan, Administrative Law, Irwin Law, 2001, 438. Professor Mullan’s reference in the above quotation to “merits” is actually a reference to the substantive grounds of judicial review, rather than the “merits” of an administrative decision applying the distinction between legality and merits as has developed under Australian law. For a brief introduction to the operation of the jurisdiction requirements in Ontario, see Cassimatis, Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England (2010) 34 Melbourne University Law Review 1.

23 This part of our submission is based on our April 2011 submission to the NSW government on proposed reforms of judicial review in NSW.

24 For example, See Aronson, Is the ADJR Act hampering the development of Australian administrative law? (2004) 15 Public Law Review 202, 208-209; and, Griffiths SC, Commentary on Professor Aronson’s article “Is the ADJR Act hampering the development of Australian administrative law?” (2005) 12 Australian Journal of Administrative Law 98, 101. We generally support the jurisdictional formula proposed by Professor Aronson - Aronson, Is the ADJR Act Hampering the Development of Australian Administrative Law? (2004) 15 Public Law Review 202, 212. We believe that this formula would extend judicial review under the ADJR Act to private bodies. We do, however, also believe that the formula should expressly address cases of mixed public and private powers and functions. We see no difficulty in the coexistence of private law remedies (whether in tort or contract) with public law remedies. We support the continuing role of ombudsmen in reviewing the conduct of certain non-government entities. We do not see that positive roles for ombudsmen (or similar officers) require the exclusion of judicial review.
body is discharging public functions’? Moreover, are administrative law grounds appropriate for constraining commercial power?

A ‘public function’ test (that may be expressed, alternatively, as a ‘functions of a public/governmental nature’ test) could provide some clarification about the range of decisions amenable to judicial review. A ‘public function’ test would expressly recognise the changing nature of governance and reflect the shifting boundaries of administrative law as forms of governance have altered over the last quarter of a century, with power to allocate resources and services often located in the private sphere rather than in traditional statutory bodies. These developments have been criticised by some public law scholars for diminishing accountability for regulation and the provision of public services, and the means to correct errors made through such governance arrangements.25

It is our submission that a ‘public function’ criterion could firmly establish a shift to the functional approach that has been adopted and evident in England since the cases of *R v Criminal Injuries Compensation Board, ex parte Lain*26 and *R v Panel on Take-overs and Mergers, ex parte Datafin* (‘*Datafin*’) – the latter case was the first case to extend some judicial review remedies to a private (or, quasi-private) body because of the public nature of its functioning (operating in the absence of statutory authorisation).27

The ‘functional turn’ evidenced in *Datafin* has been approved by Australian State courts: including, *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* (‘*Masu*’),28 where Shaw J concluded that ‘the preponderance of Australian authority indicates that [*Datafin*] is applicable in this country’;29 and, most recently, by the Victorian Supreme Court in *CECA Institute Pty Ltd v Australian Council for Private Education and Training*,30 where Kyrou J opined that:

“[t]he Datafin principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the Datafin principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature” [emphasis supplied].31

The *Datafin* ‘principle’, referred to by Kyrou J above, provides a degree of clarity (but not certainty) about which decisions should be subject to judicial review. Kyrou J explained that:

“[t]he Datafin principle is that a decision of a private body which was not made in the exercise of a statutory power may be amenable to review if the decision is, in a practical

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28 (2004) ACSR 554. *Masu* is the only case, to date, in which the *Datafin* principle was the basis for the granting of a judicial review remedy where a private body exercised power that was neither statutory nor executive.
30 [2010] VSC 552.
31 [2010] VSC 552 [99]. It should be noted that in the absence of an authoritative ruling by the High Court of Australia on the applicability of *Datafin* in Australia, administrative lawyers are still left pondering its relevance.
sense, made in the performance of a ‘public duty’ or in the exercise of a power which has a ‘public element’.

In determining the ‘publicness’ of a given function, the English courts, in the course of exercising their supervisory jurisdiction, have asked whether the government would be likely to make provision for the exercise of a function if it was not being performed by the private body. Emphasis has also been placed on the extent to which the function operates as an integral part of (or, is ‘enmeshed with’) a scheme of public regulation or service provision, which may include government decision-makers. Moreover, the source of a power, while not decisive in determining whether the function is amenable to judicial review, may provide a strong indication of the nature of the function. Correspondingly, a multi-factor – contextual – approach was adopted by the NSW Supreme Court in *Masu*, where Shaw J relied on several indicia in the course of considering whether a private body, the Financial Industry Complaints Service Ltd, was exercising powers of a public nature.

However, in determining what should be considered public, the contextual factors (referenced above) have not (and could not have) removed the necessity for judges to make value judgments about the appropriate scope of judicial review. For example, there is no objective or mechanical test of how integrated into a public scheme a function must be to qualify as public, and there may be no conclusive evidence relevant to answering the question of whether the government would provide for the performance of a given function in the absence of the private entity doing so.

If the formulation of a general test (to determine whether a function is of a public nature) is favoured then further guidance may be sought from the opinions of Lord Bingham and Baroness Hale in the case of *YL v Birmingham CC*, (a case concerning the meaning of public function for the purposes of s.6(3)(b) Human Rights Act 1998 (UK)). It is worth quoting extensively from Lord Bingham:

“It will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function - public or private - which is decisive under the section.

It is also relevant to consider the role and responsibility of the state in relation to the subject matter in question. In some fields the involvement of the state is long-standing and governmental in a strict sense: one might instance defence or the running of prisons. In other fields, such as sport or the arts, the involvement of the state is more recent and more remote. It is relevant to consider the nature and extent of the public interest in the function in question.

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33 *R v Chief Rabbi of United Hebrew Congregations of GB and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036 (this has been referred to as the ‘necessity criterion’ by Peter Cane (*Administrative Law* (2004, OUP)) 42).
34 *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909; and, *Poplar Housing and Regeneration Committee Association v Donoghue* [2002] QB 48 (this is labelled the ‘integration criterion’ by Cane (ibid)).
35 (2004) ACSR 554, 560 [7].
It will be relevant to consider the nature and extent of any statutory power or duty in relation to the function in question. This will throw light on the nature and extent of the state’s concern and of the responsibility (if any) undertaken. Conversely, the absence of any statutory intervention will tend to indicate parliamentary recognition that the function in question is private and so an inappropriate subject for public regulation.

Also relevant will be the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it. This is an indicator of the state’s concern that the function should be performed to an acceptable standard. It also indicates the state’s recognition of the importance of the function, and of the harm which may be done if the function is improperly performed.

It will be relevant to consider whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. The greater the state’s involvement in making payment for the function in question, the greater (other things being equal) is its assumption of responsibility.”

It should be noted however, that Lord Bingham himself cautioned against the formulation of general tests, he opined that:

“[t]here is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so.”

Similarly, Baroness Hale observed:

“While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest. I accept that not every function which is performed by a ‘core’ public authority is necessarily a ‘function of a public nature’; but the fact that a function is or has been performed by a core public authority for the benefit of the public must, [...] be a relevant consideration.”

In our view, the question of whether private bodies should be regulated by the courts (ex post) via a statutorily imposed public function test (or, equivalent) raises critical political questions about the role of the state, and judicial versus parliamentary accountability. Interpreting an abstract ‘public function’ test leaves the question of how to conceive of the state in the hands of administrative lawyers and judges (to be informed by common law developments and perhaps the interpretation of statutory tests such as those in the UK and NZ). McLean suggests that common lawyers have scant

39 [2007] UKHL 27 [5].
40 [2007] UKHL 27 [65].
41 [2007] UKHL 27 [72].
42 See New Zealand Bill of Rights Act 1990 – which (like the HRA 1998 (UK)) also applies human rights norms to core public authorities and extends into the private sphere where private bodies perform acts that entail public functions.
resources on which to draw when addressing such critical questions about the state, accordingly Parliament should perhaps seek to define a ‘public function’ to provide a degree of certainty.

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?

In our submission, the express exclusion of review of decisions of the Governor-General in the ADJR Act illustrates one of the risks of attempting to expressly include justiciability inspired restrictions on the scope of judicial review under the ADJR Act. We therefore do not believe that the 1989 recommendation of the Council would necessarily increase accessibility under a general statutory review scheme. It might, depending on subsequent common law developments, actually undermine accessibility. Perhaps the best guidance that could be given in legislation would be the inclusion of an express statutory provision that the ADJR Act operates without prejudice to principles of non-justiciability that have developed or may develop at common law.

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?

We support the Council’s 1989 recommendations. We also believe that any exclusions should now be restricted to ensure that any remaining exclusions complement the Constitutional jurisprudence on jurisdiction errors. Thus ADJR Act review should be preserved for all cases of jurisdictional error that could form the basis for review by the High Court under section 75(v) of the Constitution.

We also submit that when drafting exclusions, special attention should also be given to discretionary grounds for restricting judicial review. We believe that common underlying justifications for restricting or excluding review (such as the avoidance of fragmentation of government decision-making and the existence of simpler, more expeditious or more comprehensive review mechanisms) might be better articulated.


44 The view on the justiciability of decisions of the Governor-General held by the drafters of the ADJR Act was very quickly undermined by developments in the common law post-1977.
We agree with the Council’s suggestion regarding the removal of the exclusion for decisions of the Governor-General. Other than common law non-justiciability principles, we see no reason to treat decision-making by the Governor-General differently to other executive decision-making.

We do not support any blanket exclusion of commercial decisions from the scope of judicial review. Other common law jurisdictions permit judicial review of, for example, tendering decisions in limited circumstances. Important public policy reasons underpin (albeit limited) review. Existing Australian authority also supports limited review. In general terms, where the legislature requires procedures to be followed when government makes commercial decisions, judicial review, to at least ensure that these procedures are followed, appears justified.

In our submission the statutory codification of review grounds should not be restricted to jurisdictional error for the reasons given in the Consultation document at [4.66]. While the jurisdiction conferred on the courts by s.75(iii) of the Constitution and s.39(1)(A)(c) of the Judiciary Act 1903 may cover non-jurisdictional errors, such a piecemeal approach seems inimical to access to

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45 In Canada, see, for example, Shell Canada Products Ltd v City of Vancouver [1994] 1 SCR 231, 272–5 (Sopinka J for La Forest, Sopinka, Cory, Iacobucci and Major JJ); in the United Kingdom, see, for example, Bailey, Judicial Review of Contracting Decisions [2007] Public Law 444; and Clive Lewis, Judicial Remedies in Public Law, Sweet & Maxwell, 4th ed, 2009, 85–97; and in New Zealand, see, for example, Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 2 NZLR 385, 391. See also Taggart, Corporatisation, Contracting and the Courts [1994] Public Law 351.

46 These include international legal obligations. The public policy issues, from a legal perspective, are considered in Cassimatis, Government Procurement Following the Australia US Free Trade Agreement — Is Australia Complying with its Obligations to Provide Remedies to Unsuccessful Tenderers? (2008) 30 Sydney Law Review 412.

Justice and the promotion of transparency in/over governance. The ADJR Act expresses the available heads of review in an accessible way in contrast to the technicalities associated with jurisdictional errors of law which provide less guidance notwithstanding cases such as Plaintiff S157/200248 and Professor Aronson’s synthesis of relevant authorities.49 Indeed, in Kirk v Industrial Relations Commissioner (NSW)50 the High Court observed that it was “neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.”

In our view, the codification of review grounds in the ADJR Act has enhanced accessibility to review, providing both transparency and flexibility to adapt to the evolving administrative state. The expansive ground “that the decision was otherwise contrary to law” (ADJR Act s.5(1)(j)) and also the inclusion of “any other exercise of a power in a way that constitutes abuse of the power” in the catalogue of “improper exercises of power” (ADJR Act s.5(2)(j)) point to the adaptive potential of the scheme even if this has yet to be realised in practice. Out of an abundance of caution, statutory recognition of “any ground of review that may be available at common law” in Australia (as suggested at [4.71] of the Consultation Paper) appears logical and would address concerns that statutory review mechanisms might inhibit the law’s evolutionary capacity.

In the course of considering what judicial review grounds should be codified, in our opinion it would be beneficial to examine potential reforms to existing grounds. We recommend revisiting the question of whether the ‘no evidence’ ground should reflect the (seemingly) more expansive common law approach.51 If not, then it would seem desirable to review the operation of the relevant statutory provisions (ADJR Act s.5(1)(h) and s.5(1)(j)) over which there have been judicial differences of opinion in the High Court of Australia.52 Re-drafting the ‘no evidence’ ground could bring the clarity sought by the drafters of the ADJR Act, and provide a more precise guide for judges when determining whether an evidential/factual error should be classified as a legal error. Furthermore, consideration should be given to whether the grounds of “serious irrationality or illogicality” should be enumerated as a distinct ground of review given common law developments.53

How useful would a meta-principles clause, at the beginning of a codified scheme, be in practice? Broad statements of principle linking constitutional concepts (the separation of powers and the rule of law) or abstractions (such as, “legality, fairness and rationality”) to the role and operation of the courts would, we submit, be uncontroversial, serve a basic educative function and, be unlikely to hamper the development of administrative law. Indeed, such underlying principles may provide an impetus for the judicial development of the particular, enumerated, grounds of review.

**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?**

In our submission attempts to codify procedure in the context of migration decision-making illustrates that such legal manoeuvrings are ill advised and highly problematic in practice.

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48. (2003) 211 CLR 476
50. [2010] HCA 1
51. *ABT v Bond* (1990) 170 CLR 321, 355 per Mason CJ.
Attempts to define natural justice (or, procedural fairness) requirements exhaustively in a precise statutory code in the Migration Reform Act 1992 (Cth) (new Subdivision AB) were unsuccessful and outflanked by challenges brought under s.75(v) of the Constitution in Re RRT; ex parte Aala and Re MIMA; ex parte Miah. The subsequent legislative attempt (via the Migration Legislation Amendment (Procedural Fairness) Act 2002) (Cth) to provide an exhaustive statement of natural justice requirements governing the RRT and MRT (Migration Act 1958 (Cth) (s.422B and s.357A respectively) resulted in considerable complexity in the conduct of tribunal proceedings. Indeed, judicial interpretation of the procedural code’s requirements in SAAP and SZEEU placed onerous obligations on tribunals that, paradoxically, led to confusion, delay and expense. Notably, the courts have ruled that a failure to follow statutory procedures correctly results in invalidity (or subject to a rehearing or open to challenge).

In 2007 the Migration Amendment (Review Provisions) Act 2007 (Cth) was passed to overcome these particular difficulties. O’Brien has observed that these changes “have ameliorated but not overcome difficulties with the code”. The inflexibility of the code (notably the mandatory nature of obligations on tribunals) remained a significant issue for decision-makers, resulting in increased litigation and remittal rates. Further legislative tinkering – via the Migration Legislation Amendment Act (No 1) (2009) (Cth) - has attempted to supply greater flexibility in the way the tribunals obtain information in relation to reviews.

In short, there is a very strong argument to be made that the codification of procedural fairness has been counterproductive and failed to assist tribunals deliver substantial justice in a timely and cost-effective manner. In our view the procedural code should be scrapped and a return to common law procedural fairness obligations is warranted so that procedures can be adapted to ensure there is no practical injustice in the particular context and circumstances surrounding a given administrative decision. In short, the common law brings greater flexibility: importantly, not every procedural error will result in invalidity because errors may be disregarded if they have no substantive impact on the outcome.

54 [2000] HCA 57; and [2011] HCA 22.
56 SZEEU v MIMIA (2006) 150 FCR 214
57 SZEEU v MIMIA (2006) 150 FCR 214 [183].
59 Re MIMA; ex parte Lam (2003) 214 CLR 1, 14 (Gleeson CJ).
We support adoption of the approach to standing taken under the Administrative Appeals Tribunal Act 1975 (Cth) (“AAT Act”).

In our submission, the common law rules of standing continue to be unnecessarily complex. For example, there is High Court authority suggesting that the standing requirements for different remedies remain distinct. Whilst some Federal Court authority supports a liberal approach to standing under the ADJR Act, other decisions suggest a more restrictive approach. Obiter in the decision in Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd suggests that the special interest criterion for injunctive relief may indeed be broader than suggested by earlier decisions. In our submission, this uncertainly undermines the public law values that judicial review is intended to serve.

If one uniform standing rule was to be applied to all remedies then, on balance, we submit that the “person affected” formula employed in legislation such as the AAT Act is to be preferred over alternative formulations. The “person affected” formula is broad enough to allow access to the courts for those whose rights, interests or legitimate expectations are impacted on by public decision-making. Another important value advanced by administrative law, namely the value of ensuring that the repositories of public power stay within the limits of their power, is more likely, in our submission, to be advanced by the “person affected” formula for standing than it would be if the “person aggrieved” formula under the ADJR Act model or the “special interest” criterion developed for injunctive and declaratory relief were adopted instead. The discretionary powers to deny relief referred to above appear sufficient to guard against the potential for abuse of any expansion in the test for standing.

We support the approach adopted in section 27(2) of the AAT Act, in which organisations have standing if a decision relates to a matter included in the objects or purposes of the organisation.

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60 This part of our submission is based on our April 2011 submission to the NSW government on proposed reforms of judicial review in NSW.
61 See, for example, Allan v Transurban City Link Ltd (2001) 208 CLR 167 at paragraphs 15-16 and 53-56.
62 See, for example, ACF v Minister for Resources (1989) 19 ALD 70 and North Coast Environment Council Inc v Minister for Resources (1994) 127 ALR 617.
63 See, for example, Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health (1995) 128 ALR 238 and Friends of Castle Hill v Queensland Heritage Council (1993) 81 LGERA 346.
66 See, for example, Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135, 156-157 [54-55].
Such a formula appears to work effectively in the context of environmental legislation and we see no reason not to expand the operation of this type of provision beyond an environmental context.

**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?

We support the existence of a generalised right to reasons. In order to ensure public awareness of the existence of this important right we consider it advisable, following the practice in New Zealand, to locate the right in legislation that specifically addresses transparency in governmental activities.

In our submission, the basic formula governing the generalised right to reasons employed in the *ADJR Act* should be employed. Persons affected by final decisions of an administrative character should be entitled to apply for a statement of reasons.

We see advantages in separating the criteria for judicial review from the preconditions for a statutory right to reasons. These advantages include the important principle that the right to reasons should not depend on demonstrating any form of error in administrative decision-making. As is currently the case under the *ADJR Act*, legally unimpeachable administrative decisions should be subject to the right to reasons just as much as legally flawed decisions. Another advantage is that different policy considerations apply to the scope of judicial review compared to the right to reasons.

In our submission, the right to reasons should essentially be restricted to final decisions to avoid fragmentation of decision-making processes. Judicial review, on the other hand, should not be limited in this way. If judicial review was so limited, then the current availability of the writ of prohibition would be restricted. Restricting the right to reasons to final decisions would go some way to avoid the difficulties created by the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

We note that exceptions to the common law approach in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 have been recognised. We therefore submit that a general statutory right to

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67 This part of our submission is based on our April 2011 submission to the NSW government on proposed reforms of judicial review in NSW.

68 See the discussion above for our submission on why we believe the “person affected” formula to be preferable than the current “person aggrieved” test set out in the *ADJR Act*.

69 We generally support the public interest and confidentiality exceptions currently applicable to the right to reasons under the *ADJR Act*. We also support the right to reasons arising only upon request by a person affected by a decision rather than operating automatically once a decision is made. We base this view essentially on efficiency and cost concerns.

70 We acknowledge, however, that an exception may be warranted for formal reports or recommendations of the kind envisaged in section 3(3) of the *ADJR Act*.


reasons include an express provision indicating that the statutory right is without prejudice to any other right to obtain reasons arising from statutory or other sources.\textsuperscript{73}

The \textit{QJR Act} also includes a special provision regarding costs associated with attempts to vindicate, through court proceedings, the statutory right to reasons (see section 50 of the \textit{QJR Act}). Whilst this provision has not, to our knowledge, been relied upon and might have been better drafted,\textsuperscript{74} we submit that a similar provision would have utility Federally.\textsuperscript{75}

**Question 17**

What, if any, exemptions should there be from any obligation to provide reasons?

In addition to the Council’s prior reports relevant to this question, we note that the Queensland Electoral and Administrative Review Commission addressed the topic in 1991.\textsuperscript{76}

**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?

Having reviewed the \textit{ADJR Act} case law on reasons we believe that the form of statement required by the \textit{ADJR Act} does not require substantial revision.

**Question 19**

What other consequences, if any, should there be of a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons?

As is currently the case, there should be a mechanism to judicially enforce the right to reasons (both in cases of complete refusals to provide reasons and in cases of provision of inadequate statements). In our submission, as noted above, there is also a strong case for special rules regarding court costs where a person affected by a decision must have resort to judicial proceedings in order to fully enforce their rights.

\textsuperscript{73}We also agree with Professor Groves when he argues that the right to reasons should be available regardless of the particular review remedy (statutory or common law) that might be relied upon to challenge the legality of decision – see Groves, Should the Administrative Law Act 1978 (Vic) be repealed? (2010) 34 \textit{Melbourne University Law Review} 452 at 457-459.

\textsuperscript{74}The provision appears not to apply to court proceedings initiated by an administrative decision-maker that is seeking to resist an application for reasons. We see no justification for this apparent limitation in the scope of section 50 \textit{QJR Act}.

\textsuperscript{75}We also note that the \textit{QJR Act} also expressly addresses the situation where a decision-maker ignores a request for reasons. See Gilbert and Lane, \textit{Queensland Administrative Law}, Loose-leaf, Law Book Co, at paragraph 1.2540.

vindicate their legal right to reasons. We note that the common law grounds of review have been developing, such that a failure to provide adequate reasons may also undermine the legality of the particular decision.

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?

As indicated above, we support codification of the discretionary grounds for denial relief in judicial review proceedings. In our view, for example, judicial review should generally operate as a remedy of last resort after merits review options have been exhausted.

We note that one significant mischief of the traditional judicial review remedies identified by the Kerr and Ellicott committees was the situation where an applicant’s choice of one remedy led to dismissal of the claim on technical grounds that might have been avoided if an alternative judicial review remedy had been sought. In our submission, this mischief has not disappeared, and more could be done to avoid its occurrence. In Queensland, attempts have been made to avoid the mischief. The avoidance of this mischief, in our submission, is so important that it warrants Council consideration of measures such as inclusion of a statutory duty on a court conducting judicial review to consider alternative judicial review remedies (with attendant powers to issue those remedies where appropriate) before dismissing a judicial review application on jurisdictional grounds.

77 See, for example, Report of the Committee of Review on Prerogative Writ Procedure (Ellicott Committee Report), Parl Paper No 56, 1973, pp 5-6 [19]. The Ellicott Committee confidently assert that if the Kerr Committee’s recommendations were implemented then “[a] person aggrieved will no longer have to run the risk of applying for the wrong remedy”.

78 See section 43(3) of the QJR Act and Rule 569 of the Queensland Uniform Civil Procedure Rules. Rule 569 could have been, but was not, utilised in Griffith University v Tang (2005) 221 CLR 99. It is not clear why the rule did not receive explicit consideration in the judgments in that case. Rule 569 provides:

“If—
(a) an application is made under rule 566 or 568 for a statutory order of review in relation to—
(i) a decision; or
(ii) conduct engaged in, or proposed to be engaged in, for the purpose of making a decision; or
(iii) a failure to make a decision; and
(b) the court considers—
(i) the decision to which the application relates does not fall within the definition decision to which this Act applies in section 4 of the Act; and
(ii) any relief or remedy mentioned in section 43 of the Act may have been granted in relation to the decision, conduct or failure if it had been sought in an application for review at the time of starting the application for a statutory order of review;
the court may, instead of refusing the application, order the proceeding to continue as if it had been started as an application for review at that time.”

Given the failure to rely on this provision in Griffith University v Tang (2005) 221 CLR 99, it may be appropriate to formulate an equivalent rule in mandatory terms.
The Migration Litigation Reform Act 2005 (Cth) introduced, inter alia, increased powers for the courts to dismiss matters summarily if it was believed that the case had no reasonable prospects of success, to impose personal costs on lawyers to discourage unmeritorious claims and stricter time limits upon applications to the Federal Magistrates Court, Federal Court and the High Court of Australia.79

Arguably, the reforms were based upon a false premise – that rising numbers of judicial review applicants indicated that they (and their lawyers) were inappropriately using the judicial process to extend the applicant’s time in Australia.80 Accordingly, any extension of such reforms would need to establish such streamlining measures were actually warranted i.e. be evidence-based. If there is evidence that points to a problem in respect of unmeritorious applications for review then focusing on the possible structural causes, (such as the adequacy of legal aid funding) rather than simply the effects, should be part of an overall strategy.

As indicated above, we support efforts to codify the discretionary grounds for dismissing judicial review proceedings, particularly in the light of existing merits review options. The QJR Act includes sections 12-14. Litigation under the Building and Construction Industry Payment Act 2004 (Qld) has, in our view, highlighted weaknesses in the drafting of sections 12 and 13.81

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79 In 2009–10, appellate proceedings filed in the Federal Court concerning decisions under the Migration Act fell by twenty-six per cent and comprise forty-six per cent of appeals and related actions, compared with fifty per cent in 2008–09. “While the reasons for the drop in migration appeals are not clear, it is likely that the Court’s procedures to streamline the preparation and conduct of these appeals and applications, which have resulted in reduced timeframes for their disposition, have had an impact.” (Federal Court of Australia, Annual Report 2009-10, p.15).

80 As the ARC noted in 2003, abuse of judicial review is not necessarily evidenced by the number of applications for review, the number of unsuccessful applications or the number of withdrawals (Administrative Review Council, The Scope of Judicial Review: Discussion Paper, 2003, 76-77).

81 See, for example, Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd [2007] QSC 333. For a more recent consideration of the issues, following the High Court’s decision in Kirk, see Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2011] QCA 22.
As important as the constitutional review mechanisms are, we believe (as indicated in our submission in Question 12 above) that the common law grounds of review that extend beyond jurisdictional error still advance important values that animate administrative law. The constitutional jurisdictional error grounds are an irreducible foundation for legality. Legality is, however, still undermined by non-jurisdictional legal errors. These include failures to follow procedures set down by parliament, an inferior court failing to consider matters that legislation requires the inferior court to consider (or the consideration of factors that legislation forbids consideration of), and certain failures to abide by the rules of natural justice. In our submission, a statutory judicial review scheme enhances respect for the rule of law by extending beyond the fundamental errors encompassed by the concept of “jurisdictional error”.

We have outlined above our opposition to the restriction of Federal judicial review to cases of jurisdictional error. We would emphasise that any restriction of review to jurisdictional error would involve an absolute reduction in the scope of judicial review currently available under section 39B of the Judiciary Act and under the ADJR Act. We do not believe such a reduction in the scope of judicial review is warranted.

We might also refer to the disjunction that such an approach would entail when the scope of judicial review Federally was compared to judicial review in State jurisdictions. Administrative law is already beset by many complex and confusing rules and procedures. A further bifurcation of Federal and State judicial review would simply compound the complexity and confusion.

We support efforts to expand public awareness of the constitutional judicial review mechanisms. The Council is extremely well placed to take a leading role in increasing public awareness.

82 Recall Lon Fuller’s distinction between the morality of duty and the morality of aspiration in the context of the rule of law – Fuller, The Morality of Law, revised edition, Yale University Press, 1967.

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**Question 27**

Since judicial review is available via constitutional review, what role, if any, should a statutory review scheme play in the future?

**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?
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 mechanisms, rather than attempting to streamline the range of existing judicial review mechanisms?

We support both the Council’s preparation of policy principles to guide one through the variety of mechanisms and the Council’s attempts to reform judicial review Federally. We believe that both are worthy aims for the Council to pursue.
Concluding observations

We believe that the ADJR Act has had an important educative effect within Australia. We therefore support continuing statutory enunciation of the grounds of review. We also support the Council’s proposal that the ADJR Act’s specific grounds of review should supplemented by a general statement of the underlying principles of judicial review. This would, in our view, go some way to ensuring that by codifying the grounds of review, their development at common law is not thereby retarded.

Perhaps the most disappointing failure of the ADJR Act model has been its inability to escape the choice of remedy dilemma that bedevilled the traditional common law remedies and now appears to afflict the ADJR Act jurisprudence. We therefore believe that reform of Federal judicial review should include judicial duties to consider and powers to award the most appropriate remedy (both jurisdictionally and substantively) irrespective of the particular remedy initially sought.

Dr Peter Billings
Dr Anthony E Cassimatis
June 2011

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83 Indeed, we generally support the recommendations made by the Human Rights Consultation report in 2009, regarding amendments to the ADJR Act. We believe that it would have been better for the Council to have included specific consideration, from an administrative law perspective, of these 2009 recommendations in the Consultation Paper and to have invited submissions on these proposed changes to the ADJR Act, again, from an administrative law perspective.