ADMINISTRATIVE REVIEW COUNCIL

THE SCOPE OF JUDICIAL REVIEW

REPORT TO THE ATTORNEY-GENERAL

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Administrative Review Council

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20 April 2006

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

I have pleasure in submitting to you the Administrative Review Council’s report entitled *The Scope of Judicial Review*. The report discusses constitutional and policy matters relevant to the scope of judicial review and confirms the essential role of judicial review in ensuring the lawful exercise of power by the executive and in maintaining executive accountability.

It is the Council’s view that the analysis in the report—including the examination of mechanisms used by Parliament to limit judicial review—will contribute to a greater understanding of justifications for limiting such review. The Council hopes that its framework of indicative principles will prove a useful tool for government in its consideration of the review mechanisms to be incorporated in legislation.

Yours sincerely

[Signature]

Jillian Segal AM
President
At the time of finalisation of the report the following people were members of the Administrative Review Council:

Jillian Segal AM (President)
Justice Garry Downes AM
Professor John McMillan
Professor David Weisbrot
Peter Anderson
Ian Carnell
Robert Cornall AO
Professor Robin Creyke
Richard Humphry AO
Andrew Metcalfe
Melanie Sloss SC
Major General Paul Stevens AO (rtd)
Sue Vardon AO

The following were members of the Council’s scope of judicial review sub-committee:

Professor Robin Creyke
Stephen Gageler SC
Wayne Martin QC (President from 22 August 2002 to 21 August 2005)
Professor John McMillan
Jillian Segal AM (President from 15 September 2005)
Melanie Sloss SC

Although the terms of appointment of Stephen Gageler SC and Wayne Martin QC ended before the report was finalised, both agreed to remain members of the sub-committee until the report’s completion. The Council thanks them for this.

Justice Downes AM had observer status on the sub-committee.

The Council also commissioned Mr Stephen Lloyd, barrister, to do work on this report. It thanks Mr Lloyd for his valuable contribution.
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Preface

Judicial review plays a vital role in Australia’s system of government. There has, however, been little concerted analysis of its desirable scope or of the circumstances in which limitations on judicial review might be justified. This is perhaps surprising when one considers Parliament’s capacity, subject to the Australian Constitution, to vary the scope of judicial review.

In this report the Council responds to this lack of analysis by considering the constitutional framework within which judicial review and its elements sit, the factors relevant to when legislative amendment to the scope of judicial review might be appropriate and in the public interest, and how this might best be achieved. An important question dealt with is the extent to which it is proper for Parliament either to cut back on the scope of a judicial review jurisdiction it has previously created or to seek to minimise the ambit of judicial review practically available under s 75(v) of the Constitution.

The conclusions the Council reached as a result of its analysis are brought together in a framework of indicative principles at the end of the report.

For the purposes of this report the Council takes as its benchmarks the public law values that underlie judicial review—the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation. The report reflects the Council’s view that these values are fundamental and that the strongest reasons would be needed if judicial review were to be reduced in a way that might allow unlawful conduct to proceed without any kind of remedy.

In developing its report, the Council also assessed the desirable scope of judicial review against the background of the jurisdiction of Commonwealth courts in this area, the range of activities covered and people entitled to seek relief, the grounds on which they may do so, and the remedies available to them.

Chapter 5 responds directly to arguments that have been advanced to justify restrictions on judicial review in the context of the Council’s own project and in other contexts—for example, in seeking to exclude decisions from review through listing in Schedule 1 of the Administrative Decisions (Judicial Review) Act 1977. Among other things, the arguments deal with the availability of adequate alternative remedies; the unmeritorious nature of the claims made in relation to certain sorts of decisions; areas of decision making where consistency is of particular importance; and claims made on the basis of unreasonableness, procedural fairness or related grounds.

The Council hopes that the analysis it provides will encourage informed discussion and that its framework of indicative principles will be a useful complement to the non-binding guidelines on merits review contained in its 1999 publication What Decisions should be Subject to Merits Review? It also trusts that the indicative principles will be useful when new legislation is being considered.
1 Introduction

‘Judicial review’ has a number of facets. It can be described broadly as the function or capacity of courts to provide remedies to people adversely affected by unlawful government action. Such a description identifies the primary elements affecting the breadth of judicial review:

- the extent of the jurisdiction of courts to hear and determine disputes arising in relation to government action or inaction
- the range of government action or inaction in relation to which relief can be sought if that action or inaction is unlawful. This element has several aspects
  - the source and nature of the power being exercised
  - the nature of the decision maker
  - the nature of the decision
- the available remedies and the circumstances in which the remedies might be refused on discretionary grounds
- the people entitled to seek relief from a court with jurisdiction to hear and determine disputes of this nature
- the procedural and substantive limitations on the grounds of review.

1.1 The purpose of this report

In this report the Council provides advice to the Attorney-General, in accordance with its functions under s 51 of the **Administrative Appeals Tribunal Act 1975 (Cth)** in connection with the scope of judicial review. (See Appendix A for the full text of s 51 of the Act.)

The purpose of the report is to examine the scope of judicial review of executive (including subordinate legislative) actions of the Commonwealth government, its agencies and agents, with a view to determining when limitations on judicial review are appropriate and in the public interest and how they might best be achieved.

On the basis of this analysis, the report concludes with a framework of indicative principles. The Council hopes the principles will assist government agencies, legislators and commentators in determining when limitations to judicial review are appropriate in the context of particular policy and legislative proposals.

The report and the framework of principles represent a response by the Council to its perception that, although there are numerous ways Parliament can expand and contract the ambit of judicial review (some of which are outlined in the report), there
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has to date been little concerted analysis of the desirable scope of judicial review or of the circumstances in which limitations on review might be justified.

The constitutional framework for judicial review at the Commonwealth level has regard to important public law values such as the rule of law, the safeguarding of individual rights, and executive accountability. The framework of indicative principles reflects the Council’s view that the rule of law and the provision of remedies for people affected by unlawful government action or inaction are paramount and that the strongest reasons would be needed if judicial review were to be reduced in a way that might allow unlawful conduct to proceed without any kind of remedy.

In 1999 the Council published a booklet entitled What Decisions should be Subject to Merits Review?, which contained non-binding guidelines designed to help with the development of legislative proposals involving administrative decision-making powers. The Council hopes the principles identified in this current report in relation to judicial review will be a useful complement to those in relation to merits review in the earlier publication.

1.2 The structure of the report

Chapter 2 summarises the current situation in connection with judicial review at the Commonwealth level. Consistent with the general focus of the report, judicial review at the state and territory level is not considered. Chapter 2 does not seek to be comprehensive: a number of texts cover this field.

Chapter 3 is concerned with the capacity of Parliament to expand the scope of judicial review beyond what is constitutionally entrenched as well as mechanisms to remove or limit that scope in particular cases.

In Chapter 4 the Council discusses the constitutional framework within which judicial review and its elements reside. The Constitution places important limits on the extent to which elements of judicial review can be altered beyond an irreducible minimum. Chapter 4 also discusses the crucial role of judicial review in Australia’s system of government and especially in maintaining the rule of law. Implicit in the discussion is the notion that any attempt to reduce the scope of judicial review could impair the effectiveness of the rule of law.

Chapter 5 looks at the circumstances in which it is justifiable to limit the breadth of one or more of the elements of judicial review dealt with in the preceding chapters. In particular, it considers arguments that are commonly advanced to justify such limitations and the extent to which it is appropriate to accede to them.

Chapter 6 presents the conclusions the Council reached as a result of its analysis; these are set out in the form of a framework of indicative principles that are relevant to situations when amendments to the scope of judicial review might be relevant and in the public interest.

The Council notes that the question of the need for reform of the rules relating to standing—one of the elements of judicial review—has been the subject of detailed
analysis by the Australian Law Reform Commission on two occasions—first in 1985, in its report no. 27, *Standing in Public Interest Litigation*; and then in 1996, in its report no. 78, *Beyond the Door-keeper: standing to sue for public remedies*. In the light of this, and of the fact that the second of these reports is relatively recent, the Council does not canvass in this report what might be the appropriate standing for applications for judicial review.

### 1.3 Consultation

In developing its report the Council was assisted by responses to its discussion paper entitled *The Scope of Judicial Review*, published in 2003.

Appendix B lists the respondents to the discussion paper, which attracted interest from a variety of people and agencies, over 1500 copies being distributed. The discussion paper was available in print, on CD-ROM and on the Council’s website <law.gov.au/arc>. The Council thanks those who provided comment.
2 The present scope of judicial review

A general discussion of the current scope of judicial review of Commonwealth action provides a context for the analysis that follows in subsequent chapters of this report. The discussion does not attempt to catalogue provisions applying in specific fields that in some way narrow the scope of review.

The elements discussed here are to some extent inter-related.

2.1 Sources of judicial review jurisdiction and the range of government activity subject to judicial review

The sources of judicial review jurisdiction and the range of government activity subject to judicial review are conceptually different but closely related. They are linked by similar criteria or touchstones.

2.1.1 The High Court’s constitutional jurisdiction

Under the Australian Constitution the High Court has original jurisdiction in respect of all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (s 75(iii)) and all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)).

The first of these sources of jurisdiction—s 75(iii)—turns solely on the identity of the Commonwealth or the agent being sued. The ambit of s 75(iii) as a source of jurisdiction for undertaking judicial review has not been the subject of extensive analysis in the High Court.

The second source—s 75(v)—provides jurisdiction in connection with certain remedies against ‘officers of the Commonwealth’. This section ensures that those remedies are available when a Commonwealth officer has failed to perform an enforceable legal duty (mandamus), has exceeded their powers (prohibition) or has otherwise acted unlawfully (injunction). On one view, the jurisdiction conferred by s 75(v) provides greater particularisation of one aspect of the jurisdiction conferred by s 75(iii).1

The two provisions confer on the High Court the jurisdiction to undertake judicial review of administrative and legislative action by the Commonwealth and its

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1 As to the relationship between ss 75(iii) and 75(v), see Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1994) 183 CLR 168, Mason CJ at 179, Deane and Gaudron JJ at 204–5, Dawson J at 221; Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, Gaudron and Gummow JJ at 92; Bank of New South Wales v The Commonwealth (1948) 76 CLR 1, Dixon CJ at 363; The Commonwealth v Mewett (1996) 191 CLR 471, Gummow and Kirby JJ at 547.
officers—in particular, to ensure that such action is carried out within limits imposed by the Constitution and any valid enactment.

2.1.2 The Federal Court’s statutory jurisdiction

The Federal Court’s judicial review jurisdiction derives from two statutory sources.

The first is the Administrative Decisions (Judicial Review) Act 1977 (Cth), which provides that the Federal Court has jurisdiction to review the making of or the failure to make a decision, or conduct engaged in for the purpose of making a decision, to which that Act applies. In essence, this means decisions of an administrative character made under a Commonwealth enactment or by a Commonwealth authority under a state or territory enactment. The most direct effect of the provision is to exclude review of non-statutory decisions—such as decisions made under executive or prerogative powers and under contracts to which a government agency is a party. Additionally, jurisdiction does not extend to decisions by the Governor-General or decisions of a kind expressly excluded, as provided for in Schedule 1 to the Act.

The Administrative Decisions (Judicial Review) Act spells out the grounds for judicial review—for example, breach of natural justice, error of law, and consideration of an irrelevant matter. The Act also contains other important features, among them enabling the court to suspend the operation of a decision pending review and, in contrast with the common law situation, enabling a person aggrieved by a decision to obtain a statement of reasons for that decision.

The Federal Court’s second source of jurisdiction is s 39B(1) of the Judiciary Act 1903 (Cth); this is the same as the jurisdiction of the High Court in relation to any matter in respect of which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

This second source of jurisdiction is subject to some exceptions. It does not extend to 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. Nor does it extend to the situation 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. In both these cases the state or territory court is invested with jurisdiction to grant the specified remedies.

Further, jurisdiction does not arise under s 39B(1) where the Commonwealth officer is a person holding office under the Workplace Relations Act 1996 (Cth) or the (Cth)

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2 For more detail, see Administrative Decisions (Judicial Review) Act 1977 (Cth), s 3.
3 Although this right may be excluded under s 13 of the Act by inclusion in Schedule 2.
4 Section 39B(1) of the Act.
5 Section 39B(1B) of the Act.
6 Section 39B(1C) of the Act. In such circumstances the court does not generally have jurisdiction, but see s 39B(1D) of the Act.
7 If any such proceeding were commenced in the High Court, it could remit the proceeding to the relevant state court but not the Federal Court—Judiciary Act 1903 (Cth), s 44(1).
8 Judiciary Act 1903 (Cth), s 39B (2)(a).
Act 1946 or is a judge of the Family Court of Australia or a justice of the Federal Court of Australia.

The Federal Court has a separate source of jurisdiction to undertake judicial review under s 39B(1A) of the Judiciary Act. This section confers jurisdiction in respect of any matter arising under the Constitution or involving its interpretation and arising under the laws made by the Parliament—with the exception of a matter in which a criminal prosecution is instituted or any other criminal matter, including a matter in which the Commonwealth is seeking an injunction or a declaration (s 39B(1A)(a)). Where the court does have jurisdiction, it has the power to make orders of such kinds and to issue such writs as the Court thinks appropriate.

There is considerable overlap in the jurisdiction to undertake judicial review, as conferred by ss 39B(1) and 39B(1A). The sections are not, however, identical. For example, the jurisdiction conferred by s 39B(1) extends to powers exercised by officers of the Commonwealth that do not arise under statute or under the Constitution. The range of Commonwealth activity covered by s 39B(1A) is less predictable because the touchstone for jurisdiction is more amorphous. The Federal Court has jurisdiction to undertake judicial review of a decision or conduct if the matter arises under a law made by the Parliament or under the Constitution. This occurs when the right or duty in question in the proceeding owes its existence to federal law or the Constitution or depends on such a law for its enforcement. This law must be legislative in nature.

The jurisdiction conferred by s 39B(1A) does not require that one of the remedies specified in s 39B(1) be invoked and does not require that the respondent be an officer of the Commonwealth.

The Federal Court’s original jurisdiction under the Administrative Decisions (Judicial Review) Act in relation to certain migration decisions is limited. Its jurisdiction for the majority of migration decisions derives from the Migration Act 1958 (Cth) and the Judiciary Act, subject to the privative clause in s 474 of the Migration Act. The court’s original jurisdiction in relation to migration decisions has been further limited by the Migration Litigation Reform Act 2005 (Cth).

2.1.3 The Federal Magistrates Court

The Federal Magistrates Court has the same jurisdiction as the Federal Court under the Administrative Decisions (Judicial Review) Act.

Subject to certain exceptions—arising from the passage of the Migration Litigation Reform Act—the Federal Magistrates Court has the same original jurisdiction, under the Migration Act, in relation to migration decisions as the High Court has under s 75(v) of the Constitution.

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9 *Judiciary Act 1903 (Cth), s 39B(2)(b).*
10 *Re Jarman; Ex parte Cook (No. 1) (1997) 188 CLR 595.*
11 *Federal Court of Australia Act 1976 (Cth), s 23.*
12 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett (1945) 70 CLR 141, Latham CJ at 154; James v South Australia (1927) 40 CLR 1 at 40.*
2.1.4 State and territory courts

The jurisdiction of state and territory courts to undertake judicial review of Commonwealth conduct is limited.

Section 9 of the Administrative Decisions (Judicial Review) Act provides that state courts do not have jurisdiction to review decisions to which that Act applies or decisions specified in Schedule 1 to the Act.

The Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) provides that ‘special federal matters’ generally be transferred to the Federal Court or some other specified court. The term ‘special federal matters’ includes a matter arising under the Administrative Decisions (Judicial Review) Act and any matter that is within the original jurisdiction of the Federal Court by virtue of s 39B of the Judiciary Act.13

Neither of these provisions affects the scheme just noted, which invests state and territory courts with jurisdiction in relation to certain judicial review applications arising in the criminal justice process.

2.1.5 The range of Commonwealth activity subject to judicial review

Most Commonwealth decision making is subject to judicial review. There are some exceptions, and the tests to be applied raise difficult questions. Decisions made and conduct engaged in under Commonwealth enactments are subject to judicial review by the Federal Court or the Federal Magistrates Court—with the exception of decisions and conduct described in Schedule 1 to the Administrative Decisions (Judicial Review) Act and decisions and conduct of the Governor-General.14 The same holds for decisions made under state or territory laws by ‘Commonwealth authorities’. Decisions exempted from the Administrative Decisions (Judicial Review) Act may, however, be reviewed under ss 39B and 39B(1A)(c) of the Judiciary Act if the criteria specified in those sections are met.

In addition, Commonwealth action can be subject to collateral challenge in proceedings in any court with jurisdiction over the principal cause of the action. For example, in an action for trespass to property, the validity of an authority to enter purportedly conferred under a Commonwealth enactment can be challenged. Hence, even when a court does not have jurisdiction to give administrative law remedies in relation to, say, a decision of an officer of the Commonwealth, the court might need to determine what legal consequences attach to the decision, and this might be affected by whether that decision was validly made.

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13 Courts (Cross-Vesting) Act 1987 (Cth), ss 6 and 3.
14 The Act excludes a ‘decision by the Governor-General’ from its definition of a ‘decision to which this Act applies’ (s 3(1)). The Council recommended the removal of this limitation in Chapter 5 of its 1989 report entitled Review of the Administrative Decisions (Judicial Review) Act 1977: the ambit of the Act (Report no. 32).
2.2 Remedies and standing

2.2.1 Constitutional and other remedies

As noted, s 75(v) of the Australian Constitution confers jurisdiction on the High Court in respect of three remedies — the writ of mandamus, the writ of prohibition and an injunction — when they are sought against an officer of the Commonwealth. This jurisdiction is broadly shared with the Federal Court and, as a result of the passage of the Migration Litigation Reform Act, with the Federal Magistrates Court.

These courts also have power to give other remedies — such as certiorari, declaration and habeas corpus — where these are associated with one of the nominated remedies. In addition, the High Court has power under ss 31 and 33 of the Judiciary Act to give these remedies when its jurisdiction is invoked under s 75(iii) of the Constitution.\(^\text{15}\)

The Federal Court has power to make orders and issue these writs as well under s 23 of the Federal Court of Australia Act 1976, where the Court has jurisdiction in a matter (in particular, under s 39B(1A), as discussed), even when mandamus, prohibition and injunctions are not sought.

The rules relating to standing for these remedies are complex and still evolving. It appears there is no single test for standing that applies to all the remedies, although there are some common threads.\(^\text{16}\) Broadly speaking, a person will have standing to seek any of the remedies if they are adversely affected by executive action in the sense that they have a special interest in the subject of the decision or would be adversely affected by the outcome.

The following sections provide a brief description of each of the common law remedies that have been mentioned, along with a succinct statement of the applicable standing test.

2.2.2 Mandamus

A writ of mandamus is a command compelling the respondent to perform a public duty. This remedy is particularly appropriate if the person responsible for discharging the public duty either has failed to perform it or has constructively failed to perform it — in the sense that any purported performance was infected with jurisdictional error and was therefore not a legally effective performance of the duty.

The test for standing of a person who seeks a writ of mandamus has been variously described as requiring a ‘specific legal right’, ‘legal right’, ‘real interest’ and ‘special interest’. It is generally considered stricter than the standing rules applying to certiorari and prohibition.

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\(^\text{15}\) For example, see *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 20.

2.2.3 **Prohibition and certiorari**

A writ of prohibition restrains the person to whom the writ is directed from doing something unlawful that is proposed to be done or from continuing to do an unlawful act already begun. The ground on which the writ is issued is that the decision or conduct under review is infected by a jurisdictional error so that it has no effect at law.

An order for certiorari has two parts: to remove the official record of the impugned decision into the court making the order; and then, if the action is found to have been unlawful, to quash the impugned decision. This remedy is appropriate if a decision has some legal effect but is liable to be set aside for breach of a ground of review. In such a case, the remedy can be said to wipe the slate clean. An order for certiorari is usually coupled with a writ of mandamus to direct that the matter be considered afresh according to law.

It is evident, then, that prohibition and certiorari are closely related, and the question of which is appropriate turns on whether the official conduct has concluded and been fully implemented. When a decision has been made but no further action is pending, certiorari alone might suffice. When unlawful conduct is proposed or is occurring, prohibition might be the more suitable remedy. An added feature of certiorari is that it can be used to quash a decision that is infected with an error of law, even though that error is not a jurisdictional error provided the error appears on the record.

The standing rules for certiorari and prohibition are generally considered to be the same. A party to the impugned decision-making process will have standing. A stranger to that process can have standing subject to the discretion of the court. Generally, if a stranger has a personal interest in the outcome of proceedings or would be adversely affected by the outcome, standing is more likely to be granted.

2.2.4 **Injunction**

Injunctions are available to protect statutory rights and to enforce the statutory obligations of officials or others; the remedy can be issued in prohibitory or mandatory form. An injunction is more flexible than other remedies and can be moulded to the circumstances of the case so as to allow the respondent an opportunity to rectify problems. Injunctions lie for both jurisdictional and non-jurisdictional illegality.17

2.2.5 **Declaration**

A declaration is a court order resolving a dispute about the law that applies to a situation. It has no mandatory or restraining effect and is merely declaratory. Nonetheless, it can be a useful remedy against a public authority because such authorities can be expected to give effect to the court’s determination without any compulsion. A declaration is often sought along with consequential relief.

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The standing rule for a declaration is the same as that for an injunction.\footnote{For example, \textit{Australian Conservation Foundation v The Commonwealth} (1980) 146 CLR 493, Gibbs J at 526.} A person must have a ‘special interest in the subject matter of the action’ in order to have standing to seek one of these remedies.\footnote{ibid. at 527.} Although this test is generally considered stricter than that for the prerogative remedies just discussed, it is not clear whether in practice it presents a major additional hurdle for many applicants. The Attorney-General can also grant his or her fiat to a person in order that they can sue as the Attorney-General’s relator.

### 2.2.6 Habeas corpus

The writ of habeas corpus is available to secure the release of a person from illegal detention. There is no standing rule for applications for this writ.

### 2.2.7 Discretionary considerations

Each of the above remedies is said to be discretionary, although it is difficult to think of a case where a writ of habeas corpus would be refused if it were determined that the detention was unlawful.\footnote{But see the comments of Beaumont J in \textit{Ruddock v Vadarlis} (2001) 110 FCR 491.}

It is not possible to describe exhaustively the factors that might attend a court’s exercise of discretion in granting relief. In \textit{R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd},\footnote{(1949) 78 CLR 389.} however, five justices noted the following factors as relevant in the context of an application for a writ of mandamus. These factors have subsequently been said also to provide guidance in the context of writs for prohibition and certiorari:\footnote{Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, Gaudron and Gummow JJ at 108 [56].}

> For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court’s discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

The following considerations have also been seen as relevant in the context of whether an injunction should be granted:

> that a new law may or will soon come into operation; the defendant’s economic loss if the injunction issues; the offer of an undertaking in place of an injunction; the impossibility of obeying the injunction; whether the defendant’s illegality was culpable or innocent; any time needed to enable compliance with the proposed injunction; whether and the extent to which people are benefited or inconvenienced by the defendant’s acts; whether the
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injunction would be disproportionate to the defendant’s illegality; whether
the defendant’s illegality is merely technical; whether the injunction
application is brought for a collateral or a legitimate purpose; the defendant’s
innocent reliance upon the incorrect advice of a government department; the
defendant’s personal circumstances, including the effect on his or her health
of having to obey the proposed injunction; the plaintiff’s delay; the
unfairness of making only one of many lawbreakers obey the law, and the
correlative injustice of condoning a breach of the law by one person when
everyone else has complied; whether a jurisdictional error resulted in any
real injustice or affected the outcome in any way; and the defendant’s
clandestine or precipitate conduct designed to make it more difficult to grant
an injunction.23

2.2.8 The Administrative Decisions (Judicial Review) Act

Section 16 of the Administrative Decisions (Judicial Review) Act confers on the
Federal Court and the Federal Magistrates Court power to make orders similar in
nature and effect to the common law remedies.

There is a power to make orders quashing or setting aside a decision (s 16(1)(a)); this
power is more flexible than the constitutional and other remedies because it can be
directed to part only of a decision and because the court has a discretion as to the
date from which the order is to have effect. There is a power to remit a matter to a
decision maker for further consideration; the order may include such directions as
the court thinks fit (s 16(1)(b)). There is a power to declare the rights of the parties
(s 16(1)(c)) and a power to direct any of the parties to do or refrain from doing any
act or thing where the court considers necessary in order to do justice between the
parties (s 16(1)(d)). There are also powers to restrain unlawful conduct (s 16(2)) and
to compel the making of a decision (s 16(3)).

These powers are sufficiently flexible to do all the work done by the constitutional
and general law remedies, yet with added flexibility. The powers are also
discretionary. The Act does not expressly state any criteria for the exercise of this
discretion, and in practice the Federal Court has applied principles similar to those
that apply in the context of non-statutory remedies.

An application under the Act may be made by a ‘person who is aggrieved by’ a
decision, conduct or failure to make a decision (ss 5–7). This is defined to include a
person ‘whose interests are adversely affected’ by the decision, conduct or failure
(s 3(4)). While this standing rule differs in form from those applying in respect of the
constitutional and other remedies, it has been said that it is no narrower.24

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23 Aronson, M, Dyer, B & Groves, M 2004, Judicial Review of Administrative Action, 3rd edn, Thomson,
Sydney, pp. 826–7 [footnotes omitted].
24 Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 71 ALR
73, Gummow J at 81.
2.3 **The grounds of review**

Section 5 of the Administrative Decisions (Judicial Review) Act lists the grounds of review available for the review of decisions made under the Act; examples are breach of natural justice, error of law, acting for an unauthorised purpose, failure to consider a relevant matter, and acting under direction. Under s 6 of the Act essentially the same grounds are available in respect of conduct engaged in for the purpose of making a decision. Section 7 provides that, if there has been a failure to make a decision, review is available either for failure to make a decision within a prescribed time or for unreasonable delay in making a decision where there is no prescribed time.

For the most part, the grounds derive from the grounds for review available under common law in relation to one or other of the prerogative writs or equitable remedies. Some of those grounds are defined differently in the Administrative Decisions (Judicial Review) Act, notably the grounds for no evidence (s 5(3)) and error of law (s 5(1)(f)). In addition, by the insertion of s 5(1)(i)—‘that the decision was otherwise contrary to law’ or any other exercise of power in a way that constitutes abuse of the power (s 5(2)(j))—the Act permits developments in the grounds of review to be available under the Act.

The grounds of judicial review, whether in the Administrative Decisions (Judicial Review) Act or in their non-statutory guise, can usefully be divided into two categories: grounds relating to procedure and grounds relating to the substantive exercise of power. In the first category falls denial of procedural fairness, which includes a requirement that the decision maker be, and appear to be, free from bias and/or that the person is entitled to a fair hearing. The first category is also directed at ensuring mandatory statutory procedures are observed.

The second category is designed to ensure that decision makers act within their substantive authority and correctly apply the substantive law that governs the exercise of power. This includes construing the law correctly, having regard to all mandatory considerations and disregarding all matters that are irrelevant considerations, exercising the power only for a statutory purpose and not at the behest of others or in accordance with an inflexible policy. It also includes the ground described as ‘*Wednesbury* unreasonableness’, which applies where a purported exercise of a discretionary power is so unreasonable that no reasonable repository of the power could have exercised it in that way.

There is considerable overlap between the various grounds of judicial review. The ultimate purpose of each of the grounds is to ensure that a decision maker does not exceed the limited powers conferred by statute, the Constitution or common law. As Brennan J stated in *Attorney-General (NSW) v Quin*:

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26 The term comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
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. The 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.27

The grounds of judicial review impose limits on decision-making authority and also stipulate duties in relation to how decisions should be made. In the end, however, the content of those limits and duties can be varied by Parliament (within the limits of the Constitution). Provided a law determines the nature and content of such limits and duties and does not completely exclude the grounds of review or unduly limit the scope of review, the limits and duties are valid. If the legislature enlarges the ambit of the decision maker’s authority, legal error in the exercise of power will be less likely to occur, and the scope of judicial review within constitutional limits is commensurately reduced. These limits are discussed in Chapter 3.

27 (1990) 170 CLR 1 at 35–6.
3 The Parliament and the scope of judicial review

This chapter discusses the powers of Parliament to define the scope of judicial review. The first matter for discussion is Parliament’s capacity to make laws expanding the availability of judicial review beyond that provided for in the Constitution. The second matter for discussion is the various mechanisms available to Parliament should it seek to remove or limit the scope of judicial review.

3.1 Legislative power to expand the scope of judicial review

From its inception, the Constitution conferred jurisdiction on the High Court in ss 75(iii) and 75(v) to undertake judicial review of certain Commonwealth action (as discussed in Chapter 2).

Under s 76 of the Constitution Parliament has power to confer on the High Court additional original jurisdiction in any matter arising under the Constitution or involving its interpretation (s 76(i)) and arising under any laws made by Parliament (s 76(ii)). These provisions do not entrench any jurisdiction to undertake judicial review but do empower Parliament to confer jurisdiction in the broadest terms on the High Court to undertake judicial review of Commonwealth action.

Section 77 of the Constitution gives Parliament power to make laws defining the jurisdiction of any federal court other than the High Court with respect to, among other things, the matters mentioned in ss 75(iii), 75(v), 76(i) and 76(ii). Parliament can define the extent to which the jurisdiction of any federal court is exclusive of that which belongs to or is invested in the state courts. Parliament can also invest this jurisdiction in the state courts.

Before the Federal Court was established the High Court’s original jurisdiction under s 75(v) was exclusive. In 1977 the Administrative Decisions (Judicial Review) Act conferred on the Federal Court jurisdiction to undertake judicial review in relation to most Commonwealth decisions made under enactments (see Chapter 2). It was thought at the time that applications under the Act would largely replace recourse to the constitutional writs specified in s 75(v). In fact the writs have retained their importance, especially in recent years in the migration jurisdiction.

By amendment to the Judiciary Act, in 1983 the Federal Court was given the same jurisdiction as that of the High Court under s 75(v), with some limited exceptions. As noted in Chapter 2, the same jurisdiction has also been bestowed on the Federal Magistrates Court.

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28 Judiciary Act 1903 (Cth), s 38.
29 Migration Litigation Reform Act 2005 (Cth).
In 1997 the Federal Court was given jurisdiction in general terms in relation to the matters described in ss 76(i) and 76(ii) of the Constitution (as noted), save in relation to some criminal matters.

Those legislative changes illustrate that the Commonwealth Parliament has significant legislative power—which it has exercised—to extend judicial review beyond what is expressed in the Constitution. Parliament has, however, made provision for certain areas of Commonwealth activity to be exempt from this expanded jurisdiction (notably in Schedule 1 of the Administrative Decisions (Judicial Review) Act).

### 3.2 Legislative power to reduce the scope of judicial review

The Commonwealth Parliament has power to limit or remove any judicial review jurisdiction that has been created, so long as any limitation does not infringe Chapter III of the Constitution and so long as the limitation is sufficiently clearly expressed.\(^{30}\)

It is equally the case that s 75(v) of the Constitution vests in the High Court a jurisdiction for judicial review that provides an irreducible minimum basis for challenging unlawful Commonwealth activity; that is, Parliament does not have legislative power to remove this jurisdiction.

An important subject dealt with in this report concerns the extent to which it is appropriate for Parliament either to cut back on the scope of a judicial review jurisdiction it has earlier created or to seek to minimise the ambit of judicial review practically available under s 75(v) of the Constitution. Before turning to these questions, it is convenient to consider legislative mechanisms that have been adopted by, or might be available to, Parliament to reduce the scope of judicial review directly and indirectly.

### 3.3 Provisions seeking to make decisions final and conclusive

The most comprehensive means by which Parliament has sought to limit the scope of judicial review has been through the use of privative clauses. Such clauses are primarily directed at the constitutional jurisdiction of the High Court, since the jurisdiction of the Federal Court, the Federal Magistrates Court and other courts exercising federal jurisdiction under statute can readily be removed. An example of a privative clause is s 474 of the *Migration Act 1958* (Cth), which provides that some decisions made under that Act are privative clause decisions and are subject to the following restrictions on judicial review:

- (1) A privative clause decision:
  - (a) is final and conclusive; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

\(^{30}\) *Shergold v Tanner* (2002) 209 CLR 126 at 139 [42].
The scope of judicial review

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.\(^31\)

In *Hickman’s* case in 1945\(^32\) the High Court upheld the validity of a similar clause by construing it as defining the extent of a decision maker’s power, rather than as seeking to remove the High Court’s jurisdiction to grant relief of the kind provided for in s 75(v) of the Constitution. Dixon J said a decision of the board covered by the privative clause is not invalid, ‘provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body’ — the *Hickman* provisos.\(^33\) Later cases added ‘inviolable limitation’\(^34\) and breach of natural justice.\(^35\)

The High Court re-examined the construction of this type of clause in *Plaintiff S157/2002 v The Commonwealth*\(^36\), a case in which the validity of s 474 of the Migration Act was under consideration. Although the validity of the section was upheld, that was done on the basis that the privative clause did not apply to decisions infected with jurisdictional error — and thus did not operate to preclude the availability of mandamus and prohibition where they would normally lie. There was a clear indication by some members of the court that, if the provision had applied to decisions infected by jurisdictional error or if it purported to prevent the court from granting an injunction to prevent unlawful conduct by an officer of the Commonwealth, there would be a real question about the constitutional validity of the section.\(^37\)

As a consequence of the decision in *Plaintiff S157*, the effectiveness of such privative clauses has been eroded. In particular, *Plaintiff S157* stands as authority against any proposition that a privative clause of the kind under consideration will have the effect of limiting review by the High Court for jurisdictional error. Nor is the concept of jurisdictional error necessarily to be limited to the three *Hickman* provisos.\(^38\) Indeed, the courts have further clarified what constitutes a jurisdictional error since *Plaintiff S157*.\(^39\)

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\(^{31}\) Note that this form of privative clause was drawn from earlier such clauses usually appearing in Acts concerning industrial relations, such as s 150 of the *Workplace Relations Act 1996*, s 41 of the *Defence (Re-Establishment) Act 1965*, s 7 of the *Independent Schools (Loan Guarantee) Act 1967*, and s 48 of the *Commonwealth Electoral Act 1918*.

\(^{32}\) *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. The case related to the validity or otherwise of r 17 of the National Security (Coal Mining Industry Employment) Regulations, which provided that decisions about the settlement of industrial disputes by local reference boards could not be ‘challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court whatever’.

\(^{33}\) ibid. at 615.

\(^{34}\) *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

\(^{35}\) *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

\(^{36}\) (2003) 211 CLR 476.

\(^{37}\) See especially [82].

\(^{38}\) See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] 207 ALR 12 [57].

\(^{39}\) It is now clearly accepted that a breach of natural justice may be a jurisdictional error: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) HCA 24. See also Aronson, Dyer & Groves, op. cit., p. 12.
It is difficult to predict the effect the decision in Plaintiff S157 will have in other areas currently subject to privative clauses. For example, use of such clauses in the industrial relations context has been relatively uncontroversial and therefore effective. It may be significant that this is a context in which there have often been extensive alternative review and appeal rights to which the courts have paid regard when considering the scope and effect of privative clauses applying to industrial disputes.\(^{40}\)

### 3.4 Provisions limiting or amending grounds of review

#### 3.4.1 The Federal Court

In Abebe v Commonwealth\(^ {41} \) the High Court confirmed Parliament’s constitutional capacity to make laws defining the jurisdiction of the Federal Court by limiting the grounds of judicial review in that court.

Through the Migration Reform Act 1992 (Cth) the Parliament sought to establish a regime for judicial review of specific migration decisions that would operate separately from either the Administrative Decisions (Judicial Review) Act or s 39B of the Judiciary Act. Parliament conferred on the Federal Court jurisdiction analogous to that in the Administrative Decisions (Judicial Review) Act but did not include in the amended Migration Act several grounds of review available under s 5 of the former Act. The grounds that were excluded from the jurisdiction of the Federal Court continued, however, to be available in the constitutional jurisdiction of the High Court.

The Council notes three important things from this. First, once the system of dual jurisdiction was understood by practitioners and litigants generally, many applications for constitutional writs were filed in the High Court on grounds unavailable in the Federal Court, resulting in a large workload for the High Court. This led to delays in the handling of such matters. It also led to delays and a duplication of judicial resources because applicants who were unsuccessful before the Federal Court could initiate fresh proceedings in the High Court on grounds unavailable in the Federal Court.

Second, the approach of omitting several of the grounds contained in the Administrative Decisions (Judicial Review) Act did not have the effect of narrowing the grounds of review to the extent that Parliament might have intended. This is because the grounds overlap to a considerable degree, and the removal of one ground of review did not prevent essentially the same legal error falling within a ground that was not removed.\(^ {42} \)

Third, the legislation truncated, rather than eliminated, the grounds of review.

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\(^{40}\) See O’Toole v Charles David Pty Ltd (1991) 171 CLR 232 at 289–92 per Deane, Gaudron and McHugh JJ.

\(^{41}\) (1999) 197 CLR 510.

\(^{42}\) See, for example, Tien v Minister for Immigration and Multicultural Affairs (1998) 89 FCR 80, Goldberg J at 93C–93D.
3.4.2 The High Court

The High Court can grant a constitutional remedy if an exercise of power by an officer of the Commonwealth amounts to a ‘jurisdictional error’. Generally, this means the officer has exceeded a legal limit on power—for example, has failed to comply with a duty to give a hearing or to reveal to a person to be affected by a decision adverse information that was critical to the outcome or to have regard to certain considerations. The content of these duties—and, in fact, whether the duties exist at all—can be varied by Parliament (within the limits of the Constitution).

An unresolved question is whether Parliament could enact a law that purported to remove one or more grounds of review commonly associated with the issuing of a constitutional writ. For example, it is questionable whether Parliament could enact a law providing that prohibition does not lie for denial of procedural fairness or for having regard to considerations the decision maker is bound not to consider. If, in any case, there is an explicit or implicit statutory duty upon an officer of the Commonwealth to accord natural justice or disregard certain factors, then mandamus will lie to compel the officer to perform that duty and prohibition will lie to prevent the officer from exceeding his or her jurisdiction.

In contrast, it remains open to Parliament to legislate in a particular context to contain the requirements of procedural fairness or to change what considerations are mandatory and those that are required to be disregarded. Strictly speaking, however, laws of this kind do not amend the grounds of review: they simply limit the potential applicability of the grounds of review to a particular factual situation. Laws that operate in this fashion are discussed further in the next section.

3.5 Provisions empowering the issue of certificates that constitute conclusive evidence of a valid decision

An example of a provision giving conclusive effect to an administrative action is s 177(1) of the Income Tax Assessment Act 1936 (Cth), which provides:

The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953, on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.43

That provision, in conjunction with s 175 of the Act (discussed in the following section), has the effect of excluding challenges to the validity of income tax assessments—including any challenges made under s 75(v) of the Constitution—outside the review and appeal regimes established by the Act. That those regimes are

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43 In Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168 this clause was held to be a privative clause subject to the grounds for judicial review identified in Hickman’s case. Section 22 of the Product Grants and Benefits Administration Act 2000 (Cth) is another example of such a provision.
comprehensive in nature was considered important when the High Court upheld the validity of the legislation in *Deputy Commissioner for Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.44

3.6 **Provisions indicating that non-compliance with aspects of a statutory requirement does not affect the validity of action taken**

Parliament can reduce the ambit of judicial review by indicating that failure to comply with specified constraints does not result in action taken being invalid.45 This follows from two considerations: first, that mandamus and prohibition are available only where there is jurisdictional error; second, that as a general principle Parliament can determine what constraints limit the jurisdiction of people on whom statutory powers and duties are conferred.

As a general rule, therefore, Parliament can specify that a failure to comply with a statutory procedural provision does not affect validity. There is no reason to doubt the effectiveness of the provision.

Parliament has also sought to rely on similar general provisions designed to immunise categories of decision from non-compliance with provisions of an Act. For example, s 175 of the *Income Tax Assessment Act* provides, ‘The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with’.46 This provision was held to be valid and effective in *Richard Walter*.47

The Council notes, however, that the *Income Tax Assessment Act* provides a comprehensive scheme of review and appeal rights in which a taxpayer can have their tax liability finally determined by a court. This makes it relatively easy for a court to give wide-ranging effect to s 175.

Where, however, a provision of this kind is included in an Act with no scheme of review and appeal rights, the same result is not assured. It might become necessary to try to reconcile an apparently general provision of this kind with an express and specific constraint apparently imposed by the Act. This would be done in accordance with the normal rules of statutory construction—in which specific provisions usually prevail over general ones.

It follows that the more precise are provisions of this kind the more likely it is that they will be construed as effective in protecting relevant decisions from invalidity.

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44 See also *F J Bloemen Pty Ltd v FCT* (1981) 147 CLR 360, 375 per Mason and Wilson JJ.
45 *Project Blue Sky Inc v Australian Broadcasting Tribunal* (1998) 194 CLR 355, 388–9 per McHugh, Gummow, Kirby and Hayne JJ.
46 Other examples can be found in the *Reserve Bank Act 1959* (Cth), s 87, and the *Export Finance and Insurance Corporation Act 1991* (Cth), s 89(2).
The Council notes, too, that provisions of this kind do not exclude jurisdiction in respect of an injunction, which does not require jurisdictional error, or certiorari for non-jurisdictional error on the face of the record.

### 3.7 Time limits

There is no doubt that Parliament can limit the jurisdiction of the Federal Court and the Federal Magistrates Court by providing that any application to the court must be commenced within a prescribed period.\(^{48}\) If, however, such a limitation is not equally effective in relation to the High Court, its imposition on those two courts is likely to lead to applicants commencing proceedings in the High Court when the time for making applications to another court has expired. This is not a desirable policy outcome.

It is not clear whether a law that imposed an absolute time limit for invoking the High Court’s jurisdiction under s 75(v) of the Constitution would be valid. A provision that apparently imposed such a limit in the Migration Act, s 486A, was construed in *Plaintiff S157* as having no application in relation to decisions infected by jurisdictional error. The court noted that the provision still had meaningful operation insofar as it purported to impose a time limit on applications for injunctions, which can be made under s 75(v) regardless of whether there is jurisdictional error. But the Court left open the question of whether the provision was valid in this regard.\(^{49}\) Callinan J, whose reasoning did require him to deal with this question, concluded that a 35-day time limit was invalid because it constituted an effective removal of jurisdiction.\(^{50}\) His Honour might have reached a different conclusion had the period been longer.\(^{51}\)

A law imposing a time limit for initiating proceedings in the High Court that was subject to a discretion to extend time would be more likely to be valid than a law imposing an absolute time limit. The High Court Rules themselves impose a time limit for mandamus and certiorari, subject to a power to extend time. The question of validity could be affected by whether the discretion is open-ended or tightly constrained.

A time limit imposed on challenging the validity of a decision might not prove effective when the decision provides the basis for future conduct. It might remain open to a person adversely affected by the decision to seek prohibition to restrain the proposed future conduct, even when the time for directly challenging the decision has passed. A decision that is infected by jurisdictional error\(^{52}\) can have no legal

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\(^{48}\) *Rahman v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 448. As noted in Emeritus Professor Enid Campbell’s submission to the Council, there is ‘a distinction between time limits which give a court discretion to extend time and time limit clauses which do not accord any such discretion’.

\(^{49}\) At [84]–[91].

\(^{50}\) At [173]–[175].

\(^{51}\) The enabling legislation made the time limit extendable and longer, to match the suggestion of Callinan J.

\(^{52}\) See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, Gaudron and Gummow JJ at [53].
significance, such that the proposed future conduct remains unlawful and may be restrained.

3.8 Provisions conferring powers with no duty to exercise

The scope of judicial review can be greatly reduced by a provision stating that the statutory decision maker is under no obligation to exercise the statutory power. Section 417(7) of the Migration Act is an example of such a provision:

The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in other circumstances.

The impact of a provision of this kind was examined in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002.* All members of the Court accepted that such a provision precluded the issuing of a writ of mandamus. Moreover, where mandamus does not lie, there might be no point in granting any other relief, as was the position in that case.

The Council considers this sort of provision further in Chapter 5.

3.9 Tailoring provisions that govern the decision-making power

There are several other ways in which Parliament can frame legislation in order to minimise the prospect of a successful challenge to the lawful exercise of the decision-making power.

3.9.1 Satisfaction of the decision maker

One approach is to draft legislation in such a way that the condition for exercising of the decision-making power is not an objectively provable fact but the satisfaction of a decision maker as to the state of the facts. In practice, if these facts are of a general nature it could be difficult to challenge the exercise of power under most grounds of review.

An example of this can be seen in s 14(1) of the *Financial Sector (Shareholdings) Act 1998* (Cth), which provides, ‘If the applicant satisfies the Treasurer that it is in the national interest to approve the applicant holding a stake in the company of more than 15%, the Treasurer may grant the application’. The power to grant an

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53 Section 417(1) of the Migration Act provides that the decision in question is a decision reviewable by the Refugee Review Tribunal under s 415 of the Act.
54 A somewhat similar provision is s 151AQB(2) of the *Trade Practices Act 1974*.
56 As noted in the submission to the Council by the Victorian Bar, ‘Where it is considered appropriate to do so, and subject to constitutional limits, Parliament can confer broad and unstructured discretionary powers, or can provide that there is no duty to exercise or to consider the exercise of such powers’.
application under s 14(1) arises only if the Treasurer is satisfied that the matter concerned is in ‘the national interest’. Although a decision of this nature remains subject to challenge, one would expect that vesting discretion in a Minister in the national interest would make it difficult to establish that a particular consideration either should not be or must be considered.  

Consistent with Australian authorities on the point, the Council considers that the primary purpose of a provision in that form is not to reduce the scope of judicial review; rather, it is to ensure that critical facts going to jurisdiction are to be determined by an administrative decision maker and not a court. This will generally have the effect of reducing the amount of judicial review because it will be harder to reveal jurisdictional error when the jurisdictional fact is the satisfaction of the decision maker as to the existence of a fact, rather than the existence of the fact itself, and especially where the fact itself (such as ‘the national interest’) is indeterminate.

A provision of this kind does not, however, preclude judicial review. An affected party can still seek relief on the basis that the decision maker did not respond to the correct legal question (and thus did not form the correct state of satisfaction) or reached conclusions that were not reasonably open on the evidence or denied the party procedural fairness. Because judicial review in that form is still available, there is a need for caution in drafting a provision of this kind in the expectation that it will provide an obstacle to judicial review.

Another example of this sort of drafting can be seen in s 65 of the Migration Act, which provides as follows:

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied;

… is to grant the visa; or …

(b) if not so satisfied, is to refuse to grant the visa.

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57 A ‘state of mind’ formula does not prevent judicial review on the ground, for example, that an incorrect test was applied or an irrelevant matter was taken into consideration. See R v Connell; Ex parte The Hetton Bellbird Collieries Ltd (1944) 69 CLR 407, especially Latham CJ at 430. Although it certainly does not immunise the decision from successful challenge (see Re Patterson; Ex parte Taylor (2001) 207 CLR 391), the courts have held that the subjective nature of the decision is nonetheless relevant to whether or not there has been an error of law (see Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 276 per Brennan CJ, Toohey, McHugh and Gummow JJ, approving as an accurate statement of principle comments by Gibbs CJ in Buck v Bavone (1976) 135 CLR 110).

58 See Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, discussion by Gummow J at [131]-[146] and the cases therein mentioned; see also The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100, cited by McHugh and Gummow JJ in Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59 [34]; Kruger v Commonwealth (1997) 190 CLR 1, 36 per Brennan J.
History reveals that, although this drafting technique has not reduced the quantity of judicial review, it has nevertheless reduced the scope of such review. It has done this by limiting the role of the court to one of determining in the most general sense the Minister’s or the Refugee Review Tribunal’s satisfaction as to whether statutory criteria have been met was lawful. On these applications the court has no role to determine for itself whether the criteria have been met. The position would be different if the Act provided simply that the Minister had a duty to grant visas if the statutory criteria were met.

3.9.2 The conferring of broad discretions

For many reasons it is desirable to confer on a decision maker a broad discretion as to whether or not to exercise a power. Discretion is useful for mitigating the inflexibility of legal rules and allows decision makers to modify their responses so as to accommodate individual or unanticipated circumstances.59

The example noted from the Financial Sector (Shareholdings) Act shows that discretion is vested in the Treasurer after the jurisdictional fact (the satisfaction) is established. This can be contrasted with the position of the Minister under s 65 of the Migration Act, which imposes a duty to grant or to refuse to grant a visa if the relevant state of satisfaction is or is not attained.

Where a broad discretion is conferred, limitations on the exercise of that power can be implied from the subject matter, scope and purpose of the legislation. This does allow some scope for judicial review, but it will often be difficult to establish a jurisdictional or legal error in this context. The ground of Wednesbury unreasonableness also applies to an exercise of discretion, although experience suggests that this ground will be difficult to make out in the absence of a clear instance of perverse action by the decision maker.

3.9.3 The narrowing or removal of discretions

An alternative approach is to remove or reduce the ambit of decision making by clearly prescribing the circumstances in which a power may or must be exercised. Drafting of this kind can make legislation clearer and more understandable for both the decision maker and the person in relation to whom the decision is made and tends to increase the consistency and predictability of decision making. Additionally, people affected by decisions are in a better position to assess and manage risks.

On the other hand, this approach obviously limits a decision maker’s capacity to provide for individual or unanticipated circumstances. This kind of approach also minimises the ambit for grounds such as Wednesbury unreasonableness. The more prescriptive the laws are, however, the more scope there tends to be to argue about their correct meaning.

With this model, clarity in drafting is essential in order that the quantum of successful judicial review is reduced.

3.9.4 Codification of procedures

A further example of the narrowing of discretion can be seen in provisions that seek to specify exhaustively the procedural obligations imposed on administrative decision makers. Such an approach is designed to provide greater certainty for decision makers in relation to what procedures must be followed. The effect, however, is to reduce or eliminate the capacity of courts to identify procedural obligations through the principles of procedural fairness.

Although it is clear that Parliament has the power to exclude or define the procedural requirements imposed on decision makers, it is difficult for any code to cover all the circumstances that might be thrown up. For example, it is one thing to define the ambit of a decision maker’s duty to disclose material. It is more difficult to deal exhaustively with circumstances in which a decision maker has misled a person affected by a decision and deprived them of an opportunity to present a case fairly. It is equally difficult to deal with a situation in which the decision maker proposes to make adverse findings about a person without giving them an opportunity to respond. Although the effect of such a provision may be to reduce judicial review, it is doubtful, in practice, that review could be eliminated entirely. 60

3.10 Privatisation of decision making

Another way in which the scope of judicial review might be reduced highlights the importance of the jurisdictional touchstones 61 for judicial review referred to in Chapter 2. The mechanism came to prominence in the decision of the High Court in Neat Domestic Trading Pty Ltd v AWB Ltd62, which was referred to in a number of submissions presented to the Council in response to its discussion paper.63

In that 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 (AWBL), and without AWBL’s approval.

60 As noted in the Law Council of Australia’s submission to this Council, the effectiveness of such an approach is perhaps more at issue than the capacity of the legislature to use it.
61 As noted, jurisdiction under the Administrative Decisions (Judicial Review) Act is limited to ‘decisions under an enactment’; jurisdiction conferred on the High Court under s 75(v) of the Constitution (and s 39B(1) of the Judiciary Act) is limited to ‘officers of the Commonwealth’; jurisdiction under s 75(iii) of the Constitution is limited to claims against the Commonwealth; and an action under s 39B(1A)(c) of the Judiciary Act must ‘arise under’ a law made by Parliament. These limitations provide scope for decision-making powers to be placed beyond this jurisdictional reach.
63 For example, the submission presented by the Victorian Bar.
Chief Justice Gleeson found that the conduct of AWBI did not establish the ground of review relied on under the Administrative Decisions (Judicial Review) Act, although he also observed, in dicta, that he considered AWBI’s refusal to approve the export a decision of an administrative character made under an enactment.\textsuperscript{64}

Justices McHugh, Hayne and Callinan were also of the view that Neat had not established any ground of review. They went further, however, and 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. The approval was a condition precedent to the Wheat Export Authority considering whether to give its consent to export.\textsuperscript{65}

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 AWB International Ltd for any failure to consider the application.\textsuperscript{66} Justice Kirby dissented and would have allowed the appeal by Neat.

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, decisions about the registration and deregistration of migration agents under s 275 of the Migration Act are made by an entity referred to as the ‘Migration Agents Registration Authority’\textsuperscript{67}, which can be either a company registered under the Corporations Act 2001 (Cth) (the Migration Institute of Australia Limited) or the Minister.

In addition, there are instances where the criteria for the grant of a visa turn on some form of assessment by a private body— for example, assessment of a visa applicant’s work experience or qualifications.\textsuperscript{68} It is common, moreover, albeit at the state and territory level, for private bodies exercising statutory powers (such as state and territory law societies) to regulate professional areas. The judgments in Neat suggest that the law in this area is not entirely settled. At the very least, attempts to exclude judicial review in this way would probably be the subject of judicial challenge.

In its 1995 report \textit{Government Business Enterprises and Commonwealth Administrative Law}\textsuperscript{69} the Council recommended that Commonwealth administrative law statutes prima facie apply to bodies that are government controlled (including government business enterprises) but that government business enterprises be exempt from the operation of Commonwealth administrative law statutes in relation to commercial activities carried out in a market where there is real competition. In its 1998 report \textit{The Contracting Out of Government Services}\textsuperscript{70} the Council recommended that the Administrative Decisions (Judicial Review) Act extend to include a decision of an

\textsuperscript{64} At [27].
\textsuperscript{65} See [54], [55].
\textsuperscript{66} At [59].
\textsuperscript{67} This provision was referred to in the submission to the Council by the Victorian Bar.
\textsuperscript{68} At present, these assessments are not subject to judicial review directly, but the decision of the Minister or tribunal might reveal an error of law if the decision maker relies on an assessment that contains an error of law: Bellaiche v Department of Immigration and Ethnic Affairs (1998) 51 ALD 356.
\textsuperscript{69} Report no. 38, ARC, Canberra, para. 4.29.
\textsuperscript{70} Report no. 42, ARC, Canberra, para. 6.43.
The scope of judicial review

administrative character made or proposed to be made by an officer under a non-statutory scheme or program whose funds are authorised by an appropriation of Parliament.

Consistent with the views expressed in those two reports, the Council considers that a decision that is made by a private body and is given statutory effect ought in principle to be subject to judicial review. To redress the situation arising in Neat, and also under the Migration Regulations, the Victorian Bar suggested that judicial review include review of a decision of an administrative character made by a person other than under an enactment where both the following criteria apply:

- 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.
- 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.\(^\text{71}\)

Another submission suggested that 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.\(^\text{72}\)

The Council agrees with these suggestions.

### 3.11 Concluding remarks

The discussion in this chapter shows that there are a number of ways in which, if it chooses to do so, Parliament can expand or limit the scope of judicial review in the context of particular decision-making powers. In situations where legislation affects the practical scope of judicial review, the Council considers that two guiding principles for legislative drafting are essential.

First, in order for provisions of this kind to be effective, they must be clear and unambiguous in their effect and operation.\(^\text{73}\) Provisions that limit the scope of judicial review will be narrowly construed: courts will assume that Parliament does not intend to impose any restrictions beyond what is clearly and unambiguously stated.

Second, the provisions should be as specific as possible. That is, it is inadvisable to use general privative clauses or provisions that in some general manner seek to protect all decisions made under an enactment.\(^\text{74}\) This is because, when a general provision of this kind appears to conflict with a specific provision that limits the powers of an administrative decision maker, normal principles of statutory

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\(^{71}\) Submission by the Victorian Bar, p. 12 [34].

\(^{72}\) Submission by Timothy Ginnane.

\(^{73}\) As noted in the submission to the Council by the Victorian Bar, ‘… legislation should clearly set out the boundaries of decision-making powers. It should not require reference to another general provision in order to demonstrate the limits of power’.

\(^{74}\) This view was expressed in the submission presented by His Honour, the Chief Justice of the Federal Court of Australia, Michael Black AC.
construction tend to favour giving effect to the specific provision rather than the general one. It follows that in this context any provisions designed to limit the scope of judicial review should specify clearly what the limits of the exercise of power are.

This is also the case in relation to legislation designed to determine the ambit of relevant considerations and the requirement of procedural fairness.
4 Judicial review in context

When examining the scope of judicial review, it is important to understand the role judicial review plays in and under Australia’s Constitution. In this chapter the Council discusses that role and the values the Constitution enshrines. Other important aspects of judicial review that are considered are the notions of justiciability and deference.

4.1 The role of judicial review

Broadly speaking, judicial review of administrative action and legislation involves a process whereby disputes about the effect of past allegedly unlawful action can be resolved and current or proposed unlawful conduct can be stopped or prevented. In this way the courts provide a check on the executive and legislative branches of government.

In Australia, power to check unlawful Commonwealth action is provided for in ss 75(iii) and 75(v) of the Constitution. The jurisdiction conferred on the High Court by s 75 is a crucial part of the doctrine of the separation of powers. Underlying this doctrine is the principle that a strict separation of power between the executive, legislative and judicial branches of government will help preserve democracy and protect citizens from any abuse of government power.

The text of the Australian Constitution reflects the separation of powers at a textual level, with provisions relating to the legislative branch in Chapter I, provisions relating to the executive branch in Chapter II, and provisions relating to the judicial branch in Chapter III. This arrangement has been construed as requiring that federal judicial power be exercised only by courts vested with jurisdiction in accordance with Chapter III.75 It is an exercise of judicial power finally to determine whether or not conduct of the executive branch is lawful. In this way the doctrine provides a constitutional basis for judicial review.

It would be wrong, however, to think that judicial review stems exclusively from this doctrine. Many countries that do not have a formal constitutional separation of powers of the type seen in Australia nevertheless have vigorous and effective judicial review processes. Indeed, that is the position in the Australian states.

The doctrine of the separation of powers, and the entrenchment of at least some judicial review jurisdiction in the Constitution, show that the Constitution has, to this extent, enshrined the public law values that underlie judicial review.

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75 An exception exists in relation to military discipline, but that does not affect the discussion here.
4.2 Public law values

For the purpose of this report the Council takes the public law values that underlie judicial review to be the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation.

The importance of the rule of law was referred to in a number of submissions to the Council. Gleeson CJ discussed the rule of law in the following terms in S157:

Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted …

The Parliament cannot abrogate or curtail the Court’s constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution. However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.

As the term suggests, the rule of law is concerned with the lawfulness of official conduct—not whether the laws are wise or fair. Judicial review is thus not directed to the merits of a decision in circumstances where Parliament has vested in an executive officer the power to make the decision. It is not part of judicial review for a judge to replace a decision he or she considers wrong. Judicial review and the rule of law are limited to consideration of whether a decision was made within the limits of the power or duty imposed on the decision maker. Gleeson CJ made this point in another recent decision in the migration context:

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76 The Council considers five core administrative law values—fairness, lawfulness, rationality, openness (or transparency) and efficiency—fundamental to the Commonwealth administrative system and has used them as benchmarks for analysis in a number of its reports and other publications. The Council relies on the public law values referred to in this report because they were extensively referred to in many of the submissions in response to the discussion paper and there is considerable overlap between the Council’s core administrative law values and the public law values used in the report.

77 For example, submissions by the Law Society of South Australia, the Victorian Bar, the Law Council of Australia and John Griffiths SC.

Under s 75(v) of the Constitution, the Court is empowered, in the exercise of its responsibility to maintain the rule of law, to make orders of specified kinds aimed at ensuring observance of the law by officers of the Commonwealth. It is not invested with an appellate jurisdiction, enabling the Court to set aside decisions, lawfully and regularly made, upon the ground that the Court disagrees with such decisions. The rule of law is not maintained by subverting the democratic process. The Constitution, which is the instrument of government of a democratic, and therefore political, society, has not substituted general judicial review for political accountability. The question raised by the principal proceedings is whether the Minister has acted according to law; not whether his decisions are wise, or humane, or in the public interest.79

This is not to suggest that the rule of law is necessarily without any substantive content—only to say that its central focus is maintaining governance by the laws made by Parliament (whatever their content) and the courts.80

The second, and related, public law value is that judicial review safeguards individual rights. Judicial review is a mechanism whereby individuals are entitled to bring an action in the courts to enforce a right or protect an interest by stopping unlawful conduct of the government or one of its agencies. The grounds available in judicial review are designed to ensure that government decisions are reached by fair procedures and are rational and lawful.

The third public law value is that judicial review plays an essential role in maintaining the accountability of people exercising administrative decision-making powers and ensuring that they are as much subject to the law as the people affected by the exercise of such powers. This form of accountability focuses the attention of primary decision makers and tribunals on acting lawfully. The prospect that a decision might be reviewed encourages a decision maker to take responsibility for ensuring that the decision is properly made according to law.

The fourth public law value underlying judicial review is consistency and certainty in the administration of legislation. Although judicial review cases usually arise in an ad hoc way, individual cases often provide guidance on the interpretation of legislation that affects many other people. In that way, judicial review can have a broad-ranging effect because of the precedential value of the court’s reasons for decision. A judicial ruling on a matter of law is conclusive and binding on the executive branch.

Together, these public law values can engender community confidence in the standards generally applicable to decision making that affects the interests of individuals. Furthermore, as the Council noted in an earlier paper, ‘An essential part of judicial review of administrative action has been the progressive development by

79 Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu [2000] HCA 23.
80 For further discussion, including consideration of ‘how much, and what, substantive law is given constitutional status by being regarded as integrally attached to the specified remedies’, see Kirk J 1999, ‘Administrative justice and the Australian Constitution’, in R Creyke & J McMillan (eds), Administrative Justice – the core and the fringe: papers presented at the 1999 National Administrative Law Forum, Australian Institute of Administrative Law, Canberra, p. 84.
an independent judiciary of procedural standards of fairness and lawfulness against which the powers of government officials may be measured.\(^{81}\)

### 4.3 Uncertainty about the content or application of grounds of review

To some degree the grounds of review are not static. First, the content or ambit of certain grounds of review and whether they establish jurisdictional error remains the subject of varying opinions in the federal courts and elsewhere.\(^{82}\) Second, and more commonly, there can be a reasonable difference of opinion about how and whether an established ground applies in a particular case. For example, there are questions of degree and judgment about what practical duties of fairness are imposed by the common law or implied by an enactment in any given factual context.

Although the Council accepts that there is a lack of precision in the grounds of judicial review, this is not in itself a reason for narrowing the scope of such review. Differences of opinion among courts or members of courts about the content of the law or its application in a particular case are matters to be resolved in the same manner as in all other areas of law—namely, by determination on appeal.

### 4.4 Justiciability

Courts have developed the concept of justiciability in order to identify areas of executive action or legislation in which the power of judicial review cannot or should not be exercised. In so doing, courts require that an appropriate balance be struck between the concepts of the rule of law and the separation of powers.\(^{83}\)

A non-justiciable decision is one where a court considers that ‘the decision-making function lies within the province of the executive [or the Parliament] and that it is inappropriate that the courts should trespass into that preserve’.\(^{84}\) Importantly, a court must be satisfied that a matter is non-justiciable before declining to deal with it.\(^{85}\)

As Kirby J has said:

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\(^{82}\) For example, the decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 89 provides support for the view that *Wednesbury* unreasonableness does not embrace challenges to fact finding or to statutorily mandated conclusions but applies only to decision makers’ discretionary decisions. On the other hand, the decision of the court in *Minister for Immigration and Indigenous Affairs v SGLB* (2004) 207 ALR 12 provides authority for the view that irrationality and illogicality are different concepts and that only the latter can apply to the fact-finding component of a decision. This approach is at odds with the approach taken in other cases, such as *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, where unreasonableness, irrationality and illogicality are regarded as interchangeable concepts.


\(^{85}\) *Ruddock v Vadarlis* [2001] FCA 1329; 183 ALR 1.
Th[e] foundation [of justiciability] lies in the separation of powers required by the Constitution. Is the question tendered, of its nature, such as is apt to a court performing court-like functions? If it is not, it matters little in practical terms whether the court, facing an objection, rules that it lacks jurisdiction for want of a ‘matter’ engaging its powers, or that it says that any such ‘matter’ would be non-justiciable. In either event, the court’s duty is plain. It should stop the proceedings forthwith. It will thereby send the parties to the other branches of government, or to other public fora, in which they can make their complaint.\textsuperscript{86}

The following has also been noted:

… consistently with the general development of administrative law, important factors will include the nature and effect of the decision in question and whether it directly affects individual liberties, alters rights or obligations of a particular person or deprives the person of some benefit or advantage, as well as the nature of the policy considerations involved. There is of course no general principle that decisions that are made in the public interest or that are politically controversial are immune from judicial review.\textsuperscript{87}

Traditionally, a number of subject areas have been regarded as falling outside the scope of judicial review, among them treaty making, recognition of the government of a foreign state and of the boundaries of a foreign state\textsuperscript{88}, declaring war\textsuperscript{89}, conducting foreign policy, dissolving Parliament, budgetary and financial policy decisions\textsuperscript{90}, and decisions relating to national security.\textsuperscript{91}

Even in these areas, however, one question a court must ask itself is whether there are judicially manageable standards by which the particular dispute can be determined. It is not the case that decisions in these fields are excluded per se; rather, these are areas where there can readily be a lack of explicit standards that could render the case unsuited to judicial scrutiny.\textsuperscript{92}

Furthermore, justiciability is not an ‘all or nothing’ concept. Some aspects of decisions might be justiciable while others might not. Regardless of the matter at issue, decisions will be subject to judicial review if they are illegal or ultra vires.\textsuperscript{93} Additionally, consideration may be given to the way such decisions are arrived at, rather than the subject area.\textsuperscript{94}

\textsuperscript{86} Thorpe v Commonwealth of Australia (No. 3) (1997) 144 ALR 677, 692.
\textsuperscript{88} See, for instance, the decision of the High Court in Horta v Commonwealth (1994) 181 CLR 183, 195–6.
\textsuperscript{89} ibid.
\textsuperscript{90} ibid.
\textsuperscript{91} ibid.
\textsuperscript{92} Re Ditfort (1988) 19 FCR 347.
\textsuperscript{93} Mason, Sir Anthony 1994, op. cit.
\textsuperscript{94} In one case, for example, where a decision to remove a person’s positive security vetting because of sexual preference was based on national security considerations and was not reviewable on substantive grounds, the decision was deemed reviewable for want of procedural fairness: R v Director of Government Communications Headquarters; Ex parte Hodges [1988] COD 123.
The existence of this body of principles of justiciability tends to ensure that courts do not undertake judicial review in a manner that intrudes unduly on activities that pertain to the other branches of government. This suggests that statutory restrictions to protect these kinds of areas from judicial review are not necessary.

### 4.5 Judicial restraint and deference

In the United States, on the basis of what is commonly referred to as the *Chevron* doctrine, the Supreme Court has followed a principle of deference to the executive on questions of statutory construction. In Australia, in contrast, there is no similar doctrine of deference. Fundamental to Australian administrative law is the principle that it is for the courts to interpret and apply the law and for administrative decision makers to make determinations on the facts of the case.

That is not to say that in some situations Australian courts will not exercise restraint in their response to the findings of tribunals on questions of fact. A court is unlikely to interfere with a specialist finding resulting from the application of an uncontroversial legal test to largely undisputed facts. Similarly, in *Corporation of City of Enfield v Development Assessment Commission* it was held that the court may attach weight to decisions of a specialist tribunal on a jurisdictional fact, although ultimately that is a matter for the court’s determination. A variety of circumstances bear on whether a jurisdictional fact is given special weight:

> These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials on which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning.

There can be no question of ‘deference’ in relation to a decision maker’s findings on non-jurisdictional facts: by virtue of the distinction between merits and judicial review, the administrative decision maker already has complete authority in this area, subject to the accepted grounds of judicial review.

Australian courts have generally taken a cautious approach when exercising judicial review. As noted in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

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97 (2000) 199 CLR 135 at [45]–[49], [60].
98 ibid. [47].
99 This point was made in the submission to the Council by the Honourable Chief Justice of the Federal Court of Australia, Michael Black AC.
It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.\textsuperscript{100}

Similar views are reflected in judgments in \textit{Minister for Immigration and Ethnic Affairs v Wu Shan Liang}, where it was noted:

\begin{quote}
... the reasons of an administrative decision maker are meant to inform and not to be scrutinised upon by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.\textsuperscript{101}
\end{quote}

\begin{quote}
... It is erroneous to adopt a narrow approach, combing through the words of the decision maker with a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.\textsuperscript{102}
\end{quote}

These comments reflect a balancing of interests that is part of the jurisprudence of judicial review in Australia. The view is that it is the role of the courts, not the executive, to make binding determinations on the meaning and application of the law, and that it is for the executive, not the courts, to determine non-jurisdictional facts (subject to any constraints in particular statutes). In considering jurisdictional questions of fact, weight should be given to the findings of expert tribunals at least in the same way as it is given to the testimony of expert witnesses.

### 4.6 Concluding remarks

The discussion in this chapter reflects the crucial role of the courts in delineating the boundaries of judicial review. The Council has regard to this role in Chapter 5, in its response to arguments that have been put forward for limiting judicial review. It also has regard to the role of the courts in delineating the boundaries of judicial review, within the framework of indicative principles set out at the end of Chapter 6.

\textsuperscript{100} (1986) 162 CLR 24, 40–1 per Mason J.
\textsuperscript{101} \textit{Minister for Immigration and Ethnic Affairs v Wu Shan Liang} (1996) 185 CLR 186 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.
\textsuperscript{102} ibid. per Kirby J [291].
5 Justifications put forward for reducing the scope of judicial review

In the course of the Council’s current project and in support of past legislation, various reasons have been advanced to justify reductions in the scope of judicial review. This chapter considers those justifications and suggests guiding principles for circumstances in which it may be appropriate to place limitations on the scope of judicial review.

5.1 The Council’s approach

As noted in Chapter 4, for the purposes of this report the Council takes the public law values that underlie judicial review to be the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation.

The Council accepts that in some limited circumstances these values can be advanced by means other than judicial review. It also accepts that there are other important legal and governmental values that can at times conflict with the values underlying judicial review. To minimise that conflict, it might be possible to balance the two sets of values in a way that permits some reduction in the scope of judicial review without materially diminishing the maintenance of the public law values upheld by judicial review.

That said, the Council considers that the rule of law and the provision of remedies for redressing unlawful government action or inaction are paramount values in Australian society and under the Australian Constitution. A strong justification is needed to reduce judicial review in such a way as to allow unlawful conduct to proceed without the availability of any kind of remedy.

5.2 Factors impinging on the availability and scope of judicial review

The following factors have been advanced as relevant to any consideration of limiting the scope or availability of judicial review:

- fragmentation of criminal justice proceedings
- decisions of a subordinate legislative character
- decisions about policy

103 Submission to the Council by the Australian Securities and Investments Commission.
• decisions involving polycentric factors
• decisions of an exceptional nature providing a benefit not otherwise available
• decisions subject to unmeritorious challenge or where the delay inherent in judicial review (and related appeal proceedings) constitutes an end in itself\textsuperscript{104}
• decisions that are not final or operative
• decisions where there is a particular need for certainty
• urgent decisions
• decisions where adequate alternative remedies are available
• decisions where consistency in decision making is important
• decisions where judicial review is sought on grounds of unreasonableness or procedural unfairness.

The following discussion of these factors is designed to provide practical guidance in response to claimed justifications for reducing the scope of judicial review.

5.2.1 Fragmentation of criminal justice proceedings

There is a cogent argument that judicial review of decisions relating to criminal proceedings should be confined so as to avoid fragmentation of such proceedings. Underlying this argument are legitimate concerns about preventing unnecessary and costly litigation, preventing unnecessary delay in the criminal justice process as a result of fragmentation of proceedings, and preventing an abuse of court processes generally. It is also argued that courts hearing substantive criminal proceedings themselves provide a safeguard for people involved in those proceedings. In the Council’s view, these are weighty considerations that can provide a legitimate basis for limiting the forum and timing of particular applications for judicial review.

There is a strong argument that any determination of the lawfulness of government activity related to a substantive criminal proceeding should be a matter for the court adjudging that proceeding and not another court. For example, if a person who has been charged with a criminal offence seeks to challenge the lawfulness of police conduct in obtaining evidence, there is no reason why this cannot and should not be determined by the court dealing with the proceeding.

This does not involve any limitation on the opportunity for judicial review because there is still an avenue for judicial review of the relevant decisions. It is more a question of which court should have the judicial review function. The Council considers that it is generally preferable that criminal proceedings not become fragmented.

\textsuperscript{104} Submission to the Council by the Department of Immigration and Multicultural Affairs.
The same applies to judicial review of proceedings for civil penalties and for extradition: the court hearing the substantive proceeding is best placed to determine any collateral matters in relation to the lawfulness of associated government activity.

This rationale is not limited to challenges to the lawfulness of evidence gathering; it could include, for example, a decision whether to prosecute at all. Thus, if there were evidence that a decision to prosecute was motivated by an improper purpose, the court hearing the criminal proceeding would be well placed to deal with that.

Such an approach reduces the expenditure of public resources and the potential for delay and abuse of process, without derogating from the values underlying judicial review. Although it might limit the scope of review available in particular courts, it does not in fact limit the opportunity for judicial review.

The same considerations do not justify a reduction in the right to challenge the lawfulness of decisions to issue search warrants or other similar processes occurring before the commencement of criminal or civil penalty proceedings or action taken by people who are not the subject of such proceedings. To allow for separate judicial review of these actions is not to derogate from the criminal justice proceedings. Nor is it an abuse of process. Judicial review should be available in respect of those separate matters, as it is.

5.2.2 Decisions of a subordinate legislative character

Legislation enacted by Parliament is subject to judicial review on the ground of constitutional validity. Delegated legislation is also subject to review on some grounds—for example, if the decision maker exceeds the power to make subordinate legislation conferred by the primary legislation. The power to make subordinate legislation is, however, commonly conferred in broad terms, making it difficult to apply some of the grounds for judicial review. The ambit of judicial review of the validity of subordinate legislation was explained by Hely J in *One.Tel Ltd v Australian Communications Authority*:

A regulation may not be inconsistent with the legislation under the authority of which the regulation is made. The ambit of the regulation-making power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned:

In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit.

*Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

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105 Submission to the Council by the Victorian Bar.
It is common ground that the ambit of regulation-making power is subject to two limiting principles. The first is that the power must not be exercised in a manner which is arbitrary, capricious or unreasonable. The second is that the power must not be exercised in a manner which is disproportionate to the attainment of the objects for which it is conferred.

‘Unreasonableness’ (and the concepts of arbitrariness or capriciousness which are included therein) in this context means that ‘the regulation is so oppressive and capricious that no reasonable mind can justify it’: *Qui v Minister for Immigration and Ethnic Affairs* (1994) 55 FCR 439 at 446. It needs to be borne in mind that the fundamental issue is one of power, not expediency: *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 149–50. In *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381; 112 ALR 211, Lockhart J emphasised (at FCR 384) that it is only in ‘an extreme case’ that delegated legislation would be declared invalid on this ground.106

To the extent that judicial review of the making of subordinate legislation is narrower than judicial review of administrative decision making, this is so only because there are generally fewer constraints imposed on the making of delegated legislation. For example, unless there is a statutory requirement to consult before making delegated legislation, there is generally no obligation to give procedural fairness before such legislation is made. As a result, denial of procedural fairness will generally not be available as a ground of review when challenging delegated legislation.

The position can be summarised by saying that the fact that a decision is legislative in nature does not, of itself, provide a justification for reducing the scope of judicial review. The grounds of review might not apply as easily, but that is because of the nature of the function that is under review.107

5.2.3 Decisions about policy

It is occasionally argued that decisions involving questions of government policy should not be subject to judicial review. The reason given is that the executive, not the judiciary, is in the best position to determine policy matters.

As a general proposition, that argument carries little weight. An application for judicial review might require a court to consider questions of policy in a variety of ways. It might be said that the decision maker did not, but should have, considered a government policy, or that the decision maker misconstrued the government policy in question and in so doing failed to have regard to a relevant consideration. Further, it might be said that, in having regard to government policy, the decision maker took account of a policy that was unlawful because it was repugnant to some legislation. Or, where there is no stated policy, a question can arise as to whether the policy factors considered by the decision maker were permissible under the legislation being applied.


107 A number of submissions to the Council, including those of the Victorian Bar, the Law Council of Australia and the Law Society of South Australia, concur with this view.
These are standard concerns arising in judicial review proceedings. The fact that policy is involved or that a court might be called on to determine the lawfulness of a stated policy, or the lawfulness of unexpressed policy considerations applied in a given case, is no justification for the exclusion of judicial review. In such a circumstance the court is not usurping government’s democratic right to develop policy. Instead, the proper role of the court is to determine whether the policies that have been developed and applied are lawful.

The situation can be otherwise if there is no judicially manageable standard for determining whether or not a policy or policy-related decision is lawful. As noted in Chapter 4, courts will generally consider a decision of this nature not to be justiciable.

5.2.4 Decisions involving polycentric factors

A related issue concerns ‘polycentric’ decisions, which involve the distribution of limited resources among one or more applicants for those resources. An example is a decision about which of several applicants should be given funding to provide services on behalf of government. Another example is a decision about which applicants should be given a quota to take particular resources during a specified period.

A difficulty arises when a polycentric decision is subject to judicial review, especially if a stay is ordered. A proceeding initiated by a disgruntled applicant might lead to a delay in allocation of the government funding and hence a delay in service delivery or the closing down of facilities reliant on that funding. If the proceedings take a long time the problem can be exacerbated and the decision could be entirely frustrated. For example, a decision to allot a quota to catch specific types of fish during a season would be frustrated if the season expired before the proceeding was finalised.

The Council sees a possibility for interference in such situations. Although this might not justify a reduction in the availability of judicial review, it does point to the need for careful drafting of legislation so as to minimise the potential difficulty.

It is difficult to be prescriptive when dealing with the matter at this level of generality. One approach is to ensure that decision making of this kind occurs well before it becomes time sensitive, so that any application for judicial review can be made and determined without problems arising. In some such cases, the legislation might provide that a stay can be granted or that some proportion of the resource in question be distributed in accordance with the administrative decision pending any judicial review proceedings. Mechanisms of this type would ensure that the lawfulness of decisions could still be challenged in a meaningful way and without all or most of the potential problems just mentioned.

In this context it is worth noting that decisions of this nature would generally fall within the High Court’s original jurisdiction under s 75(v) of the Constitution (and

108 As the Law Society of South Australia noted in its submission, in judicially reviewing a polycentric decision, the courts do not ask whether the decision allocating a limited resource is the correct one; they ask whether the decision was lawfully made.
thus the Federal Court’s jurisdiction under s 39B of the Judiciary Act). This is because such decisions may be made by officers of the Commonwealth. As a consequence, complete removal of judicial review is not possible, and the need to develop a different approach for controlling judicial review becomes even more pressing. Cases in the polycentric category might in some instances be regarded as non-justiciable.

### 5.2.5 Decisions of an exceptional nature providing a benefit not otherwise available

For a small category of decision-making powers the objective is for government to make a decision in a person’s favour but in circumstances where the person has neither a right to a favourable outcome nor a right to insist that a decision even be made. Two examples are a decision to pardon a convicted criminal or to make an ex gratia payment and a ministerial safety net power such as the power under s 417 of the Migration Act to grant a visa to a person in circumstances where the person has no other entitlement to a visa. The defining feature of these powers is that the decision maker is to exercise a substantially unconstrained discretion without any duty to consider a request for a favourable exercise of that discretion.

The Council considers that in such cases it can be appropriate for legislation to provide clearly that the decision maker is under no duty to consider exercising the power. As already noted, the effect of that restriction will be to make it practically impossible for a person who is seeking a favourable exercise of the power to challenge a failure to exercise it. The justification for imposing such a limitation on judicial review is that by its nature the power is one to be exercised, if at all, in exceptional circumstances and is not a power that confers any right or gives rise to any legitimate expectation in relation to its exercise. If the power were routinely subject to judicial review, it is possible that the purpose of the power would be removed, thus defeating the reason for its existence. In summary, it is better that the government has this form of discretionary power, even if relief for unlawful decision making is difficult to obtain, than for there to be no discretionary power at all.109

There will still be some room for judicial review and control. For example, if such a discretion were exercised in bad faith or for an improper purpose, a person with standing could challenge the decision and have it set aside.

### 5.2.6 Decisions subject to unmeritorious challenge or where the delay inherent in judicial review proceedings (and related appeals) constitutes an end in itself

An unmeritorious challenge to administrative decision making can arise in any area but is most likely to arise when the making of such a challenge provides some

109 Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441 at [44]–[48] and [98]–[100]
collateral advantage. A common reason is to delay the enforcement of the decision that is subject to the judicial review proceedings.\textsuperscript{110}

There is strong anecdotal evidence that this has been the reason for many judicial review proceedings brought against decisions to refuse the grant of immigration visas. The same problem can arise in other areas: for example, challenging the validity of a tax assessment or an assessment which might have the consequence of delaying the payment of taxes.

These instances raise important public policy questions, but the Council is not convinced that such considerations justify a limitation on the right to judicial review. A limitation on judicial review can apply indiscriminately to applicants with and without merit.\textsuperscript{111} A desire to safeguard the integrity of administrative decision making does not justify wholesale removal of or a reduction in judicial review.

In the tax context, challenges to tax assessments and related decisions have been effectively eliminated by ss 175 and 177 of the \textit{Income Tax Assessment Act 1936} (Cth). The Commissioner can make assessments and enforce them while any objection process takes place. There is no advantage to people making unmeritorious objections and seeking review by the Administrative Appeals Tribunal or judicial review simply for the purpose of delay. At the same time, all taxpayers have comprehensive access to merits review and judicial review of substantive tax decisions. The result is that, although judicial review of one layer of decision making has effectively been excluded, there is no substantive diminution in the upholding of core public law values.

The review processes built into the tax legislation guarantee the rule of law and the right of people to challenge unlawful decisions, but they do not remove the obligation to pay tax in the meantime. This model would not, however, work in every context. In the migration area, for instance, the appropriate response revolves around the establishment of procedures to minimise the amount of delay involved in judicial processes and to provide, to the extent possible, for a single avenue—rather than multiple and differing avenues—of redress.

The Council also notes in this respect the \textit{Migration Litigation Reform Act 2005}, the main purpose of which is as follows:

- to direct migration cases to the Federal Magistrates Court, so that the Federal Court will have limited jurisdiction in migration matters and nearly all migration cases remitted from the High Court will go directly to the Federal Magistrates Court

- to impose uniform time limits on the making of migration case applications to the Federal Magistrates Court, the Federal Court and the High Court

\textsuperscript{110} It can also occur where the making of such an application provides a basis for eligibility for a bridging visa.

\textsuperscript{111} This concern was expressed, for instance, in submissions to the Council by the Hon Justice Murray of the Supreme Court of Western Australia, the Victorian Bar and the Law Council of Australia.
to ensure identical grounds of review in migration cases by providing that the
grounds of review in all courts be the same as those in the High Court

to facilitate more rapid handling of migration cases by requiring applicants to
disclose previous applications for judicial review of the same decision and by
providing for the High Court to remit migration and other cases ‘on the papers’

to deter unmeritorious applications by allowing the High Court, the Federal
Court and the Federal Magistrates Court to dispose of a matter summarily on
their own initiative if satisfied that there is no reasonable prospect of success and
by prohibiting lawyers, migration agents and others from encouraging
unmeritorious migration litigation, with the risk of a personal costs order for
contravening this prohibition.

5.2.7 Decisions that are not final or operative

A vexed question in administrative law is whether judicial review should extend to
the preliminary steps and conduct leading to the making of a final decision. If every
step in the administrative process is separately reviewable, there is a danger that
efficient decision making will be hampered and fragmented. On the other hand, the
integrity of the administrative process can hinge on whether the preliminary steps in
that process have been undertaken lawfully.

These competing tensions are reflected in the Administrative Decisions (Judicial
Review) Act and the decisions interpreting it. The Act provides that an order of
review can be sought in respect of both a ‘decision’ (s 5) and ‘conduct for the purpose
of making a decision’ (s 6). In Australian Broadcasting Tribunal v Bond112 a majority of
the High Court read both terms restrictively, holding that ‘decision’ refers to
administrative activity that is substantive, final or operative and that ‘conduct’ refers
to pre-decision administrative activity that reveals a flawed administrative process.
Subsequent cases have illustrated the difficulty of applying these concepts in a
complex statutory setting where numerous steps are involved in making and
implementing a decision. There are many examples of judicial review under the
Administrative Decisions (Judicial Review) Act in respect of statutory steps that
occur before the culmination of the administrative process.113

Similar difficulties can arise at common law. For example, the writ of certiorari issues
only when there is a decision that has ‘a discernible or apparent legal effect upon
rights’.114 A declaration will not be granted in respect of an issue that is hypothetical.
The rules of standing can also constrain the commencement of proceedings at a
premature stage when there is no present injury to an existing legal interest.

112 (1990) 170 CLR 321.
113 See, for instance, Right to Life Association (NSW) Inc v Secretary, Department of Human Resources and
Health (1995) 56 FCR 50; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; Edelsten v Health
360.
114 See Hot Holdings Pty Ltd v Creasey (1996) 185 CLR 149 in R Creyke & J McMillan 2005, Control of
In the Council’s view, it is difficult to add to the law on this subject by developing a clear principle relating to the steps in the administrative process that are amenable to judicial review. The modern tendency has been to rely mainly on a court’s discretion to control the litigation process and to ensure that proceedings are not initiated prematurely or for a spurious or ulterior reason.

5.2.8 Decisions where there is a particular need for certainty

Chapter 4 discusses certainty about legal interpretation. What follows here concerns the uncertainty that can arise when judicial review of a decision is sought.

A characteristic of some administrative decisions is that many people will rely on them. An example is a decision to allow a building development (or demolition) to go ahead. There is a distinct public interest in the legal certainty that such a decision will not be a matter for dispute. Third parties reliant on the decision will often be unaware of any legal doubt attaching to it or, for legal or practical reasons, will not be in a position to clarify the validity of the decision.

It is difficult to argue, however, that a person adversely affected by a decision should be denied the normal opportunity the legal system provides to initiate judicial review proceedings to question the validity of the decision. The competing public interests — in legal certainty, a presumption of regularity, and the right to judicial review — can be adjusted in other ways.

One option is to require that any challenge to the validity of a decision be brought at an early stage. Unwarranted delay in seeking judicial review might be a discretionary basis for declining to grant relief. This is more likely to be so if the unwarranted delay is accompanied by third-party reliance on the validity of the decision.

The Council recognises, though, that the availability of a discretionary ground for refusing relief might not in all cases be sufficient to provide the certainty that is needed. If, for example, a third party has acted on the basis of an invalid order (say, demolished a house), that third party will still be exposed to an action for trespass and damages by contending that if the order had been challenged directly relief would have been refused. This flows from the fact that a decision made beyond jurisdiction might have no effect at law.\(^{115}\)

Another option is to impose a strict time limit on the initiation of judicial review proceedings, but this is not without difficulty either. As discussed in Chapter 3, there is doubt about whether an absolute time limit can be validly imposed in relation to the High Court’s jurisdiction under s 75(v) of the Constitution (discretionary time limits provide no real certainty).

In any event, as the example just given demonstrates, a time limit prohibiting a person from directly challenging a purported decision might not validate the purported decision. As a consequence, a time limit might not protect action taken in

\(^{115}\) See Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597, Gaudron and Gummow JJ at [53].
reliance on the purported decision where that action would be tortious if the purported decision were invalid.

In summary, it is not clear that time limits—even absolute time limits—will be effective for preventing collateral challenge to government action. In other cases, however, it has been accepted by the courts that, provided a time limit is reasonable and that it has not barred judicial review completely and has provided the necessary finality to the proceedings, it will be upheld.

In cases where it is important for third parties to be able to rely on the validity of decisions, the Council sees the appropriate course to be for a legislative statement that the decision has force and effect as though it were valid, after a reasonable period for commencing proceedings challenging the decision has passed. Legislation of this kind would allow a period for change but protect action taken in reliance on the decision after the statutory deadline has passed. This result would follow even if it were later discovered that the decision was affected by fraud.\textsuperscript{116}

This path should be pursued only if the risks to third parties\textsuperscript{117} would be significant. In such situations the need for certainty and the protection of third parties can outweigh the values underlying judicial review after a reasonable period for correction of unlawful conduct has passed. This should be an exceptional case.

5.2.9 Urgent decisions

Some decision-making powers are exercised in an urgent or emergency setting. The question that arises is whether this consideration alone should support a restriction on the right to initiate proceedings, either at the time or later, to challenge the validity of the exercise of power.

In its submission to the Council the Australian Securities and Investments Commission gave as examples its own decisions to issue interim stop orders under ss 739(3) and 1020E(5) of the Corporations Act to prevent the release of disclosure statements pending further investigation, in order to provide immediate protection to the public.

It is difficult to frame a general principle to deal with the question of whether urgency is a sufficient reason to reduce the scope of judicial review. It is better to consider each power in isolation, paying particular attention to whether the power is only ever exercised in an emergency or is also exercised in routine circumstances.

Urgency can provide a justification for limiting the scope of an obligation to provide procedural fairness. This principle has generally been accepted by courts, but with a distinct onus on the person exercising the power to point to the urgency that made it impractical to provide procedural fairness, even in an attenuated form. If a power is of a kind that is necessarily exercised in urgent situations—for example, in the national security environment—it is appropriate for the legislature to spell out the

\textsuperscript{116} Smith v East Elloe Rural District Council [1956] AC 736 and R v Environment Secretary; Ex parte Ostler [1977] 1 QB 122.

\textsuperscript{117} That is, not the decision maker or the person challenging the decision.
procedural safeguards that surround the power and to deal expressly with the extent of a decision maker’s obligation to afford procedural fairness.\footnote{118} It may be—as with the Corporations Act provision just noted—that no obligation should exist to give a hearing before an interim order is made.

These considerations do not justify a more comprehensive exclusion of judicial review on the ground of urgency. For example, there would be no reason to exclude review of decisions affected by actual bias, fraud or other mala fides.\footnote{119}

The Council agrees that courts should be slow to stay administrative decisions made for the protection of the public pending a final decision on an application for judicial review. It is, however, possible to conceive of circumstances where judicial review would be appropriate even when a decision is made purportedly in the public interest—for example, if there was cogent evidence that the decision was made on receipt of a bribe. It would be problematic to constrain the jurisdiction of courts to grant interlocutory relief in relation to decisions of that nature.

5.2.10 Decisions where adequate alternative remedies are available

As noted in Chapter 2, the High Court has discretion to refuse relief in an application for constitutional writs if it considers ‘a more convenient and satisfactory remedy exists’. As also noted, relief under the Administrative Decisions (Judicial Review) Act is likewise discretionary and the content of the discretion is in practice similar. In this context, s 10 of the Act contains an express provision dealing with situations in which there is an alternative remedy:

Rights conferred by this Act to be additional to other rights

(1) The rights conferred by sections 5, 6 and 7 on a person to make an application to the Federal Court or the Federal Magistrates Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision or in respect of a failure to make a decision:

(a) are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure; and

(b) shall be disregarded for the purposes of the application of subsection 6(3) of the Ombudsman Act 1976 and subsection 24(2A) of the Complaints (Australian Federal Police) Act 1981.

(2) Notwithstanding subsection (1):

(a) the Federal Court or the Federal Magistrates Court, or any other court, may, in a proceeding instituted otherwise than under this Act, in its discretion, refuse to grant an application for a review of a
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decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision, for the reason that an application has been made to the Federal Court or the Federal Magistrates Court under section 5, 6 or 7 in respect of that decision, conduct or failure; and

(b) the Federal Court or the Federal Magistrates Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason:

(i) that the applicant has sought a review by the court, or by another court, of that decision, conduct or failure otherwise than under this Act; or

(ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.

(3) In this section, *review* includes a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order.

The discretion conferred by s 10(2)(b)(ii) of the Act appears to be at least as wide as the common law discretion in relation to constitutional writs.

It is not necessary to state comprehensively the boundaries of that discretion, but it is convenient to note the following:

- Any alternative appeal or review rights need to be full and comprehensive.\(^ {120} \)

- Recourse to a review that has no capacity to reverse or modify the impugned decision will not be sufficient.\(^ {121} \) Recommendatory review is not a true alternative remedy.\(^ {122} \)

- An appeal limited to questions of law alone is unlikely to suffice.\(^ {123} \)

- Similarly, an appeal to a Minister without any right to a hearing or representation will probably not be sufficient to activate the discretion.\(^ {124} \)

- A review will not be a true alternative if it is subject to a leave requirement or if relief is discretionary.

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\(^ {120} \) *Furnell v Whangarei High Schools Board* [1973] AC 660.
\(^ {121} \) *Colpitts v Australian Telecommunications Commission* (1988) 14 ALD 554.
\(^ {122} \) *R v Hull Board of Visitors; Ex parte St Germain* (1979) QB 425, 448–9, 456, 465.
\(^ {124} \) *R v Spalding* (1955) 5 DLR (2d) 374.
A review may not be a real alternative to judicial review if there are onerous standing requirements or if an inappropriate onus is placed on the applicant.

A relevant question concerns the timeliness of the alternative remedy as compared with judicial review: in circumstances where time is important and the alternative remedy too slow, the remedy is unlikely to be adequate.

In *NAUV v Minister for Immigration and Multicultural and Indigenous Affairs* Justice Hely provided a brief summary of the position in relation to whether the option of merits review is an adequate alternative to judicial review:

Ordinarily, where *de novo* review on the merits is available which will resolve fully and directly any complaint which would be dealt with in judicial review, it should first be exhausted. Save in exceptional circumstances, prerogative relief will be withheld on discretionary grounds where other suitable remedies are available and have not been used. The discretion to grant prerogative relief may nevertheless be exercised where there is an error going to jurisdiction that is patent and not based on any contested or contestable facts.\(^\text{125}\)

One question the Council raised in its discussion paper was whether the principles just stated are adequate or whether the existence of an adequate alternative remedy justifies an even greater restriction on the availability of judicial review. Most respondents agreed that the availability of an adequate alternative remedy should generally result in deferring the availability of judicial review.\(^\text{126}\) Nor was there any substantial criticism of the way the existing discretion is exercised.

The Council agrees with this approach. As with any discretion, there will always be room for debate about whether the discretion has been exercised properly in a particular case. But the principles guiding the exercise of the discretion to decline to exercise judicial review jurisdiction where there is an alternative remedy are well settled and comprehensive. It is difficult to see that a legislative formula could deal with the topic more successfully. Moreover, much will depend on the circumstances of an individual case, the nature of the alternative remedy that is available, the matter under review, and the interest at stake.

Applying the principles outlined in this section, the Council considers that when dispute arises in an area where a specialist body that is capable of resolving the dispute has been established—as in the area of industrial relations—that body is almost always going to be a forum preferable to a court undertaking judicial review.

The same applies to government decisions in relation to Commonwealth public servants. The Council considers that in most instances merits review by the Merit Protection Commissioner under the *Public Service Act 1999* (Cth) is an adequate forum. To minimise the scope for successful review on the grounds of procedural fairness, procedures applicable to such review should be clearly stated and properly applied. Beyond that, the subjective nature of the decision will make it difficult for an

\(^{125}\) [2003] FCA 1319 [49].

\(^{126}\) For example, the submission to the Council by the Victorian Bar.
applicant to establish any grounds of review. Arguments for limiting judicial review that centre on the often continuing nature of employment relationships thus have little weight.

In both instances, a court’s discretion to refuse to exercise jurisdiction where there is an adequate alternative remedy is sufficient to deal with such cases, and no further restriction on the availability of judicial review is warranted.

5.2.11 Decisions where consistency in decision making is important

Another question the Council raised in its discussion paper was whether judicial review should be restricted in circumstances where it could undermine the objective of consistency in decision making. Several organisations responded to this in their submissions.\(^{127}\)

The Council gave as an example the provisions in the *Veterans’ Entitlement Act 1986* (Cth) relating to the establishment of Statements of Principle by the Repatriation Medical Authority. These Statements seek to identify factors in respect of which there is a causal connection between veterans’ exposure to them and specific injuries, diseases or death. A Statement so made is binding on decision makers and review tribunals.

This system was developed in response to the previous situation whereby different administrative decision makers would reach different conclusions on whether or not a reasonable hypothesis could be established in relation to a particular disease, injury or death in the light of the evidence presented by the applicant concerned. The result was that divergent results could be reached for fundamentally similar scientific questions.

The advantage of the Statement of Principles model is that an expert assessment is made and thereupon all veterans in a similar position are treated equally insofar as it is possible to establish a reasonable hypothesis of causation. This example illustrates the advantage of legislation or quasi-legislation in clarifying when criteria for eligibility are met. The Council sees this approach as preferable to any blanket attempt—for example, by a privative clause—to exclude review.

The purpose of the new system was to avoid the inconsistency that resulted from different analyses of factual matters or different findings of fact made on the same or different evidence. It had little, if anything, to do with judicial review or questions of law.

Is there scope for extending that model to other areas? Generally, as the Council notes in Chapter 4, one of the core values advanced by judicial review is consistency in decision making. It is necessary, however, to distinguish between the different types of questions that can arise in judicial review. The mechanism of judicial review already promotes consistency in construing and applying the law, since the ruling of

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\(^{127}\) For example, the submissions of the Victorian Bar, the Law Society of South Australia, and the Law Council of Australia.
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a court on a point of law is conclusive and binding (unless set aside on appeal); otherwise, courts have limited powers to intervene on questions of fact.

To the extent that discrepancies arise because the decision-making task involves complex questions of fact about which minds might reasonably differ, judicial review therefore has little or no role to play in resolving this problem. The model adopted in connection with veterans’ entitlements serves as a good example of how consistency on factual questions can be engineered, but there is arguably a limit to the situations in which this model can be applied.

An important characteristic of the veterans’ model is that it is dealing with ascertainment of facts in the relatively well established scientific and medical fields.\(^\text{128}\) In contrast, in decision making relating to refugees, for example, the social and political circumstances of a nation from which someone seeks refuge can be so dynamic that the use of binding statements that must be applied by all decision makers, regardless of the circumstances of a particular case, would be inadvisable.

5.2.12 Decisions where judicial review is sought on grounds of unreasonableness or procedural unfairness, failure to have regard to relevant considerations or having regard to irrelevant considerations

As already noted, some grounds of review involve a considerable degree of flexibility and uncertainty and provide for decision makers little guidance about the limits of their authority. One approach to restricting judicial review is to create a statutory scheme that includes some, but not all, the common law grounds for review. This approach was tried in the Migration Act, which provided that judicial review was available in the Federal Court on specific grounds but not on others. There were four grounds on which judicial review was unavailable:

- denial of procedural fairness, except as to actual bias
- unreasonableness
- failure to have regard to relevant considerations
- having regard to irrelevant considerations.

The ambit of these grounds of review can be difficult to state in any definitive or comprehensive fashion.\(^\text{129}\) For example, many statutes do not make explicit the considerations a decision maker is bound to have regard to and those that the decision maker is bound not to have regard to. This means that a court will be left to determine the scope of review by reference to the object, scope and subject matter of the enactment concerned. The same can be said of the common law rules of

\(^{128}\) This view was expressed in a number of submissions, among them that of the Law Council of Australia.

\(^{129}\) Nonetheless, as observed in the submission of the Honourable the Chief Justice of the Federal Court of Australia, Michael Black AC, the fact that ‘except in the most unusual and isolated cases, a court does not re-decide the case on the merits but remits it to the decision maker for decision on the merits according to law’ represents a strong argument for not legislatively limiting judicial review on this basis.
procedural fairness, which impose requirements that may differ from one case to the next and often supplement the decision-making code set out in legislation.

Although the difficulties these grounds can pose for decision makers must be acknowledged, to remove the grounds from a scheme of judicial review would raise other difficulties. In the federal arena, it is still open to a person to commence proceedings in the original jurisdiction of the High Court conferred by s 75(v) of the Constitution. It is possible that review will be available in that forum on a ground excluded from the jurisdiction of another federal court—at least if the error is jurisdictional in nature. This was the result in *Aala*¹³⁰, in which an unsuccessful applicant for a protection (refugee) visa was able to seek judicial review in the High Court (but not the Federal Court) on the ground of denial of procedural fairness.¹³¹

Another difficulty with restricting the grounds of judicial review is that there is overlap between those grounds. It is thus possible that a ground that is available substantially overlaps with an excluded ground. Once again, this was held to be the case in relation to the restricted scheme for judicial review in the Migration Act. In *Yusuf*¹³² the High Court held that one of the grounds available under the Act (that the decision maker ‘did not have jurisdiction to make the decision’) included errors that were jurisdictional in nature, such as failure to consider relevant matters, which was a ground otherwise excluded from the migration scheme.

An alternative approach is to state more clearly in legislation the legal requirements for exercising a power—for example, to elaborate the factors that must be considered and those that must not be when making a decision. This gives clearer guidance to a decision maker and thus lessens the possibility of a decision being set aside on the relevant/irrelevant ground of review, without formally attempting to exclude those grounds from the scheme for judicial review.

The same observations can be made in relation to procedural fairness. Although it would be difficult to codify exhaustively the content of procedural fairness¹³³, legislation could specify a range of matters relating to procedural duties that substitute for common law principles governing the same subject matter. For example, legislation could identify who is entitled to a hearing and who is not, what information needs to be disclosed to a person affected and what need not, and what procedures are to be applied at the hearing; it could also impose time limits for the taking of specified procedural steps. Such provisions could be drafted so as to exclude any contrary or supplementary obligations that might otherwise be imposed.

The practical limitations of this approach must nevertheless be acknowledged, so far at least as the obligation to observe procedural fairness is concerned. It is not possible to predict all the circumstances that can be thrown up in the human experience. For

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¹³⁰ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

¹³¹ This was the experience in the migration context when the Federal Court’s jurisdiction excluded certain grounds of review.


¹³³ Moreover, as noted in several submissions to the Council, including that of the Victorian Bar, legislative attempts to codify or restrict grounds of review do not necessarily result in greater certainty. As also noted in the submission of Timothy Ginnane, the grounds of review are continually evolving.
example, a decision maker might inadvertently mislead a person in a way that prevents the person from making use of a statutory procedure in order to put the case. Whether relief should be given might depend on how important the procedure was and what the person would have done had that person not been misled. It would be difficult, if not impossible, to deal with all such cases by a general provision. And, of course, a general provision of this nature would pose the same difficulties for decision makers as the current common law principles of procedural fairness.

In the Council’s view, procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances. It is consistent with this goal and entirely appropriate—even desirable—to legislate to specify the procedural obligations of decision makers in areas where the requirements of procedural fairness are not sufficiently certain. It is inadvisable, however, to try to do this in a way that will cover all aspects of procedural fairness: this is not likely to be possible. Any attempt to codify exhaustively principles in this context would probably involve an exclusion of relief in relation to unforeseen circumstances, which does nothing to promote the objective of fairness.\(^\text{134}\)

The question of unreasonableness is perhaps most problematic of all. Attacks on this ground do not generally arise because the law is uncertain or because the decision maker is uncertain about his or her obligations. Rather, they usually arise because a person strongly contests the logic, rationality, proportionality or correctness of an exercise of discretion or finding of fact. It is unlikely that clearer legislation would redress these sorts of concerns. Once again, though, there is a practical answer to the concerns that are often raised, since the ground of unreasonableness (while often argued) rarely succeeds.

There are many judicial statements to the effect that a court should be slow to set aside a decision on the ground of unreasonableness. To do so runs the risk of substituting the view of the court for that of the decision maker on a matter of judgment in relation to which there is scope for differing views. Nevertheless, it is generally accepted in administrative law that it is appropriate that a decision that is unreasonable—in the sense that the decision, finding or exercise of discretion was so unreasonable that no reasonable decision maker could have reached that conclusion—should be able to be set aside in judicial review proceedings. This is because it is a proper implication that Parliament intends the powers it confers to be exercised reasonably.\(^\text{135}\) An exercise of power that fails that test is not a lawful exercise of power.

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\(^{134}\) This was recognised, for example, in submissions, including that of the Law Society of South Australia. It has been given emphasis by the three-two majority decision of the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA (18 May 2005), where it was held by the majority of the court that the Refugee Review Tribunal had failed to comply with s 424A of the *Migration Act 1958*, which it held set out mandatory steps to accord procedural fairness.

\(^{135}\) *Kruger v Commonwealth* (1997) 190 CLR 1, Brennan J at 36.
6 Concluding comments and the framework of indicative principles

In this report the Council considers the desirable scope of judicial review against the background of the nature of the judicial review process, its constitutional significance and content, the administrative law values it espouses, and the avenues open to Parliament to reduce or vary its scope.

Chapter 3 illustrates that it is possible for Parliament to cut back the scope of judicial review jurisdiction it has previously created or to seek to minimise the scope of judicial review practically available, including under s 75(v) of the Constitution. The chapter documents a range of mechanisms Parliament has used to do this and stresses the importance of clarity and specificity in the drafting of legislative provisions designed to act on the availability of judicial review.

The focus of Chapter 5 is the extent to which it is appropriate for Parliament to seek to reduce the scope or practical availability of judicial review. The Council’s views on this are encapsulated in the following framework of indicative principles relevant to when judicial review might appropriately be limited.

As noted, for the purposes of this report the Council takes the public law values that underlie judicial review to be the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation.

These values are reflected in Chapter 5 and in the framework of indicative principles, together with the Council’s acceptance that, in some limited circumstances, the values can be advanced by means other than judicial review and that there are other important legal and governmental values that might at times conflict with those underlying judicial review.

The principles and the report as a whole reflect the Council’s view that the values are fundamental and that the strongest reasons would be needed if judicial review were to be reduced in a way that might allow unlawful conduct to proceed without any kind of remedy.

The framework of indicative principles is intended to provide a quick guide to the circumstances in which restrictions on judicial review can be justified. It should be read in conjunction with the more detailed discussion elsewhere in the report, particularly in Chapters 3 and 5.

Although the framework does not purport to cover all claimed justifications for limiting the scope of judicial review, when read in combination with the report as a whole, it can provide broad-based guidance beyond the parameters of the arguments that it deals with specifically.
As in Chapter 5, the Council’s response in the framework to claimed justifications for limiting judicial review is directed at arguments for limiting judicial review both at common law and under the Administrative Decisions (Judicial Review) Act.

In the Council’s view, there are particular advantages in maintaining the availability of review under the Administrative Decisions (Judicial Review) Act as well as under common law. Importantly — unlike the position at common law — the Act requires decision makers to provide for review applicants statements of reasons for their decisions. Additionally, the grounds of review under the Act are in some respects wider and, as a result of extensive judicial consideration, better defined than those at common law. These considerations can be of great assistance to applicants in establishing a claim for judicial review.
### Limiting judicial review: a framework of indicative principles

<table>
<thead>
<tr>
<th>Types of decisions</th>
<th>Claimed justification for limiting judicial review</th>
<th>Are limits on judicial review justified?</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions in relation to criminal, civil penalty or extradition proceedings</td>
<td>Potential fragmentation of proceedings, abuse of process</td>
<td>Yes</td>
<td>Limiting the availability of judicial review will not encroach on the rule of law: accountability and protection of individual rights can be ensured through the criminal justice process, which enables legal questions about the validity of the process to be raised both in the trial and on appeal. Questions about consistency and certainty inherent in the judicial process can also still be accommodated.</td>
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<tr>
<td>Decisions where there is neither a right to a benefit nor a duty on the decision maker to consider conferring a benefit</td>
<td>The benefit differs in kind from other legal rights and is created as part of a scheme that contains other safeguards</td>
<td>In most cases</td>
<td>By its nature, such a decision is one to be exercised, if at all, in exceptional circumstances and does not confer any right or give rise to any legitimate expectation as to its exercise. There are other means of accountability to control executive decision making in such circumstances—for example, periodic or annual reports to Parliament, periodic review of legislation, tabling of decisions in Parliament, and other mechanisms of the parliamentary process. Judicial review should be available where such power is exercised in bad faith or for an improper purpose.</td>
</tr>
<tr>
<td>Urgent decisions</td>
<td>The need for urgency in making or implementing the decision</td>
<td>Sometimes</td>
<td>Courts are well placed to decide whether the principles of judicial review need adaptation to take account of the circumstances of a particular case. If a statutory power will always be exercised in urgent circumstances, the legislative scheme can be framed with this in mind—for example, to spell out minimum procedural fairness requirements. Some legal requirements, such as absence of actual bias, fraud or other mala fides, should apply in all circumstances.</td>
</tr>
<tr>
<td>Decisions involving polycentric factors—that is, decisions that involve the distribution of limited resources among one or more applicants for those resources</td>
<td>The decision might be based on a multiplicity of factors that are beyond judicial cognisance. Judicial review might result in delays that could cause practical frustrations</td>
<td>Sometimes</td>
<td>Judicial review does not extend to the merits of the decision. A court will be guided by the nature of the legislative scheme and the importance of not undermining a policy or planning process, and it is possible that the court will find the matter non-justiciable. Careful drafting of legislation can minimise potential practical difficulties. Because decisions of this kind would generally fall within the High Court’s original jurisdiction under s 75(v) of the Constitution, a complete removal of judicial review is not possible, and the need to develop a different approach for controlling judicial review becomes all the more important.</td>
</tr>
<tr>
<td>Decisions where adequate alternative remedies are available</td>
<td>Judicial review is unnecessary</td>
<td>Sometimes</td>
<td>There are well-developed principles by which a court may decline on discretionary grounds to undertake judicial review. The discretion finds legislative expression in s 10(2)(b)(iii) of the Administrative Decisions (Judicial Review) Act 1977. Imposing additional legislative limitations on the discretionary process of the courts could impair the process or lead to failure to anticipate novel circumstances.</td>
</tr>
<tr>
<td>Decisions where there is a particular need for certainty</td>
<td>Adverse impact of judicial review on people affected by a decision, including third parties</td>
<td>Sometimes</td>
<td>Legislation can give certainty to executive processes—for example, by providing that a decision will have effect as though it is valid after the passage of a reasonable period for challenging the decision without directly seeking, and to the extent constitutionally possible, to limit judicial review.</td>
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</table>
### Types of decisions

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<td>Decisions where judicial review is sought on the ground of procedural fairness</td>
<td>Ground of review provides for decision makers little guidance on the limits of their authority</td>
<td>Sometimes</td>
<td>Procedural fairness should be an element in decision making in all contexts, although what is fair will vary with the circumstances. Flexibility enables courts to fashion the requirements of procedural fairness to reflect the circumstances of each case. Although this can lead to uncertainties for decision makers, legislation can override the general law requirements of procedural fairness and specify the requirements for a particular situation. There is, however, a risk that the legislation will have a limiting effect that disadvantages applicants in certain instances.</td>
</tr>
<tr>
<td>Decisions where judicial review is sought on grounds of unreasonableness, failure to have regard to relevant considerations, or having regard to irrelevant considerations</td>
<td>Grounds of review provide for decision makers little guidance on the limits of their authority</td>
<td>Sometimes</td>
<td>It is difficult to exclude these grounds: they embody a broader principle that legislation must be understood and applied correctly to the facts of a case. An alternative approach is to control how these grounds apply by clearly specifying in legislation the legal requirements for the exercise of a power. It is not easy to exclude from the jurisdiction of the High Court under s 75 of the Constitution grounds that embody the obligation to apply legislation correctly.</td>
</tr>
<tr>
<td>Decisions about policy</td>
<td>The executive branch of government, rather than the judiciary, is best placed to determine policy matters</td>
<td>Sometimes</td>
<td>A court is not concerned with policy as such; rather, it is concerned with determining whether a policy has been lawfully adopted and applied. If there is no judicially manageable standard for making that determination, a court is likely to find the matter non-justiciable—for example, if the policy being applied relates to treaty making, the conduct of foreign policy, some budgetary and financial decisions, and matters of national security.</td>
</tr>
<tr>
<td>Decisions that are not final or operative decisions</td>
<td>If every step in the administrative process is reviewable, efficient decision-making processes will be frustrated and fragmented</td>
<td>Sometimes</td>
<td>Courts have developed restraints to take account of this consideration and generally undertake judicial review only if an operative decision has been made that affects the rights or interests of a person. Attempts to legislate further controls would not result in greater clarity.</td>
</tr>
<tr>
<td>Decisions of a subordinate legislative character</td>
<td>The breadth of the discretion makes judicial review difficult to apply</td>
<td>No</td>
<td>The fact that a decision is legislative in nature does not of itself provide a justification for reducing the scope of judicial review. Although the grounds of review might not apply as readily, that is a consequence of the nature of the function under review.</td>
</tr>
<tr>
<td>Decisions where consistency in decision making is important</td>
<td>Judicial review can undermine the objective of consistency in such decisions</td>
<td>No</td>
<td>Judicial review is concerned only with questions of law, so it does not preclude consistency in factual or policy matters. Legislation can limit the adverse impact of judicial review on decision-making processes by clearly defining the parameters for the exercise of an administrative discretion.</td>
</tr>
<tr>
<td>Decisions that are subject to unmeritorious challenge or where delay is an end in itself</td>
<td>Strong public policy grounds such as an unwarranted burden on the courts and unnecessary expense to the community</td>
<td>No</td>
<td>Blanket removal of judicial review would affect all applicants, including those with meritorious claims. In some areas it is possible, legislatively, to remove the incentive to use judicial review as a deferral mechanism—as, for instance, under the Income Tax Assessment Act 1936. In other situations this argument can be resolved by enabling the courts to dispose of unmeritorious applications at an early stage in the proceedings, as is provided for in the Migration Litigation Reform Act 2005.</td>
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Appendix A

Section 51 of the Administrative Appeals Tribunal Act

Section 51 of the Administrative Appeals Tribunal Act 1975 (Cth) describes the functions of the Administrative Review Council:

(1) The functions of the Council are:

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in
respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

(2) The Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions.

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.
Appendix B  Submissions received

The Council received submissions from the following individuals and organisations in response to its discussion paper on the scope of judicial review:

- Justice John Goldring, District Court of New South Wales
- Mr Ernst Wilheim, Law Program, Research School of Social Sciences, Australian National University
- Emeritus Professor Enid Campbell, Faculty of Law, Monash University
- Mr Michael O’Loghlen QC
- Acting Chief Justice Murray, Supreme Court of Western Australia
- the Law Society of New South Wales
- the Department of Immigration and Multicultural Affairs
- the Victorian Bar
- Mr Timothy Ginnane, barrister
- Mr Harbinder Kharbanda
- the Australian Securities and Investments Commission
- Mr John Griffiths SC
- Ms Maureen Tagney, Acting Privacy Commissioner, New South Wales
- the Law Society of South Australia
- the Hon Chief Justice Michael Black AC, Federal Court of Australia
- the Department of the Environment and Heritage
- Ms Anita Dragovic
- the Administrative Law Committee, Law Council of Australia

The Council also thanks the Hon Chief Justice Michael Black AC and the Hon Justice Robert French of the Federal Court of Australia for participating in a video conference with Council and the Council’s Executive Director on 23 September 2003.