

# SHOULD WE FOLLOW THE GOSPEL OF THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977 (CTH)?

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*[The Administrative Decisions (Judicial Review Act) 1977 (Cth) marked a radical reform of judicial review of administrative action in Australia. The Act introduced a statutory procedure for judicial review which was designed to provide a better alternative to judicial review at common law. The Act simplified the procedure for judicial review applications, codified the grounds of review and introduced important new rights such as the right to reasons for decisions amenable to review under the Act. In the first decade or so of its operation, the Act became the primary vehicle for judicial review at the federal level. It also served as a model for reform for several states and territories, which enacted judicial review statutes that were based closely on the federal statute. This article examines why the influence of the Act has faltered in recent years. It concludes that some parts of the Act should be radically reformed, so that statutory judicial review at the federal level may once again provide the simple and attractive avenues of review that were its original purpose.]*

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## I INTRODUCTION

The enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') was an important milestone in the evolution of Australian administrative law. The *ADJR Act* was a central part of a series of sweeping reforms to administrative law at the federal level and a remarkable reform in its own right. The *ADJR Act* was the first Australian attempt to codify both the law and much of the procedure of judicial review in Australia. The Act introduced a unified and single test for standing and a right to reasons for decisions, codified the grounds of judicial review and contained a simple provision governing remedies. This new statutory avenue of judicial review provided a vastly simpler alternative to judicial review at common law and was for many years regarded as a great success.

One measure of the success of the *ADJR Act* was the influence it exerted over the law of the states and territories. A version of the Act was adopted without substantial modifications in the Australian Capital Territory, Queensland and Tasmania.<sup>1</sup> But the spread of the *ADJR Act* faltered. The introduction of *ADJR Act*-style legislation was proposed but ultimately rejected in Victoria in 1999<sup>2</sup> and Western Australia in 2002.<sup>3</sup> The adoption of any form of judicial review statute has never been publicly advocated by the governments or law reform agencies of New South Wales, South Australia or the Northern Territory.<sup>4</sup>

On the 25<sup>th</sup> anniversary of the report<sup>5</sup> that led to the introduction of the reforms to administrative law, including the *ADJR Act*, Lindsay Curtis noted the 'comparative failure of the gospel of the new administrative law to take root in other jurisdictions.'<sup>6</sup> That comment implied that the *ADJR Act* was a desirable reform that has since lost its sheen, though it shed little light on the reasons why that might be the case. This article examines the operation of the *ADJR Act* and considers whether a statute of the same nature should be adopted in those Australian jurisdictions that do not have a judicial review statute. The article also considers a neglected aspect of the *ADJR Act*, which is the remarkably static nature of its core features. The state and territory versions of the *ADJR Act* are, with some small exceptions, very closely modelled on their federal counterpart.

<sup>1</sup> See *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas).

<sup>2</sup> See Peter Bayne, *Judicial Review in Victoria* (Expert Report No 5, Victorian Attorney-General's Law Reform Advisory Council, 1999).

<sup>3</sup> Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions*, Project No 95 (2002) 26.

<sup>4</sup> In New South Wales, South Australia and the Northern Territory, judicial review is available only in its common law form, as governed by rules of court. A similar common law jurisdiction also remains available as a parallel or default avenue of review in those jurisdictions that have introduced some form of statutory judicial review. The nature of those different jurisdictions is explained in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4<sup>th</sup> ed, 2009) 20–8.

<sup>5</sup> Commonwealth, *Commonwealth Administrative Review Committee: Report*, Parl Paper No 144 (1971) ('*Kerr Committee Report*').

<sup>6</sup> Lindsay Curtis, 'The Vision Splendid: A Time for Re-Appraisal' in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 36, 52.

Although the Act has been reviewed and refined in many ways over the years,<sup>7</sup> the core features of the Act and its counterparts in other jurisdictions remain unchanged. This article also considers several key deficiencies in the *ADJR Act* model and proposes several reforms to improve the *ADJR Act* should it be adopted in other Australian jurisdictions. It will be argued that the key jurisdictional formula of the *ADJR Act*, which determines the decisions to which the Act applies, should be replaced with a radically different formula.

## II THE STRUCTURE AND OPERATION OF THE *ADJR ACT*

The wider reforms to federal administrative law of which the *ADJR Act* was a part included the creation of the Commonwealth Ombudsman, freedom of information legislation and the Commonwealth Administrative Appeals Tribunal ('AAT').<sup>8</sup> It could be argued that the *ADJR Act* can only be fully understood by reference to the creation of the AAT. More particularly, the simplified form of judicial review introduced by the *ADJR Act* operates in tandem with the relatively simple right of merits review by the AAT. In many areas of administrative decision-making, particularly those such as social security, migration and taxation, in which a large number of administrative decisions are made, it is likely that people granted a right to seek both merits and judicial review of decisions would often exercise their right of merits review. Merits review is, after all, intended to provide a quicker, simpler and cheaper alternative to judicial review.<sup>9</sup>

This reference to the role of merits review is not intended to suggest that the *ADJR Act* was narrow in focus or limited in its effect. The *ADJR Act* caused a sea-change in judicial review of administrative action. It introduced a uniform test for standing<sup>10</sup> and a streamlined remedy in the form of an order to review that could be invoked to perform the functions of one or more of the prerogative or equitable writs traditionally sought in administrative law proceedings.<sup>11</sup> The *ADJR Act* also introduced a general right to reasons for decisions to which the Act applied, including a procedure to rectify inadequate reasons without the need

<sup>7</sup> The Administrative Review Council ('ARC') has examined aspects of the *ADJR Act* in the following reports: ARC, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No 1 (1978); ARC, *Review of the Administrative Decisions (Judicial Review) Act 1977 — Stage One*, Report No 26 (1986); ARC, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989); ARC, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991). Aspects of the *ADJR Act* and the wider context within which it operates were also considered by the ARC in ARC, *The Scope of Judicial Review*, Report No 47 (2006).

<sup>8</sup> The development of the *ADJR Act* and other contemporaneous reforms to administrative law are detailed in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998).

<sup>9</sup> Robin Creyke has noted that while merits review is seen as a cornerstone of the AAT, the concept was not mentioned in either the various inquiries and reports that led to the establishment of the AAT or the *Administrative Appeals Tribunal Act 1975* (Cth) itself: Robin Creyke, 'Administrative Tribunals' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 77, 83.

<sup>10</sup> Under *ADJR Act* ss 5–7, judicial review is available to 'a person aggrieved', which is defined in s 3(4).

<sup>11</sup> *Ibid* s 16.

to commence a substantive application for review.<sup>12</sup> This aspect of the *ADJR Act* was amplified by subsequent law confirming that the statutory right to reasons should be interpreted liberally.<sup>13</sup> Since the High Court's emphatic refusal to recognise a common law right to reasons for administrative decisions,<sup>14</sup> the right conferred by the *ADJR Act* has arguably assumed greater significance.<sup>15</sup> The benefit of the statutory right to reasons and other procedural reforms in the *ADJR Act* was immediately apparent. The creation of a simpler statutory form of judicial review clearly facilitated access to the courts and enabled individuals to challenge administrative action which adversely affected their interests.<sup>16</sup> During the first decade after its enactment, the *ADJR Act* was the leading avenue of judicial review and clearly exerted great influence over Australian administrative law.<sup>17</sup> By contrast, the limitations or defects in the *ADJR Act* were less obvious and took some time to become fully apparent.<sup>18</sup> These difficulties may be conveniently divided into the following three categories: the scope of the Act, which includes the statutory formula to determine decisions that are amenable to review and also the express exclusion of some decisions and decision-makers from the Act; the codification of the grounds of review; and the absence of any guiding philosophy or overarching principle within the Act.

A separate problem which is outside the *ADJR Act* and which ultimately may prove to be the most significant challenge to the Act is the jurisdiction granted to the High Court by ss 75(iii) and (v) of the *Constitution*.<sup>19</sup> These provisions invest the High Court with a judicial review jurisdiction that parallels, and in many aspects, exceeds that of the *ADJR Act*. These avenues of judicial review have

<sup>12</sup> Ibid s 13. The first report of the ARC rejected suggestions that reasons only be available upon lodging an application for review on the grounds that this would be costly, time consuming and at odds with the remedial nature of the Act: ARC, *Exclusions under Section 19*, above n 7, 16–17 [29]–[30].

<sup>13</sup> See, eg, *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162, 177–9 (French J); *Allen Allen & Hemsley v Australian Securities Commission* (1992) 27 ALD 296, 304 (Ryan J). It is also clear that the exceptions to the right to reasons under the *ADJR Act* (which are contained in sch 2 of the Act) are interpreted narrowly: *Secretary, Department of Foreign Affairs and Trade v Boswell* (1992) 36 FCR 367, 377 (Hill J).

<sup>14</sup> See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

<sup>15</sup> See, eg, *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 583 [47], where Downes J stated:

The most significant right introduced into the law by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was not so much the right to judicial review itself, which was broadly available at common law, but the right to be furnished with comprehensive reasons which was conferred by s 13 of the Act.

<sup>16</sup> Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 123.

<sup>17</sup> A slightly different view is taken by Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 96. Those authors suggest that while the *ADJR Act* model has 'deeply influenced the way administrative lawyers think about judicial review, it has not supplanted the common law remedial model.'

<sup>18</sup> Though the decline in use of the *ADJR Act* may have been due in large part to the increased restrictions placed on the scope of that Act, particularly in successive migration statutes which precluded recourse to the *ADJR Act* to challenge migration decisions: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157] (Kirby J).

<sup>19</sup> This federal jurisdiction, and the associated and accrued jurisdiction that accompanies it, is explained in Aronson, Dyer and Groves, above n 4, 29–52.

assumed a central role in federal administrative law proceedings following the increasing use of privative clauses in federal legislation.<sup>20</sup> The constitutionally entrenched right to relief in s 75(v) of the *Constitution* provides an ‘entrenched minimum provision of judicial review’ that cannot be narrowed or removed by legislation.<sup>21</sup> Accordingly, it applies to cases that fall outside the jurisdictional formula of the *ADJR Act* and instances where the *ADJR Act* has been expressly excluded. A parallel right of review is vested in the Federal Court by ss 39B(1) and (1A) of the *Judiciary Act 1903* (Cth) (*‘Judiciary Act’*).<sup>22</sup> A crucial part of the Federal Court’s jurisdiction for judicial review of administrative action is the grant to the Court of original jurisdiction ‘in any matter ... arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.’<sup>23</sup>

Neither avenue of review is limited by the jurisdictional formula of the *ADJR Act* (which is explained in later sections of this article) and can therefore be invoked in more situations than the *ADJR Act*. In particular, each can apply beyond the category of administrative decisions to which the *ADJR Act* is limited. But each has its own disadvantages. Neither avenue provides a right to reasons for decisions or actions to which they apply.<sup>24</sup> Neither has given rise to innovative new principles of review or a body of doctrine that might guide the development of the substantive principles of judicial review.<sup>25</sup> Many aspects of each avenue of review are uncertain. Some are relatively technical issues, such

<sup>20</sup> The remedies issued under s 75 of the *Constitution* are now commonly described as constitutional writs. One feature of the rising importance of s 75 is the possible relationship between s 75(iii) and (v). The possibility that the latter might not significantly add to the former was raised by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 [18]. It is useful to note that the jurisdiction conferred upon the Federal Court by ss 39B(1) and (1A) of the *Judiciary Act 1903* (Cth) adopts the language of s 75(v) of the *Constitution*.

<sup>21</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). The High Court has since made clear that an equivalent of this minimum entrenched standard of review also applies at the state level because the integrated nature of Australia’s judicial system precludes the states from either altering their constitutions or the essential character of their Supreme Courts so that they no longer fulfil the requirements of a ‘Supreme Court of a State’ for the purposes of the appellate jurisdiction of the High Court in s 73 of the *Constitution*: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 566–7 [55], 579 [93], 581 [100], 582–3 [105]–[107] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Heydon J dissented, but agreed ‘with the substance of the reasoning’ of the other Justices: at 585 [113]. The likely effect of this reasoning will be to secure a minimum entrenched standard of review at the state level, though perhaps not to the same extent as exists at the federal level, in view of the court’s acceptance that some degree of restriction on review remain possible: at 581 [100].

<sup>22</sup> That jurisdiction is explained in Justice Allsop, ‘Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002’ (2002) 23 *Australian Bar Review* 29; Alan Robertson, ‘The Administrative Law Jurisdiction of the Federal Court — Is the *AD(JR) Act* Still Important?’ (2003) 24 *Australian Bar Review* 89.

<sup>23</sup> *Judiciary Act* s 39B(1A)(c).

<sup>24</sup> This is a common law principle that could be overturned, either by statute or by a direct challenge to current common law authority.

<sup>25</sup> A point conceded in John Basten, ‘Constitutional Elements of Judicial Review’ (2004) 15 *Public Law Review* 187, 201. Basten concludes that the High Court’s interpretive approach enables it to construe legislation so as to avoid many difficult questions, which thereby relieves it of the need to confront directly the question of whether the *Constitution* contains ‘some immutable core of administrative justice’.

as the precise scope of the Federal Court's remedial powers under the *Judiciary Act*.<sup>26</sup> But other more substantive issues also remain unsettled, such as the exact relationship of the High Court's original jurisdiction under s 75(v) of the *Constitution* to other aspects of the Court's jurisdiction.<sup>27</sup> These various uncertainties and the different formulae of each avenue of review add a technical and complex overlay to judicial review at the federal level.<sup>28</sup> At the same time, however, it is plain that each avenue of review is important, and often far more so than the *ADJR Act*.<sup>29</sup> It is against the background of the flaws in the *ADJR Act* which have become apparent over time, and the constitutionally based jurisdiction that operates in parallel to the Act at the federal level that the following analysis must be considered.<sup>30</sup>

### III THE SCOPE OF THE *ADJR ACT*

#### A *The Jurisdictional Formula of the ADJR Act*

The *ADJR Act* applies to 'decision[s]' of 'an administrative character' made 'under an enactment',<sup>31</sup> as well as 'conduct engaged in for the purpose of making [such] a decision'.<sup>32</sup> This jurisdictional formula is quite different from that of s 75(v) of the *Constitution*, which grants the High Court original jurisdiction to

<sup>26</sup> One issue, for example, is how the remedial powers granted to the Federal Court under the *ADJR Act* and s 39B(1A)(c) of the *Judiciary Act* compare. In an interesting discussion in *McGowan v Migration Agents Registration Authority* (2003) 129 FCR 118, 125–8 [21]–[35], Branson J suggested that the Federal Court's remedial powers under the *Judiciary Act* might be wider. The Australian Law Reform Commission has made various recommendations to clarify aspects of the jurisdiction invested in the Federal Court by the *Judiciary Act*: see Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 2 (2001) ch 4. These recommendations have not been implemented.

<sup>27</sup> There are many judicial remarks suggesting a possible overlap between s 75(iii) and (v) of the *Constitution*: see, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179 (Mason CJ), 204 (Deane and Gaudron JJ), 221 (Dawson J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 (Gaudron and Gummow JJ).

<sup>28</sup> A point made about the jurisdiction of the High Court and Federal Court respectively in Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 122; Michael Taggart, "'Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 6.

<sup>29</sup> Robertson has explained that the rights conferred by the *Judiciary Act* mean that the *ADJR Act* 'is not as important as inexperienced pleaders appear to think': Robertson, above n 22, 100.

<sup>30</sup> The jurisdiction invested in federal courts by ss 39–39B of the *Judiciary Act* is not, of course, constitutionally entrenched but it is clearly modelled on the jurisdiction in s 75(v) of the *Constitution*. The sections are part of a wider scheme to enable matters that do not contain a question of constitutional or other general importance to be either remitted to a lower federal court, if commenced in the original jurisdiction of the High Court, or commenced directly in those courts. It appears that any power of remittal must have a statutory basis. A majority of the High Court rejected an argument that there may be an implied constitutional basis for the High Court's power of remittal of matters to lower courts in *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 621–5 [32]–[47] (Gleeson CJ, Gummow and Hayne JJ), 656–7 [172]–[177], 659–63 [184]–[199] (Heydon, Crennan and Kiefel JJ). Kirby J accepted that such an implied power was an 'arguable concept' but ultimately found the argument was not made out in the case at hand: 643–4 [116]–[119].

<sup>31</sup> *ADJR Act* ss 5, 3(1) (definition of 'decision to which this Act applies').

<sup>32</sup> *Ibid* ss 6, 3(5).

issue remedies against ‘an officer of the Commonwealth’.<sup>33</sup> In *Griffith University v Tang* (‘*Tang*’), Gummow, Callinan and Heydon JJ noted that the *ADJR Act* formula focused on the source of power of the decision-maker, while s 75(v) focused on the identity of the decision-maker.<sup>34</sup> Their Honours suggested that this distinction had given rise to continued uncertainty about the precise scope of the *ADJR Act*.<sup>35</sup>

#### 1 ‘Decisions’ and ‘Conduct’

The distinction drawn in the *ADJR Act* between ‘decisions’ and ‘conduct engaged in for the purpose of making decisions’ has given rise to a technical body of law that seeks to distinguish one from the other.<sup>36</sup> In the leading case of *Australian Broadcasting Tribunal v Bond* (‘*Bond*’), Mason CJ stated that a decision had a ‘final or operative and determinative’ quality which distinguished it from conduct.<sup>37</sup> Mason CJ rested this restricted definition of decision on the distinction drawn between decisions and conduct in the *ADJR Act* and the possible fragmentation of the administrative process that his Honour feared might occur by taking a wide approach to ‘decisions’ for the purposes of the Act.<sup>38</sup> The logical implication of this approach is that ‘decision’ should be given a limited interpretation in order to preserve some scope for the provisions that enable review of ‘conduct’. In other words, the inclusion in the *ADJR Act* of provisions enabling review of both conduct and decisions requires an approach to each that recognises the existence of the other. The distinctions drawn in *Bond* precipitated a long line of cases that have been described as very technical and sometimes absurd.<sup>39</sup>

A possible solution is to collapse the availability of review of both decisions and conduct into one concept, so that review on the grounds specified in the *ADJR Act* could be sought of either ‘decisions or conduct’. A reform of this nature would remove the current distinction between decisions and conduct related to a decision. It would not expand the scope of review under the *ADJR Act* but would instead remove the need to categorise the administrative action under challenge as either a decision or conduct. A reform of this nature would sweep aside the technicalities arising from *Bond*.

<sup>33</sup> The Federal Court and Federal Magistrates Court are granted jurisdiction in equivalent terms under s 39B(1) of the *Judiciary Act*. For this reason, the remarks in this section about the differences between the jurisdictional formula under the *ADJR Act* and s 75(v) of the *Constitution* apply equally to the *ADJR Act* and the *Judiciary Act*.

<sup>34</sup> (2005) 221 CLR 99, 113 [29].

<sup>35</sup> *Ibid.*

<sup>36</sup> The *ADJR Act* enables review of decisions under s 5 and review of conduct related to decisions under s 6. Both are subject to the same grounds of review.

<sup>37</sup> (1990) 170 CLR 321, 337.

<sup>38</sup> *Ibid.* 341–2. See also Cane, above n 28, 129, where it is suggested that Mason CJ was also anxious to distinguish between judicial and merits review.

<sup>39</sup> See Cane and McDonald, above n 17, 57.

## 2 'Administrative Character'

The definition of 'administrative' has proved relatively simple, at least in comparison to other elements of the *ADJR Act* formula. The term is intended to exclude decisions of a legislative or judicial nature, though it is recognised that there is an inherent level of 'instability of the distinctions' in the principles devised to distinguish administrative and other decisions.<sup>40</sup> It also seems clear that the allocation of a decision to one category or another requires reference to a range of factors, the application of which will depend in large part upon the context of each case.<sup>41</sup> Decisions that might be categorised as legislative for the purpose of determining jurisdiction under the *ADJR Act*, such as the promulgation of guidelines of general application,<sup>42</sup> may still be reviewed in an application commenced under the *Judiciary Act*.<sup>43</sup> The availability of alternate avenues of review for such decisions begs the question of why they are excluded from the scope of the *ADJR Act*.<sup>44</sup> There seems to be no clear reason for this distinction. The *ADJR Act* model could be simplified if it were not limited to administrative decisions and conduct. An obvious solution would be to allow for review of decisions or conduct, without any reference or limitation to decisions or conduct of an administrative character.

## 3 'Under an Enactment'

The reference in *Tang* by Gummow, Callinan and Heydon JJ to the doctrinal confusion surrounding the formula of the *ADJR Act* was ironic given that their Honours' reasoning in that case was seen by many as having increased that very confusion.<sup>45</sup> For present purposes, it is sufficient to provide a brief outline of *Tang* and its immediate predecessor in the High Court, *NEAT Domestic Trading Pty Ltd v AWB Ltd* ('*NEAT Domestic*'),<sup>46</sup> both of which imposed important limitations on the jurisdictional formula of the *ADJR Act*.

<sup>40</sup> *Tang* (2005) 221 CLR 99, 123 [63] (Gummow, Callinan and Heydon JJ).

<sup>41</sup> Aronson, Dyer and Groves, above n 4, 73–6; Cane and McDonald, above n 17, 59. See also *Schwennesen v Minister for Environment and Resource Management* (2010) 176 LGERA 1, 14, where White J accepted that a range of factors were relevant in determining the character of a decision but concluded that the issue was ultimately 'a matter for judgment and no single factor is determinative.'

<sup>42</sup> An example is the Statements of Principles issued under the *Veterans' Entitlements Act 1986* (Cth), which have been held as legislative for the purposes of the *ADJR Act*: *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419, 430–1 (Tamberlin J). These documents are continued under the *Military Rehabilitation and Compensation Act 2004* (Cth). Section 340 of the 2004 Act enables the issue of similar determinations which, though named differently, would almost certainly also be categorised as legislative for the purposes of the *ADJR Act*.

<sup>43</sup> Aronson, Dyer and Groves, above n 4, 41.

<sup>44</sup> Justice Ronald Sackville, 'The Boundaries of Administrative Law — The Next Phase' in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law — At the Twenty-Five Year Mark* (Centre for International and Public Law, 1998) 86, 96.

<sup>45</sup> See, eg, Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22, 23; Anthony E Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: "Decisions under an Enactment"' (2006) 13 *Australian Journal of Administrative Law* 169, 170.

<sup>46</sup> (2003) 216 CLR 277.

*NEAT Domestic* involved a novel and complex statutory framework. The Wheat Export Authority was a statutory body that managed wheat exports and operated in conjunction with a private corporate vehicle, AWB International Ltd ('AWBI'), formed under the *Corporations Law* (Vic). This arrangement was complicated by the ad hoc division of functions between the two entities and a legislative monopoly that made AWBI the sole exporter of bulk quantities of wheat.<sup>47</sup> An exception to the monopoly was possible, but only if first AWBI and then the Authority gave consent. The NEAT company sought judicial review when AWBI denied its application for consent.

A majority of the High Court held that AWBI drew power to grant or refuse consent by its incorporation rather than from the wider statutory framework within which wheat export decisions were made. It did not matter that the legislation provided that the Authority could not grant consent unless AWBI had already done so.<sup>48</sup> According to this view, the refusal of AWBI to give consent was not made 'under an enactment' within the meaning of the *ADJR Act*.

The reasoning of the majority in *NEAT Domestic* was widely criticised as diminishing the reach of the *ADJR Act* and public accountability more generally.<sup>49</sup> The novel legislative and corporate framework within which wheat export decisions were taken made it difficult to determine whether the reasoning in *NEAT Domestic* heralded a narrower approach to the *ADJR Act* by the High Court.<sup>50</sup> Those doubts were laid to rest in *Tang*.

Ms Tang was a doctoral student at Griffith University charged with academic misconduct, allegedly for falsifying results of her research. She was expelled and sought judicial review of that decision.<sup>51</sup> The University argued its decision was

<sup>47</sup> The monopoly granted to AWBI was strengthened by an exemption from competition legislation.

<sup>48</sup> *NEAT Domestic* (2003) 216 CLR 277, 298 [55] (McHugh, Hayne and Callinan JJ). This explanation of *NEAT Domestic* draws on the subsequent explanation of the case given in *Tang* (2005) 221 CLR 99, 127–8 [77] (Gummow, Callinan and Heydon JJ).

<sup>49</sup> See, eg, Christos Mantziaris, 'A "Wrong Turn" on the Public/Private Distinction: *NEAT Domestic Trading Pty Ltd v AWB Ltd*' (2003) 14 *Public Law Review* 197; Graeme Hill, 'The *Administrative Decisions (Judicial Review) Act* and "under an Enactment": Can *NEAT Domestic* Be Reconciled with *Glasson*?' (2004) 11 *Australian Journal of Administrative Law* 135; Neil Arora, 'Not So Neat: Non-Statutory Corporations and the Reach of the *Administrative Decisions (Judicial Review) Act 1977*' (2004) 32 *Federal Law Review* 141; Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Australian Journal of Administrative Law* 126. Rare defences of *NEAT Domestic* are provided in Caspar Conde, 'Accountability for the Exercise of "Public" Power: A Defence of *NEAT Domestic*' (2005) 46 *AIAL Forum* 1 and PA Keane, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623. Keane appeared as counsel for Griffith University in *Tang*. The apparent narrowing of accountability which many argued *NEAT Domestic* caused proved especially ironic when it was later discovered that AWBI was heavily involved in dubious and almost certainly illegal activities: see Linda Courtenay Botterill, 'Doing It for the Growers in Iraq?: The AWB, Oil-for-Food and the Cole Inquiry' (2007) 66 *Australian Journal of Public Administration* 4.

<sup>50</sup> The majority concluded that the regulatory arrangement in issue in *NEAT Domestic* was unique: (2003) 216 CLR 277, 297 [49] (McHugh, Hayne and Callinan JJ). Their Honours subsequently made clear that their reasoning which denied any application of the *ADJR Act* to the case at hand rested on the particular statutory framework of the case rather than the more general question of whether public law remedies should be granted to private bodies that perform public functions: at 297 [50].

<sup>51</sup> The many grounds pleaded by Ms Tang were noted in *Tang* (2005) 221 CLR 99, 120 [53] (Gummow, Callinan and Heydon JJ), 138–9 [116] (Kirby J).

made pursuant to an administrative code and therefore was not made ‘under an enactment’ as required by the Queensland equivalent of the *ADJR Act*<sup>52</sup> under which the case proceeded.<sup>53</sup> Gummow, Callinan and Heydon JJ upheld the University’s claim, reasoning that:

The determination of whether a decision is ‘made ... under an enactment’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.<sup>54</sup>

Their Honours held that Ms Tang’s claim only met the first requirement and on this basis concluded that her claim fell outside the scope of the jurisdictional formula.<sup>55</sup>

*Tang* arguably raised more questions about the jurisdictional formula of the *ADJR Act* than it settled. Several of those questions weigh against adoption of the *ADJR Act* formula in a new judicial review statute. One is that the *ADJR Act* formula, as expounded in *Tang*, clearly contains a level of indeterminacy. Gummow, Callinan and Heydon JJ reasoned that the individual requirements of a ‘decision’ of ‘an administrative character’ made ‘under an enactment’ should be read as a whole rather than individually and that the precise meaning of the formula may depend on the statutory context in which the decision is made.<sup>56</sup> The precise meaning of the jurisdictional formula of the *ADJR Act* may therefore vary according to the statutory framework under which the decision subject to review is made. This possibility introduces a new and undesirable uncertainty into the *ADJR Act* formula, which is at odds with the simplified form of judicial review that the *ADJR Act* was intended to introduce.

A separate but related problem arises from the focus of the majority upon the constitutional requirement of the existence of a ‘matter’.<sup>57</sup> Gummow, Callinan and Heydon JJ explained that ‘[t]he meaning of the constitutional term “matter” requires some immediate right, duty or liability to be established by the court dealing with an application for review under the *AD(JR) Act*.’<sup>58</sup> This reasoning

<sup>52</sup> See *Judicial Review Act 1991* (Qld).

<sup>53</sup> The code did not have a status equivalent to a legislative instrument or subordinate legislation, which would have brought it within the extended definition of ‘enactment’ under the *ADJR Act* s 3(1) (definition of ‘enactment’). By contrast the definition of ‘enactment’ in the *Judicial Review Act 1991* (Qld) s 3 (definition of ‘enactment’) is far more limited and includes only an Act or statutory instrument including a part of an Act or statutory instrument.

<sup>54</sup> *Tang* (2005) 221 CLR 99, 130–1 [89].

<sup>55</sup> *Ibid* 132 [96].

<sup>56</sup> *Ibid* 120–1 [59]–[60]. The suggestion that the scope of the formula depends in part on the statutory context in which the decision was made is implicit in the passage their Honours cited from *Bond* (1990) 170 CLR 321, 377 (Toohey and Gaudron JJ).

<sup>57</sup> The concept of a ‘matter’ is used in ss 75–78 of the *Constitution*. In *Tang*, reference was made to use of the requirement that there be a ‘matter’ in s 76(ii) of the *Constitution*, which empowers the federal parliament to make laws conferring original jurisdiction in any matter ‘arising under any laws made by the Parliament’: (2005) 221 CLR 99, 131 [90] (Gummow, Callinan and Heydon JJ).

<sup>58</sup> *Tang* (2005) 221 CLR 99, 131 [90], citing *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Re McBain; Ex parte Australian*

suggests that the scope of the *ADJR Act* formula should be both informed and limited by the jurisprudence that has developed on the concept of a ‘matter’. There are several difficulties with this approach. The introduction of a constitutional concept into the statutory regime appears entirely at odds with those cases in which the High Court has accepted the separate and distinct nature of constitutional and statutory avenues of review.<sup>59</sup> It also presumes a level of agreement and clarity about the meaning of ‘matter’, which arguably does not exist.<sup>60</sup> Finally, the reliance on the concept of a ‘matter’ transposes a complex federal constitutional restriction into the state versions of the *ADJR Act*, and thereby limits and complicates those versions.<sup>61</sup>

*Tang* also left uncertain the position of decisions made under ‘soft law’, which encompasses the guidelines, policies and manuals that pervade the public sector.<sup>62</sup> The distinction that the majority drew between the statute which established the University and the administrative rules under which the expulsion decision was made cast doubt over whether decisions made under soft law are amenable to review under the *ADJR Act*.<sup>63</sup> Similar concerns apply to decisions involving contractual or consensual relationships. *Tang* made clear that the contractual decisions of statutory bodies will generally be outside the scope of the *ADJR Act*,<sup>64</sup> though *NEAT Domestic* added a further problem with its apparent reluctance to draw a novel regulatory arrangement within the scope of the *ADJR Act*. Those two issues in combination almost certainly mean that the decisions of industry regulatory bodies, which are typically supported by either a novel regulatory framework or contractual agreements between their participants, or both, fall outside the scope of the *ADJR Act*.

*Catholic Bishops Conference* (2002) 209 CLR 372, 389 [4] (Gleeson CJ), 404–7 [61]–[68] (Gaudron and Gummow JJ), 459 [243] (Hayne J).

<sup>59</sup> See, eg, *Shergold v Tanner* (2002) 209 CLR 126, 129–30 [2] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ), where it was noted that the *ADJR Act* operates ‘in addition to the jurisdiction of [the High] Court conferred by s 75 of the *Constitution* with respect to judicial review’.

<sup>60</sup> See Graeme Hill, ‘*Griffith University v Tang* — Comparison with *NEAT Domestic*, and the Relevance of Constitutional Factors’ (2005) 47 *AIAL Forum* 6, 11–12; Mantziaris and McDonald, above n 45, 32–6.

<sup>61</sup> That problem was acute in *Tang* because s 16 of the *Judicial Review Act 1991* (Qld), under which Ms Tang’s claim was brought, draws an express connection to the *ADJR Act*.

<sup>62</sup> Soft law is usefully discussed in Robin Creyke and John McMillan, ‘Soft Law v Hard Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377.

<sup>63</sup> This aspect of *Tang* and its consequences are considered in detail in Mark Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’ (2007) 35 *Federal Law Review* 1.

<sup>64</sup> See *Tang* (2005) 221 CLR 99, 109 [13] (Gleeson CJ), 128–9 [81]–[82] (Gummow, Callinan and Heydon JJ). This issue arose in part because a majority of the High Court characterised the relationship between Ms Tang and the University as voluntary or consensual: at 111 [20] (Gleeson CJ), describing the relationship as a ‘voluntary’ one that ‘[n]either party was bound to continue’, 131 [91] (Gummow, Callinan and Heydon JJ) describing the relationship as ‘at best a consensual relationship, the continuation of which was dependent upon the presence of mutuality’. This aspect of *Tang* has been widely criticised: see, eg, Daniel Stewart, ‘*Griffith University v Tang*, “under an Enactment” and Limiting Access to Judicial Review’ (2005) 33 *Federal Law Review* 525, 545–51. The conclusions of the High Court were at odds with the apparent agreement between the parties that there was no contract between Ms Tang and the University. Gleeson CJ seemed particularly dissatisfied with this assumption: see *Tang* (2005) 221 CLR 99, 108.

### B Reforming the Jurisdictional Formula of the ADJR Act

Professor Taggart spoke with the acuity of an outside observer when he marvelled that the complexities created by *NEAT Domestic* and *Tang* had unwittingly resuscitated the very kind of technicalities that the *ADJR Act* was intended to remove.<sup>65</sup> These difficulties could be removed by the introduction of a simpler jurisdictional formula for the *ADJR Act*. Aronson proposed a new formula enabling judicial review of 'decisions, conduct, acts or omissions in breach of Commonwealth law imposing restraints on or requirements for the exercise of public power.'<sup>66</sup> He reasoned that this proposed jurisdictional formula would

leave *ADJR* free to explore the outer reaches of judicial review with no more constraints than seem to apply to the common law. Any exploration would necessarily be cautious. It is true that a test of 'public power' or 'public function' is indeterminate. But it has the merit of focusing on judicial review's core mission, which is all about the legal control of public power ...<sup>67</sup>

In my view, Aronson's proposal has strengths and weaknesses. Replacing the reference to decisions or conduct made 'under an enactment' with comparable actions that were 'in breach of Commonwealth law' would remove the artificial formula devised in *Tang* to determine what was done 'under' an enactment, but it would introduce new uncertainties. Much would depend on the definition of 'Commonwealth law'. The scope of Aronson's formula would be narrow if the term is defined to include only statutes and subordinate legislation, as occurs in the current definition of the *ADJR Act* and its state and territory equivalents.<sup>68</sup> If the legislature chose not to define the phrase, one might ask precisely how the courts might define such a protean term as 'law'. If the absence of a definition was intended to encourage judicial review of soft law, as many critics of *Tang* appear to advocate, one might question why the Parliament could not simply define those soft law instruments it thought gave rise to decisions that should be subject to judicial review. The likely answer is that the range of soft law used by modern governments is so broad and variable that it would be difficult to define

<sup>65</sup> See Taggart, above n 28, 20. Many recent cases offer support for Taggart's assessment. See, eg, *White Industries Aust Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298, 312–18 [61]–[99], where Lindgren J considered whether a decision made under a guideline issued by tax officials was subject to the *ADJR Act*. The lengthy and careful analysis by his Honour usefully illustrates how difficult questions about the jurisdictional formula of the *ADJR Act* remain.

<sup>66</sup> Mark Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 89.

<sup>67</sup> *Ibid.* Aronson's suggestion may have been influenced by the remarks of Kirby J in *NEAT Domestic* (2003) 216 CLR 277, 308 [95]–[96]. His Honour reasoned that judicial review, and perhaps other administrative accountability mechanisms, should apply to bodies that were not governmental in the strict sense if they exercised 'public power'. Kirby J subsequently expanded upon this suggestion extra-judicially: Justice Michael Kirby, 'Public Funds and Public Power Beget Public Accountability' (Speech delivered at the Corporate Governance in the Public Sector Dinner, High Court of Australia, 9 March 2006) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_9mar06.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_9mar06.pdf)>.

<sup>68</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 2 (definition of 'enactment'); *Judicial Review Act 1991* (Qld) s 3 (definition of 'enactment'); *Judicial Review Act 2000* (Tas) s 3 (definition of 'enactment'). The equivalent definition in s 3(1) of the *ADJR Act* extends to 'rules, regulations or by-laws' made under Acts, which is essentially the same.

soft law clearly.<sup>69</sup> One might also question the expertise of the courts to devise a taxonomy for instruments that are ultimately creatures of the executive arm of government.

A further objection that can be raised to Aronson's suggestion is that his formula would enable the courts to explore the outer edges of judicial review but that this exploration would necessarily be cautious. There is an inherent tension in an encouragement for the courts to venture into new territory under the expectation that they will do so cautiously. Aronson's admission that concepts of 'public power' and 'public functions' are indeterminate<sup>70</sup> draws attention to a related difficulty by acknowledging that these concepts provide a dim light by which the courts might chart the terrain of judicial review. It does not, however, reveal the full range of problems that such a criterion might involve. An obvious one is whether such a test would draw upon the increasingly complex jurisprudence relating to the definition of a 'public authority' for the purposes of the *Human Rights Act 1998* (UK) c 42.<sup>71</sup> Another is whether the presence of an element of public power, however that concept is defined, will necessarily provide a sound reason for the availability of judicial review.<sup>72</sup>

Aronson subsequently made clear he favoured an expansive conception of public power when he explained that

public power is increasingly exercised from places within the private sector, by non-government bodies, and according to rules found in management manuals rather than statute books. If judicial review is about the restraint of public power, it will need to confront these shifts in who exercises public power, and in the rules by which they exercise it.<sup>73</sup>

A majority of the High Court sidestepped this very question in *NEAT Domestic*,<sup>74</sup> but there are conceptual difficulties with such an expansive approach to public power, particularly with its use as a device to determine the scope of judicial

<sup>69</sup> See Creyke and McMillan, 'Soft Law v Hard Law', above n 62, 389–90.

<sup>70</sup> Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 89.

<sup>71</sup> The prevailing tests in English law are reviewed in Colin D Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *Cambridge Law Journal* 90. Campbell offers a test of 'monopoly power' to determine the scope of judicial review of administrative action: at 116–17. Such a test would arguably encounter the same difficulty as one based upon the notion of public power because its core requirement, which is the presence of a particular form of power (whether monopoly or public), is not capable of easy definition.

<sup>72</sup> This seems to be the implicit criticism of Keane, above n 49, 633–5. Keane's criticisms are directed to the views expressed by Kirby J, both in *Tang* and extra-judicially, though they are equally relevant to Aronson's proposed new formula for the *ADJR Act*.

<sup>73</sup> Aronson, 'Private Bodies, Public Power and Soft Law', above n 63, 4. Kirby J was mindful of similar concerns in *NEAT Domestic* (2003) 216 CLR 277, 300 [67]–[68].

<sup>74</sup> (2003) 216 CLR 277, 297 [49]–[50] (McHugh, Hayne and Callinan JJ). The ultimate question is whether the High Court should finally and decisively adopt the long line of English authority, beginning with *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] QB 815, which has enabled judicial review of private sector bodies to the extent that they perform public functions: *NEAT Domestic* (2003) 216 CLR 277, 297 [49]–[50] (McHugh, Hayne and Callinan JJ). The decisions of lower courts in Australia that have grappled with this issue are discussed in Colin Campbell, 'The Public/Private Distinction in Australian Administrative Law' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 34.

review. Why should it be assumed that these new forms of 'mixed administration' which involve both public and private actors are best suited to regulation by judicial review?<sup>75</sup> In my view, it is arguable that new forms of administration should be matched by new forms of regulation rather than shoehorned into existing ones.<sup>76</sup> It is also arguable that the courts do not possess any particular expertise to decide whether and to what extent such arrangements should be subject to statutory review, particularly when the appropriateness of review can only be fully understood by reference to the availability of the various forms of redress outside the courts.

In my view, a simpler and more effective formula could be taken from the *Administrative Law Act 1978* (Vic) ('*ALA*'). That Act enables statutory judicial review of decisions of a 'tribunal',<sup>77</sup> which is defined as a body that is required to observe one or more of the rules of natural justice.<sup>78</sup> There are several advantages to a jurisdictional formula that is enlivened by a requirement to observe one or more of the rules of natural justice. While the content of the rules of natural justice continues to evolve, it is well settled that the duty to observe the doctrine applies to any decision, action or other conduct that can destroy or defeat a person's rights, interests or legitimate expectations.<sup>79</sup> In view of the wide-ranging and well-settled duty of public officials to observe the twin requirements of natural justice (namely, the hearing rule and the rule against bias), a jurisdictional formula that attached to any decision-maker required to observe one or more of these rules would have a very wide scope. A further advantage of such a test is that it would not require the development of a new body of doctrine but could instead draw from the existing law of natural justice. Such a formula would not engage the difficult and arguably uncertain criterion of 'public power' or the increasingly difficult test of 'under an enactment'.

The Victorian test could be usefully amended by replacing the term 'tribunal' with the more appropriate one of 'official', the latter term more accurately describing those whose actions are typically subject to applications for judicial review. The result would be a formula that authorises statutory judicial review of the decisions of an official which affect the rights, interests or legitimate expectations of a person, as well as conduct of an official related to such a decision.<sup>80</sup> An 'official' would be defined as a person, body or public agency

<sup>75</sup> The term 'mixed administration' is drawn from Aronson's analysis of the growing blending of public and private regulatory activities: Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 40, 53.

<sup>76</sup> The description of 'shoehorning' is taken from Keane, above n 49, 633. Keane uses the expression to counter critics of *Tang*, whom he argues seek to shoehorn the conduct of public bodies within the scope of the 'under an enactment' requirement.

<sup>77</sup> *ALA* s 3.

<sup>78</sup> *Ibid* s 2 (definition of 'tribunal').

<sup>79</sup> See, eg, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). It is also now clear that this duty can only be removed or limited by legislation expressed in absolutely clear terms: *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204, 209 [14]–[15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>80</sup> A further category of administrative action which may be subject to review is the failure to act. Such conduct is currently governed separately by s 7 of the *ADJR Act*. Judicial review of a fail-

authorised to make or alter, or refuse to make or alter, any decision or action and when doing, or refusing to do so, is required to observe one or more of the rules of natural justice.

### C *The Exclusion of Vice-Regal Decisions from the ADJR Act*

An important limitation in the *ADJR Act* is the express exclusion of decisions of the Governor-General from review. Vice-regal decisions are excluded from the definition of ‘a decision to which this Act applies’.<sup>81</sup> On this issue, the *ADJR Act* is lagging behind rather than leading the way. The state and territory judicial review statutes have no equivalent exclusion.<sup>82</sup> It is also important to note that the common law immunity of the vice-regal representative was overturned very soon after the *ADJR Act* commenced.<sup>83</sup> When the Administrative Review Council (‘ARC’) reviewed the scope of the *ADJR Act*, it concluded that the continued exclusion of decisions of the Governor-General was an anomaly and was also at odds with democratic principles.<sup>84</sup> This conclusion is consistent with the modern trend in judicial review of administrative action by which the scope of review is determined by reference to the effect of a decision rather than the identity of the decision-maker or the source of power under which the decision is made.<sup>85</sup> The ARC raised a conceptually related objection to the exclusion of vice-regal decisions from the scope of the *ADJR Act*, concluding that this exclusion was difficult to justify when the decisions of Ministers who advise vice-regal representatives are amenable to the *ADJR Act*.<sup>86</sup>

Another reason to allow statutory judicial review of vice-regal decisions is that such decisions are normally made after the receipt of ministerial advice. If vice-regal decisions adopt ministerial advice, which constitutional convention dictates should normally be the case,<sup>87</sup> there seems to be no reason to distinguish

ure to act is sufficiently rare and different from positive decisions and actions that it should be continue to be regulated separately.

<sup>81</sup> *ADJR Act* s 3(1) (definition of ‘decision to which this Act applies’ para (c)). The exemption of vice-regal decisions originated from a recommendation by one of the committees whose reports led to the enactment of the *ADJR Act* and other administrative law reforms: see *Kerr Committee Report*, above n 5, 78, 113. This Committee is generally referred to as the ‘Kerr Committee’ in recognition of the name of its chairman.

<sup>82</sup> There are various exemptions from review in the *Administrative Decisions (Judicial Review) Act 1989* (ACT) sch 1; *Judicial Review Act 1991* (Qld) sch 1 pt 2; *Judicial Review Act 2000* (Tas) sch 1. None of these statutes provides a blanket exemption for vice-regal decisions in the manner of the federal *ADJR Act*. Importantly, the definition of a ‘decision to which this Act applies’ in each of these statutes does not expressly exempt vice-regal decisions as occurs in the *ADJR Act*.

<sup>83</sup> The key cases were *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *South Australia v O’Shea* (1987) 163 CLR 378; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *A-G (NT) v Minister for Aboriginal Affairs* (1987) 16 FCR 267.

<sup>84</sup> ARC, *The Ambit of the Act*, above n 7, ch 5.

<sup>85</sup> See *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 303 (Wilcox J). The ARC drew attention to this point in its recommendation that the exclusion of vice-regal decisions be abolished: *ibid* 46–7 [199].

<sup>86</sup> ARC, *The Ambit of the Act*, above n 7, 47 [200].

<sup>87</sup> Whether this should always be the case is a difficult issue, the finer details of which are beyond the scope of this article. The issues are explained in George Winterton, ‘The Evolving Role of the

ministerial and vice-regal decisions. Aronson appeared mindful of similar concerns when he argued that a 'government should not be able to reduce judicial scrutiny of the legality of its actions by the simple device of formally vesting powers in the head of state.'<sup>88</sup> There seems to be no clear evidence that the exemption of the Governor-General from the *ADJR Act* has been exploited in such a cynical way, at least not in a wholesale manner, but there are reasons of principle to abolish the exemption. It is clearly contradictory that a statute designed to provide a simpler alternative to the common law maintains an arcane exception that has disappeared from the common law itself. The experience of the state judicial review statutes suggests that the abolition of the vice-regal exception will not cause a rush of applications to review decisions which might arguably be unsuited to review (even if one accepts such an assumption). More particularly, there appears to be no evidence that the availability of statutory judicial review of vice-regal decisions at the state level has been problematic. Accordingly, the *ADJR Act* should be amended to remove any exclusion for vice-regal decisions.<sup>89</sup> The exclusion of vice-regal decisions should also not be included in any version of the *ADJR Act* adopted by those states or territories which do not currently have such an Act.

#### D Other Exclusions from the ADJR Act — Schedule 1

The recent focus on the ambit of the jurisdictional formula of the *ADJR Act* in *NEAT Domestic* and *Tang* has distracted attention from the exclusion of several statutes and categories of decision-making from the entire Act and also the separate exclusions from the obligation to provide reasons.<sup>90</sup> The list of each is too lengthy and varied to consider in detail; suffice to say that each covers many different areas, including migration, defence, taxation assessments, the criminal justice system and the commercial decisions of federal departments and agencies. When the ARC examined the scope of the *ADJR Act* it criticised many of these exemptions and recommended that many of them be repealed.<sup>91</sup>

Australian Governor-General' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 44, 53–4.

<sup>88</sup> Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 83.

<sup>89</sup> If vice-regal decisions are amenable to statutory judicial review, it is appropriate that the respondent to any application for review be the Minister responsible for the statute or program under which the decision was made. Such a provision would effectively recognise that vice-regal decisions are made upon ministerial advice, which would make the advising minister an appropriate respondent. This approach is taken in *Judicial Review Act 1991* (Qld) s 53(a); *Judicial Review Act 2000* (Tas) s 41. Both substitute the responsible Minister for the Governor-in-Council, though the former does so only for statutory judicial review and not applications commenced at common law. There is no equivalent provision in the *Administrative Decisions (Judicial Review) Act 1989* (ACT).

<sup>90</sup> The exclusions are set out in *ADJR Act* schs 1, 2.

<sup>91</sup> ARC, *The Ambit of the Act*, above n 7, ch 6. The ARC also recommended some expansion of the exclusions, most notably by the inclusion of decisions committing a person for criminal trial: at ch 7. This recommendation was adopted and is currently reflected in s 9A of the *ADJR Act*, which provides a broad exemption for decisions related to the criminal justice process. Such decisions are also excluded from review under the *Judiciary Act*: *Judiciary Act* ss 39B(1B)–(1E).

The Report of the ARC did little to prevent the expansion of exclusions from the *ADJR Act*.<sup>92</sup> The exclusion of some decisions may be of little consequence because they are subject to alternate rights of review.<sup>93</sup> There are, however, some problems with the number of exclusions and the manner in which decisions are excluded from either the whole of the *ADJR Act* or its obligation to provide reasons. The list of excluded decisions contains no obvious coherence when viewed as a whole but instead seems to comprise a grab bag of various decisions. These decisions are not subject to regular review. Accordingly, the exclusions from both the Act as a whole and the duty to provide reasons have steadily expanded without any significant scrutiny. It could be argued that the absence of such scrutiny cultivates a belief that the exclusion or limitation of the *ADJR Act* is an unexceptional feature of our scheme of administrative review. That should not be so.

At this point, a useful contrast can be drawn with the *ALA*. That Act lacks any class or schedule of exclusions from its general jurisdictional formula. This aspect has proven to be a valuable feature of the Act because there is no easy means by which exemptions to the Act may be created. For this reason, Victoria has not witnessed anything akin to the slow but steady growth of exemptions which have been added to the *ADJR Act*. One could question, however, whether this aspect of the *ALA* is in any way related to the jurisdictional formula adopted within that Act, as opposed to the absence of a schedule containing specific exemptions. There is no necessary reason why a jurisdictional formula used in the *ALA*, that enabled review of decisions made by those who are obliged to observe one or more of the rules of natural justice, could not include a provision to specify that it excluded decision-makers or classes of decisions contained in a schedule. Such a change could easily be made by the addition of a clause to the existing formula, or a new subsection, which specified that the jurisdictional formula of the Act did not include the particular decisions, classes of decisions or decisions made under specified statutes listed in a schedule to the Act.

Whether an amendment to allow for exclusions should be adopted is another matter. In my view, the possibility of exclusions to a remedial statute that creates a right of judicial review of the decisions of public officials should be approached with great caution. The simple reason is that the exceptional can easily become more common over time, particularly if exceptions are easy to create. If the procedure for creating exclusions is not difficult and can be done without attracting significant attention (which is the case with additions to the schedules of exclusions to the *ADJR Act*) the number and scope of exclusions can easily

<sup>92</sup> A significant number of the decisions or statutes included in sch 1 of the *ADJR Act* were added after the ARC's 1989 Report.

<sup>93</sup> Tax assessments are an obvious example. They are subject to separate, detailed rights of challenge under tax legislation: see *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 152–3 [6]–[10], where Gummow, Hayne, Heydon and Crennan JJ noted that the avenues available to challenge tax assessments did not exclude rights of review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* but could influence the refusal of relief on discretionary grounds. The exclusion of a statute or class of decisions from the *ADJR Act* is far less problematic if it is subject to other avenues of redress which are sufficiently wide to invite the discretionary refusal of relief.

grow over time and eventually detract greatly from the overall value of the right of review. One way to ensure that such exemptions are controlled strictly would be to subject them to parliamentary scrutiny, so that Bills are examined to determine whether they might exclude or limit judicial review and, if so, whether that exclusion or limitation is appropriate and justified in the circumstances. This function could be performed by those parliamentary committees that scrutinise statutes and regulations to report on their effect on a range of rule of law issues, such as compliance with issues of privacy, human rights and whether the administrative powers conferred by Bills are sufficiently defined.<sup>94</sup> The existing work and accumulated expertise of such a committee would make it suitable to consider Bills which seek to limit or exclude judicial review.<sup>95</sup> Parliamentary oversight could be informed by factors such as the framework of indicative principles devised by the ARC to determine the desirable scope of judicial review.<sup>96</sup>

In my view, the same principles apply equally to the exclusion of decisions from the obligation to provide reasons under the *ADJR Act*. At present, inclusion of a decision in sch 2 of the *ADJR Act* excludes the duty to provide reasons, even though the decision itself remains amenable to review under the Act. The right to reasons is central to accountability in government, understanding administrative decisions and the informed exercise of any right of review. Therefore, any attempt to create exemptions from that right should be subject to the same scrutiny as exemptions from the right of review itself.

#### *E A Possible State Innovation to the Scope of the ADJR Act Model*

One notable innovation in the Queensland version of the *ADJR Act* is the provision extending the application of that Act beyond administrative decisions made under an enactment to similar decisions made by public officers or employees under a non-statutory 'scheme or program' supported by funds appropriated by Parliament or taxes, charges, fees or levies collected by statute.<sup>97</sup> A provision of this nature was originally recommended by the ARC, which explained that statutory judicial review should be extended to schemes or programs funded by government because their public source of funding 'gives them the same public interest character as they would have if they were the

<sup>94</sup> At the federal level, the appropriate committee is the Senate Scrutiny of Bills Committee. Similar committees exist in all Australian jurisdictions: see, eg, the Scrutiny of Acts and Regulations Committee, which is established by the *Parliamentary Committees Act 2003* (Vic) s 17.

<sup>95</sup> The role of such parliamentary committees is discussed in Carolyn Evans and Simon Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] *Public Law* 785. The analysis of these authors suggests that the various parliamentary committees that scrutinise Bills for compliance with human rights and concerns related to the accountability of government have the expertise to provide effective oversight of Bills which affect the scope of judicial review.

<sup>96</sup> See ARC, *The Scope of Judicial Review*, above n 7, 57–8.

<sup>97</sup> *Judicial Review Act 1991* (Qld) s 4(b). This provision is affected by s 9 which provides that a reference under the Act 'to the exercise of a power conferred by an enactment' extends to powers of the same type as under s 4(b). Both provisions require that the scheme or program be funded 'in whole or part' by public contributions.

subject of other legislation enacted in the public interest.<sup>98</sup> This recommendation was rejected at the federal level but accepted by Queensland's Electoral and Administrative Review Committee,<sup>99</sup> and also by the Queensland Parliament.

The few cases that have considered this novel extension of the *ADJR Act* model reveal continued uncertainty about the meaning of 'scheme or program'. The phrase has been held to encompass a single project, ongoing enterprises and the 'whole of the range ... between the two.'<sup>100</sup> On that view, an administrative decision made within a single rail project jointly funded by the Commonwealth and the State was held to be part of a 'scheme'.<sup>101</sup> In *Bituminous Products Pty Ltd v General Manager (Road System and Engineering), Department of Main Roads*, Holmes J accepted that it would often be difficult to identify a clear scheme or program, as opposed to government activity in general, and concluded that 'the greater the difficulty in identifying a discrete program or scheme, the less likely it is that there exists one.'<sup>102</sup> Holmes J was also mindful of the warning expressed in *Bond*<sup>103</sup> that the efficiency of the administrative process could be fragmented if review operated at a micro level.<sup>104</sup> According to this view, review should not extend to the individual elements of a wider scheme or program lest the efficiency of that activity be fragmented. An example can be drawn from a case in which government lawyers sought review of a decision to move them into an open plan office.<sup>105</sup> The decision was made by a committee that had established and implemented guidelines to plan and manage office accommodation for government agencies. The Court held that neither the guidelines nor the context in which they operated were part of a scheme or program.<sup>106</sup>

One judge of the Supreme Court of Queensland has similarly commented that the jurisprudence on the meaning of 'scheme or program' was 'in short supply'.<sup>107</sup> The paucity of case law on this provision might have been corrected in

<sup>98</sup> ARC, *The Ambit of the Act*, above n 7, 38 [164]. This recommendation was less far-reaching than those made by the ARC in an earlier draft report: ARC, *Review of the Administrative Decisions (Judicial Review) Act: Redefining the Act's Ambit*, Draft Report (1988) 43 [99].

<sup>99</sup> Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions*, Report No 90/R5 (1990) 51 [6.31].

<sup>100</sup> *Anghel v Minister for Transport [No 1]* [1995] 1 Qd R 465, 468 (Derrington J). In *Wide Bay Helicopter Rescue Service Inc v Minister for Emergency Services* (1999) 5 QAR 1, 8 [30] ('*Wide Bay*'), Williams J suggested that s 4(b) might only apply to 'a decision to make Government funds available'. This interpretation seems at odds with the apparent purpose of the provision to cover administrative decisions (a decision on the granting or denial of funding is generally a political rather than an administrative one). The applicant in *Wide Bay* had failed to comply with repeated orders to provide particulars of its case so it could be suggested that the point was not fully argued before the Court.

<sup>101</sup> *Anghel v Minister for Transport [No 1]* [1995] 1 Qd R 465. But the substantive application failed because no ground of review was established.

<sup>102</sup> [2005] 2 Qd R 344, 351.

<sup>103</sup> (1990) 170 CLR 321, 337 (Mason CJ).

<sup>104</sup> *Bituminous Products Pty Ltd v General Manager (Road System and Engineering), Department of Main Roads* [2005] 2 Qd R 344, 351–2.

<sup>105</sup> See *Mikitis v Director-General, Department of Justice* (1999) 5 QAR 123.

<sup>106</sup> *Ibid* 126 [8] (Wilson J).

<sup>107</sup> *Bituminous Products Pty Ltd v General Manager (Road System and Engineering), Department of Main Roads* [2005] 2 Qd R 344, 351 (Holmes J).

*Tang* if that case had been pleaded differently. Ms Tang was excluded from her doctoral studies after a committee found that she had engaged in academic misconduct in her research. The essential question before the High Court was whether the decision to exclude Ms Tang from her studies, which was made under Griffith University's code of conduct, was one made 'under an enactment' and therefore liable to statutory judicial review.<sup>108</sup> In argument before the High Court, counsel for the University noted that Ms Tang had not pleaded that the decision was made under a scheme or program supported by public funds, which would have placed her claim within the alternative formula in s 4(b) of the *Judicial Review Act 1991* (Qld).<sup>109</sup> The point was not pursued, though several members of the High Court drew attention to this possibility in their reasons. Gummow, Callinan and Heydon JJ simply repeated the terms of s 4(b) and noted that it had not been the focus of argument in the High Court.<sup>110</sup> Gleeson CJ suggested that there seemed to be 'no evidentiary basis' to argue that the decision to exclude Ms Tang fell within the scope of s 4(b).<sup>111</sup> Gleeson CJ also considered it was 'difficult to contemplate' how an argument might be mounted under s 4(b) but did not explain why this was so. Was there some particular quality to the decision to exclude Ms Tang, or the decisions of university officials more generally? Were universities simply not a scheme or program for the purposes of s 4(b)? The brief remarks of Gleeson CJ give no indication.

Kirby J took the issue a little further and pointed out that s 4(b) provided an 'alternative definition' to 'a decision of an administrative character made ... under an enactment'.<sup>112</sup> His Honour reasoned that the inclusion of s 4(b) illustrated the willingness of Parliament to extend the scope of the decisions to which the Act applied, which provided a reason against a relatively narrow interpretation of the meaning of 'under an enactment'.<sup>113</sup> In my view, the inclusion of s 4(b) can equally lead to a contrary view. The inclusion of an alternative definition arguably provides evidence of an acceptance by the legislature that the key definition in the Act is limited and, in some circumstances, needs to be amplified. What the attempted amplification of s 4(b) might ultimately mean if it is ever fully explored remains to be seen but some conclusions can be made about the utility of s 4(b).

Lane and Young conclude that s 4(b) 'has had a somewhat disappointing career'.<sup>114</sup> There is much force in that assessment. Most of the applications

<sup>108</sup> A majority of the High Court answered this question in the negative, holding that the code was not a statute or a subordinate instrument and did not itself expressly or impliedly require or authorise the decision to exclude Ms Tang: *Tang* (2005) 221 CLR 99, 130–1 [89] (Gummow, Callinan and Heydon JJ). See above Part III(A)(3) for a summary of the facts and issues.

<sup>109</sup> Transcript of Proceedings, *Griffith University v Tang* [2004] HCATrans 227 (21 June 2004) [1905] (P A Keane). Interestingly, however, Kirby J noted that in the High Court hearing Ms Tang's lawyers reserved an 'entitlement' to raise s 4(b) 'in any later possible proceedings': *ibid* 145 [139].

<sup>110</sup> *Tang* (2005) 221 CLR 99, 118–19 [48]–[49].

<sup>111</sup> *Ibid* 112 [24].

<sup>112</sup> *Ibid* 145 [139].

<sup>113</sup> *Ibid* 146 [140].

<sup>114</sup> W B Lane and Simon Young, *Administrative Law in Australia* (Lawbook, 2007) 94.

involving the provision have turned (and usually failed) on the meaning of 'scheme or program'. The absence of significant jurisprudence on s 4(b) may be because its requirement that decisions made in the course of a non-statutory scheme or program must be of an *administrative* character is counterintuitive. Even if the ARC was correct to suggest that the provision of government funds to schemes or programs invests them with a public quality,<sup>115</sup> it does not follow that the decisions made in these areas will be administrative in character. Many such decisions are commercial rather than administrative in character, such as tendering, contract or employment decisions. Viewed in this way, s 4(b) seeks to extend judicial review of administrative decisions into areas where such decisions are less likely to be made. This proposition has yet to be clearly tested in the courts, but there is no doubt that s 4(b) has not created a significant extension to the scope of the federal model upon which the Queensland statute is based. For that reason alone it should not be replicated.

#### IV THE CODIFIED GROUNDS OF REVIEW UNDER THE *ADJR ACT*

The *ADJR Act* contains a lengthy list of the grounds of review available to challenge decisions and conduct.<sup>116</sup> Most of these statutory grounds appear to repeat rather than reformulate the grounds of review available at common law.<sup>117</sup> During the 1980s, a series of cases confirmed that the grounds contained in the *ADJR Act* restate the common law without significant change. An example is *Kioa v West*,<sup>118</sup> where key differences emerged in the High Court on whether the duty to observe the requirements of natural justice arose from the common law or the statute that conferred the statutory power in issue.<sup>119</sup> No member of the Court suggested that this issue or wider questions about the requirements of natural justice might be answered or even illuminated by the *ADJR Act*, even though the application was commenced under that Act.<sup>120</sup> Mason J explained that the grounds codified in s 5 of the *ADJR Act*

<sup>115</sup> See above n 98 and accompanying text, where it was explained that the ARC relied upon such reasoning in its recommendation to extend the scope of review to decisions made in the course of such activities.

<sup>116</sup> *ADJR Act* ss 5, 6.

<sup>117</sup> A striking exception is the ground of no evidence, which is subject to an extended statutory definition: *ibid* ss 5(1)(h), (3) (covering review of decisions on the ground of no evidence) and ss 6(1)(h), (3) (covering review of conduct on the ground of no evidence). There are equivalent statutory definitions of this ground in the statutes modelled on the *ADJR Act*: *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5(1)(h), (3), 6(1)(h), (3); *Judicial Review Act 1991* (Qld) ss 20(2)(h), 21(2)(h), 24; *Judicial Review Act 2000* (Tas) ss 17(2)(h), 18(2)(h), 21. The precise meaning of this statutory formula, and therefore the extent to which it modifies the common law, is not entirely settled: see Aronson, Dyer and Groves, above n 4, 261–5; Bill Lane, 'The "No Evidence" Rule' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 233, 242–52.

<sup>118</sup> (1985) 159 CLR 550.

<sup>119</sup> These various differences and the apparent ebb and flow of subsequent High Court decisions for the different views expressed in *Kioa v West* are explained in Aronson, Dyer and Groves, above n 4, 417–23. See also *Apache Northwest Pty Ltd v Agostini [No 2]* [2009] WASCA 231 (22 December 2009) [127]–[133], where Buss JA summarised the support for the differing views in recent cases.

<sup>120</sup> The ground of denial of natural justice is available in ss 5(1)(a) and 6(1)(a) of the *ADJR Act*.

are not new — they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review, except in so far as the language of the section requires it ...<sup>121</sup>

Mason J reached a similar view a year later in his Honour's influential judgment in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, when he concluded that the grounds of unreasonableness and relevant/irrelevant considerations were 'substantially declaratory of the common law.'<sup>122</sup>

Although such cases indicate that the *ADJR Act* has codified the law in a fairly literal sense, it could be argued that the architects of the Act and its subsequent copies in other jurisdictions sought to accommodate innovation in judicial review by the inclusion of two novel and open-ended grounds that enable review of a decision that is 'otherwise contrary to law' or is an 'exercise of a power in a way that constitutes abuse of the power'.<sup>123</sup> Aronson, Dyer and Groves suggest that the inclusion of these grounds 'acknowledges the common law's capacity to develop new grounds'<sup>124</sup> but those authors do not indicate whether and how Australia's common law might do so.<sup>125</sup> In the 30 years since these grounds were first enacted, they have not been widely relied upon by applicants and have received virtually no detailed consideration by the courts. These grounds are so underused and under-theorised that they may fairly be described as 'dead letters'.<sup>126</sup>

<sup>121</sup> *Kioa v West* (1985) 159 CLR 550, 576. A similar conclusion was reached by Gibbs CJ: at 566–7 and Brennan J: at 625. A different interpretation of the case is taken by Ernst Wilhelm, 'Ten Years of the *ADJR Act*: From a Government Perspective' (1990) 20 *Federal Law Review* 111, 114. Wilhelm argues that several members of the court in *Kioa v West* emphasised the introduction by the *ADJR Act* of a right to reasons for decisions to which the Act applied as one reason for concluding that Parliament did not intend to exclude the requirements of fairness.

<sup>122</sup> (1986) 162 CLR 24, 39. Mason CJ adopted a similar approach to the 'no evidence' ground of judicial review in *Bond* (1990) 170 CLR 321, 358 when he determined the meaning of the statutory ground of no evidence with reference to the ground 'as it was accepted and applied in Australia before the enactment of the *ADJR Act*'.

<sup>123</sup> *ADJR Act* ss 5(1)(j), 6(1)(j) (otherwise contrary to law) and ss 5(1)(e), (2)(j), 6(1)(e), (2)(j) (abuse of power). Similar grounds are included in the state and territory versions of the *ADJR Act*: *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5(1)(i), 6(1)(i) (otherwise contrary to law), ss 5(1)(e), (2)(i), 6(2)(e), (2)(i) (abuse of power); *Judicial Review Act 1991* (Qld) ss 20(2)(j), 21(2)(j) (otherwise contrary to law), ss 20(2)(e), 21(2)(e), 23(i) (abuse of power); *Judicial Review Act 2000* (Tas) ss 17(2)(i), 18(2)(i) (otherwise contrary to law), ss 17(2)(e), 18(2)(e), 20(i) (abuse of power). The ground of 'otherwise contrary to law' was included at the suggestion of Sir William Wade: see Commonwealth, *Prerogative Writ Procedures: Report of Committee of Review*, Parl Paper No 56 (1973) 9–10 [41]–[43].

<sup>124</sup> Aronson, Dyer and Groves, above n 4, 124. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [156], where Kirby J referred to the 'inherent capacity of the common law for progress and relevancy.'

<sup>125</sup> Aronson has described these two grounds as 'invitations to the Federal Court to add different or newer common law grounds', though he does not specify how that invitation might be taken up: Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 80. Wade had much earlier offered a similar assessment of these two new grounds: Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) 90.

<sup>126</sup> A description used in Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 518.

Why has this happened? The Queensland discussion paper that led to that State's adoption of the *ADJR Act* model explained that one possible disadvantage of codification of the grounds of review was the 'natural preference' of many lawyers to place their trust in the common law by reason of

its ability to grow and adapt through tentatively testing the boundaries of established principles and gradually extending and enlarging them on a case by case basis. There may be a distrust of codification because a code can limit the ability of the courts to change the law to meet new circumstances, and a code can bring with it its own problems of statutory interpretation.<sup>127</sup>

On this view, the statutory licence for common law innovation contained in the open-ended grounds in the *ADJR Act* may have failed because it is counterintuitive.

The Law Reform Commission of Western Australia reached the opposite conclusion when it recommended the adoption of an *ADJR Act* model in Western Australia. The Commission doubted that Australian judicial review law had been shackled by codification of the grounds of review, though it did not examine the point in detail.<sup>128</sup> The Commission used the ground of denial of natural justice as an example to support its position. It noted that the *ADJR Act* did not define the rules of natural justice and concluded that:

the ambit and content of those rules are left to be filled by the general law as enunciated by the courts from time to time. There is thus ample scope for judicial development of the substantive law relating to natural justice within the statutory ground of review.<sup>129</sup>

The Commission unsurprisingly accepted that any inhibiting effect that codification might have upon judicial review could be overcome by an open-ended ground enabling review of decisions that were 'otherwise contrary to law'.<sup>130</sup> The failure of the Commission to provide examples of principle or case law where this ground had been invoked leaves unanswered the question of why or how it felt a generalised ground of review might pave the way to innovation.

A review of Victorian law,<sup>131</sup> which also recommended the adoption of the *ADJR Act* model, appeared much less certain about this aspect of the *ADJR Act*. While the review supported codification of the grounds of review, largely in the format used by the *ADJR Act*, it also recommended the inclusion of an additional ground enabling the grant of relief on a ground not specifically included in the

<sup>127</sup> Electoral and Administrative Review Commission, *Judicial Review of Administrative Decisions and Actions*, Issues Paper No 4 (1991) 36–7.

<sup>128</sup> Law Reform Commission of Western Australia, above n 3, 23.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.* 23–4. The Queensland Electoral and Administrative Review Commission also acknowledged that codification might inhibit the development of new principles of review but suggested this problem could be overcome by legislative amendments 'to meet changing circumstances': Electoral and Administrative Review Commission, above n 127, 37. The Commission conceded that this assumed 'developments in the law are kept under review, and Parliament is prodded when the need for amendment becomes apparent'. This suggestion implies that innovation in codified grounds of review might occur through the enactment of specific new grounds rather than the general ones included in the *ADJR Act*.

<sup>131</sup> Bayne, *Judicial Review in Victoria*, above n 2.

statutory list, but which might be available at common law.<sup>132</sup> This ‘common law’ ground appeared to offer a more explicit recognition that new grounds of review might evolve outside any statutory framework for review and should be able to be adopted within that framework. It is worth noting, however, that the Victorian review was as short on detail on this issue as the arguably equivalent open-ended grounds in the *ADJR Act* that it proposed to replicate.

In my view, any new version of the *ADJR Act* should include a ‘common law’ ground. Such a ground could provide an alternative to those grounds in the *ADJR Act* which arguably could have fostered new principles. Those grounds have not proven successful. If innovation is to arise in the common law — and the very nature of the common law suggests that this is likely — it would hardly be assisted by the inclusion of a statutory ground that has proven a failure elsewhere. One option would be to include the ‘common law’ ground of review in terms that made the purpose of the ground more apparent. The ground could, for example, be expressed as allowing review ‘on any common law ground of review that exists before or after the commencement of this Act’. A provision drafted along these lines would make clear that innovation in judicial review is expected to occur in the common law and that when this happens it could and should be able to be adopted within the statutory framework for judicial review. A statutory framework might encourage innovation if it made clear that innovation in judicial review is expected to arise from its traditional common law home, but would be equally welcome in a new statutory home if need be.

#### V SHOULD THE *ADJR ACT* HAVE AN EXPRESS STATUTORY PURPOSE OR GUIDING PRINCIPLE?

One little noticed feature of the *ADJR Act* and its subsequent copies is the absence of a statutory statement of objectives or some form of guiding principle. Aronson has suggested that this apparent gap in the *ADJR Act* reflects the absence of any wider philosophy in the Act itself.<sup>133</sup> He noted that both the *ADJR Act* and its many grounds of review

say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations. Nor does *ADJR* mention the Thatcher era’s over-arching goals of efficiency, effectiveness and economy ... *ADJR*’s grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does

<sup>132</sup> Ibid 51 (recommendation 12).

<sup>133</sup> Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’, above n 66, 94–5. The problem is not unique to the *ADJR Act*. Gageler has suggested that judicial review of administrative action in Australia is essentially a ‘bottom up’ affair, in which principles are fashioned in a relatively ad hoc manner in individual cases rather than by reference to an overarching or unifying principle: Stephen Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?’ (2000) 28 *Federal Law Review* 303, 303–4. On this view, the absence of any guiding principle in the *ADJR Act* can be understood as a specific example of the wider absence of such principles in Australian judicial review doctrine.

*ADJR* commit to liberal democratic principles, pluralism, or civic republicanism.<sup>134</sup>

Aronson did not believe the *ADJR Act* should be amended to include a guiding or overarching principle. He also doubted whether such principles were possible or desirable, largely because of the difficulty in devising grand or unifying principles that were coherent, workable and of significant value.<sup>135</sup> It could be argued this problem does not arise by reason of Australia's constitutional framework but is instead related to the protean nature of the substantive principles of administrative law more generally, which an American commentator recently described as a body of doctrine 'built around a series of open-ended standards or adjustable parameters'.<sup>136</sup> On this view, the protean nature of the core principles of judicial review may simply not be capable of yielding a cohesive statement of principle. Another possibility is that the core values or apparent goals of judicial review and administrative law more generally, which appear to have gained wide acceptance are fairly vague. These values include transparency, participation and accountability.<sup>137</sup> Such protean concepts may not be capable of easy translation into coherent legal principles.

Even if such guiding principles were drafted, any attempt to devise a general or guiding principle to the *ADJR Act*, or any other statutory vehicle for judicial review, would face an uncertain fate in the courts. The history of Australia's migration legislation in recent years indicates that legislation designed to limit or control judicial review will rarely have its desired effect and may even achieve the opposite of its intended result.<sup>138</sup> A legislative statement of principle to guide the *ADJR Act* could easily meet the same fate if it were perceived by the courts as an attempt to limit or control judicial review. If that were the case, the important question would not be what the judicial response to a legislative

<sup>134</sup> Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 94.

<sup>135</sup> Ibid 94–6.

<sup>136</sup> Adrian Vermeule, 'Our Schmittian Administrative Law' (2009) 122 *Harvard Law Review* 1095, 1097.

<sup>137</sup> Harlow has suggested that these three principles appear to have wide acceptance as desirable or as the guiding principles of administrative law: see Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187. The ARC has adopted a similar but slightly larger set of principles that it described as the 'five core administrative law values', which are fairness, lawfulness, rationality, openness (or transparency) and efficiency: ARC, *The Scope of Judicial Review*, above n 7, 30 n 76. Dame Sian Elias has suggested that other values of administrative law might be 'human rights and, in so far as it is not a separate human right, the notion of equality before the law': Dame Sian Elias, 'Administrative Law for "Living People"' (2009) 68 *Cambridge Law Journal* 47, 59. In *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [55], Gaudron J suggested that statutory schemes that enabled review of administrative and executive decisions were informed by notions of accountability. Gaudron J did not suggest that accountability was the only value or principle that underpinned administrative law remedies, though the absence of any reference to other principles arguably implies that her Honour considered accountability to be the primary principle.

<sup>138</sup> An obvious example is the series of attempts to codify the requirements of hearings before the Refugee Review Tribunal and to exclude the rules of natural justice. An overview of that issue is given in Alice Ashbolt, 'Taming the Beast: Why a Return to Common Law Procedural Fairness Would Help Curb Migration Litigation' (2009) 20 *Public Law Review* 264.

attempt to introduce a guiding principle to statutory judicial review might be, but rather how quickly that legislation might be judicially eviscerated as has been done by the High Court with successive privative clauses of recent times.<sup>139</sup>

Aronson doubted whether the courts might fare any better than the parliamentary drafters in any attempt to devise overarching principles to guide judicial review.<sup>140</sup> This problem is not unique to administrative law. Rather it is a specific illustration of the more general question of whether judges can or should articulate moral values. This question is far less problematic if moral or normative values are accepted as being objective rather than subjective, though that possibility itself is a difficult one.<sup>141</sup> The more obvious problem with any attempt by the courts to engage in devising or answering significant moral questions is the suitability of the judicial model of decision-making for such an exercise.<sup>142</sup> In the context of judicial review of administrative action, Aronson posed the question in the following terms:

To what extent might it be the judiciary's role (or even duty) to explore, deduce, describe, articulate or promote a normative framework for judicial review of administrative action? This is not to question the judiciary's role in articulating general doctrinal principle, but the question being asked here concerns a much deeper level of public law theory. ... is it the judge's *duty* to explore and

<sup>139</sup> The description of the High Court's interpretation of privative clauses is taken from David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) 113.

<sup>140</sup> Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 95–6. This caution is amply justified if recent English experience is any guide. Successive English cases in which courts have tried to articulate normative or overarching principles to guide judicial review have been strongly criticised by some commentators see, eg, Matthew Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 71, 90–3. Thomas Poole has cogently criticised the so-called common law constitutionalism that underpins many such English cases: Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435; Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142; Thomas Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford Journal of Legal Studies* 697. Craig has dismissed these criticisms, but the detail in which he does so indicates the extent of the challenge they pose: Paul Craig, *Administrative Law* (Sweet and Maxwell, 6<sup>th</sup> ed, 2008) 25–31.

<sup>141</sup> An argument to this effect, though not specific to administrative law, is made in Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 188. An effective response to Moore is given in Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75, 83–4.

<sup>142</sup> See Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2, where it is argued that the legislative model of decision-making may provide a more suitable forum for considering moral issues than the judicial model. Waldron argues the judicial model can be limited by the influence of precedent, the narrow nature of many legal disputes and the small number of judges who determine any one case. He also argues that the legislative model can take account of a wider range of views and may be better able to consider issues afresh. Waldron's argument is mainly directed to judicial review of legislation for constitutional validity but it is equally relevant to any attempt by judges to devise overarching principles for judicial review of administrative action in the sense considered by Aronson.

expound his or her philosophical underpinnings, and when they do it, are their conclusions ‘law’?<sup>143</sup>

Aronson reasoned that any conclusions the courts might reach on the grand ideals of judicial review ‘would necessarily be piecemeal, fairly vague, and subject to legislative reversal, unless, of course, it were sought to embed these theories into the *Constitution*.’<sup>144</sup> The result seems to lead to the same destination as the legalism of Sir Owen Dixon, even though it is reached by a different path. Dixon’s conception of a limited judicial function led him to conclude that Australian judges do not have the constitutional authority to venture down the path of these broad normative questions.<sup>145</sup> Aronson hopes they know better.

#### VI THE REMEDIAL POWERS GRANTED BY THE *ADJR ACT*

Section 16 of the *ADJR Act* lists the available remedies under the Act in plain English. There are two key benefits of this section. First, it is expressed in clear language that enables the nature and function of the available remedies to be easily understood. Secondly, it clearly breaks with the common law approach to remedies in judicial review under which an applicant had to select and specify the writ sought in an application for judicial review. Applicants who selected the wrong writ would normally be denied relief even if they established a ground of review.<sup>146</sup> The possibility that applicants might establish a ground of review but fail to gain relief has been described as ‘remedial roulette’ and is clearly undesirable.<sup>147</sup> The remedial provisions of the *ADJR Act* sweep aside this issue by enabling the court to issue any or all statutory remedies to an applicant who has established one or more ground of review.<sup>148</sup> The remedial focus of the *ADJR Act* is therefore the more substantive one of whether applicants have established a ground of review and not whether they have specified the correct remedy.<sup>149</sup>

There are other aspects of the remedial provision of the *ADJR Act* which make it a useful model. The current Solicitor-General of the Commonwealth has explained that the remedies available under the *ADJR Act* are ‘designed to be simple, broad and flexible.’<sup>150</sup> The High Court has similarly explained that these

<sup>143</sup> Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’, above n 66, 96 (emphasis in original).

<sup>144</sup> *Ibid.*

<sup>145</sup> Sir Anthony Mason has identified a connection between Dixon’s legalism, the limited conception of the judicial function that this involves and the consequential limits placed upon judicial review: Sir Anthony Mason, ‘Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation’ (2005) 12 *Australian Journal of Administrative Law* 103, 109.

<sup>146</sup> *Kerr Committee Report*, above n 5, 20 [58]; Cane and McDonald, above n 17, 89.

<sup>147</sup> The quoted expression is taken from Cane and McDonald, above n 17, 95.

<sup>148</sup> *ADJR Act* s 16.

<sup>149</sup> It should be noted that the language of s 16 of the *ADJR Act* states that the court ‘may’ issue relief, which clearly preserves the discretion that exists at common law to refuse relief.

<sup>150</sup> Stephen Gageler, ‘Administrative Law Judicial Remedies’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 368, 374.

powers ‘should not ... be constricted by undue technicality.’<sup>151</sup> The remedial powers of the *ADJR Act* may be flexible but they have not provided a foundation for significant change. More particularly, the *ADJR Act* does not significantly alter or expand the remedial powers of courts in the exercise of their judicial review jurisdiction. The power to issue remedies where ‘necessary to do justice between the parties’, which appears in several parts of s 16,<sup>152</sup> appears to limit the scope of remedies available under the *ADJR Act*. In *Johns v Australian Securities Commission*, Brennan J held that s 16 obliged the Court to issue justice ‘according to law’.<sup>153</sup> His Honour clearly viewed that obligation as a limitation, stating that:

If there be no right to relief against a person under the general law, that person does not become liable to ... an adverse order ... merely by reason of being joined as a respondent in an application to the Federal Court under the *ADJR Act*.<sup>154</sup>

It is against this background that the courts have rejected any suggestion that the *ADJR Act* might authorise the issue of radical new public law remedies, such as damages for unlawful administrative action.<sup>155</sup>

#### VII STATE AND TERRITORY VERSIONS OF THE *ADJR ACT* AND THE VALUE OF UNIFORMITY

The judicial review statutes of the Australian Capital Territory, Queensland and Tasmania all closely mirror the *ADJR Act*. Each Act contains core features that are essentially identical to those of the *ADJR Act*, including a uniform test for standing,<sup>156</sup> a general right to reasons for decisions to which the Act applies

<sup>151</sup> *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637, 644 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). See also *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343, 356 [32] (Gleeson CJ, McHugh, Gummow, and Hayne JJ).

<sup>152</sup> *ADJR Act* ss 16(1)(d), (2)(b), (3)(c).

<sup>153</sup> (1993) 178 CLR 408, 434.

<sup>154</sup> *Ibid.* The example Brennan J gave was the issue of relief against a party even though no ground of judicial review had been established: at 433.

<sup>155</sup> A point made tacitly in *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637, 645 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). An application commenced under the *ADJR Act* may include a common law claim for damages for unlawful administrative action because the Federal Court could entertain the latter as part of its accrued jurisdiction: Willheim, above n 121, 120. The creation of a specific cause of action for damages for unlawful administrative action was examined in detail in Public Law Team, Law Commission (UK), *Monetary Remedies in Public Law: A Discussion Paper* (2004). That report did not lead to the adoption of a general remedy of damages in public law, though it has been argued that such a remedy might not be a radical doctrinal step: Iain Steele, ‘Substantive Legitimate Expectations: Striking the Right Balance?’ (2005) 121 *Law Quarterly Review* 300, 322–7.

<sup>156</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 3B; *Judicial Review Act 1991* (Qld) s 7; *Judicial Review Act 2000* (Tas) s 7. The Tasmanian Act adopts a slightly different formula for the standing test for joinder applications. It enables joinder of a person ‘aggrieved’ by a decision: *Judicial Review Act 2000* (Tas) s 25(1). All other statutes allow a person ‘interested’ to be joined: *ADJR Act* s 12(1); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 12(1); *Judicial Review Act 1991* (Qld) s 28(1). This slightly different wording of the Tasmanian Act appears to be of no material consequence: *Nation v Kingsborough Council* (2003) 12 Tas R 141, 144 [10] (Slicer J).

without the need to commence a substantive application for review,<sup>157</sup> codified grounds of review<sup>158</sup> and a streamlined remedy in the form of an order to review that can reproduce the prerogative or equitable writs which are issued in judicial review at common law.<sup>159</sup> A striking feature of the statutes modelled on the *ADJR Act* is their lack of innovation. These statutes have almost without exception not adopted any significant changes to the federal model, let alone any radical ones. While this approach may foster a level of consistency it does so at the expense of innovation and even modest reform.

The Queensland statute takes this approach of modelling its statute upon the *ADJR Act* one step further with the inclusion of a section that provides that where a provision of the federal Act expresses ‘an idea in particular words’ and the Queensland Act expresses ‘the same idea in different words because of different legislative drafting practice’, the two should ‘not be taken to be different merely because different words are used.’<sup>160</sup> The section effectively confirms that the Queensland Act was intended to replicate large parts of the *ADJR Act* and that where this occurs, either in form or in substance, the two should be interpreted similarly. In *Tang*, Gummow, Callinan and Heydon JJ noted that this provision ‘explicitly links the text and structure’ of the Queensland Act to the *ADJR Act*.<sup>161</sup> Their Honours also drew attention to one inadvertent consequence of this connection, namely that the federal character of the *ADJR Act* was necessarily subject to constitutional constraints such as the need for the presence of a ‘matter’. Gummow, Callinan and Heydon JJ noted that the Queensland Act is not subject to the same ‘constitutional underpinning’ but was tacitly made so by its express connection to the federal Act.<sup>162</sup> Gleeson CJ similarly reasoned that the express connection the Queensland Act drew to the *ADJR Act* ‘picked up the language’ and ‘history of judicial interpretation’ of the latter but in doing so may have adopted ‘in some circumstances ... a more restricted form of judicial review than is otherwise available.’<sup>163</sup>

The various judicial statements in *Tang* about the possible consequences of the link created by the Queensland Act to the federal Act invite questions about the wisdom of that connection. While it is obvious that state laws must operate consistently with the *Constitution*, one might question whether a state statute should so consciously adopt almost the entirety of federal case law without any clear consideration of the limits which accompany that law. The most recent

<sup>157</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Judicial Review Act 1991* (Qld) pt 4; *Judicial Review Act 2000* (Tas) pt 5.

<sup>158</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5–7; *Judicial Review Act 1991* (Qld) ss 21–4; *Judicial Review Act 2000* (Tas) ss 17–21.

<sup>159</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 17; *Judicial Review Act 1991* (Qld) s 30; *Judicial Review Act 2000* (Tas) s 27.

<sup>160</sup> *Judicial Review Act 1991* (Qld) s 16(1). Schedule 3 of this Act also provides a comparative table of provisions in the Queensland and federal Acts.

<sup>161</sup> (2005) 221 CLR 99, 131 [90]. See also at 112 [26]. Gleeson CJ reached a similar conclusion: at 105 [3]. Kirby J described the statutory linkage in the Queensland Act as a ‘command to adopt an approach to the Queensland statute similar to that taken to the *AD(JR) Act*’: at 147 [145].

<sup>162</sup> *Ibid* 131 [90].

<sup>163</sup> *Ibid* 105 [3].

consideration of the arguments in favour of uniformity in judicial review legislation was provided by the Law Reform Commission of Western Australia, in its (apparently shelved) report that recommended the adoption of the *ADJR Act* model.<sup>164</sup> The Commission noted that the 'obvious advantage' of such a change was 'uniformity of the substantive law governing judicial review of administrative decisions, irrespective of whether or not those decisions are made under state or Commonwealth law.'<sup>165</sup> In my view, this benefit of uniformity is more imagined than real. It was explained earlier in this article that the *ADJR Act* codifies the existing common law grounds of review and also that there is a single common law which governs the substantive law of judicial review in Australia.<sup>166</sup> The combined effect of these two points is that a significant level of uniformity already exists in the substantive principles of judicial review in the various jurisdictions of Australia and that the *ADJR Act* may not necessarily advance this uniformity.

The other benefit of uniformity that the Commission identified was the potential for adoption of the body of law that had developed in the interpretation of the *ADJR Act*.<sup>167</sup> The Commission explained that litigation under the *ADJR Act* was

now the predominant source of the general body of law relating to judicial review in Australia. The enactment of ... legislation which follows, as far as possible, the terminology used in the Commonwealth Act will enable that body of law to be applied directly to litigation under the state Act.<sup>168</sup>

The notion that proceedings under the *ADJR Act* are the primary vehicle for federal judicial review takes no account of the other avenues of review available at the federal level. The importance of these other avenues of review mean that it is somewhat misleading to suggest that the *ADJR Act* exerts a *dominant* influence at the federal level.<sup>169</sup> If it did, that time has passed. That said, powerful arguments can still be made in favour of adoption of the *ADJR Act* model. Adoption of the *ADJR Act* model would bring the relevant state or territory into alignment with the Commonwealth. It would also align the adopting jurisdiction with those other jurisdictions that have adopted the *ADJR Act* model. While it could be argued that some level of divergence of judicial review is unavoidable at the federal level by reason of the constitutionally entrenched right of review

<sup>164</sup> Law Reform Commission of Western Australia, above n 3. The report can be described as apparently shelved because it was tabled eight years ago but successive governments have not given any public commitment to enacting a judicial review statute.

<sup>165</sup> *Ibid* 26.

<sup>166</sup> See above Part IV.

<sup>167</sup> This benefit was also recognised by the author of the 1999 review of the Victorian scheme: Peter Bayne, 'Reform of Judicial Review — A New Model?' [1996] (79) *Canberra Bulletin of Public Administration* 65, 69.

<sup>168</sup> Law Reform Commission of Western Australia, above n 3, 26.

<sup>169</sup> If any form of dominance can be ascribed to Australian judicial review, it probably belongs to the Federal Court, which has the largest judicial review case load of any Australian court. Some commentators equate the dominant position of the Federal Court with the jurisdiction that it is granted under the *ADJR Act*. See, eg, Taggart, above n 28, 2–3. The better view is probably that the singular role of the Federal Court in Australian judicial review is derived from the combined effect of its jurisdiction under both the *ADJR Act* and the *Judiciary Act*.

and the need for legislation that invests an equivalent jurisdiction in the Federal Court, the same is clearly not true of the statutory template for judicial review. The retention or introduction of an entirely different statutory vehicle of judicial review would further fragment Australian law. That should not happen. The introduction of a statute based on the *ADJR Act* in those states and territories which do not currently have such an Act would promote uniformity in Australian administrative law and deserves strong support for that reason alone.

At the same time, however, the arguments in favour of uniformity should not prevent a critical analysis and potential refinement of the law that would be adopted. The perceived advantages of uniformity imply or assume that the relevant statutes will remain the same as far as possible and, more controversially, will be amended in a like manner. The history of federal–state relations suggests that this goal is often an aspirational one.<sup>170</sup> This last point presents a particular obstacle to further reform of judicial review. If the *ADJR Act* model as enacted at the federal level is seen as the benchmark, it is difficult for those jurisdictions which adopt that model to undertake further reform beyond adoption of that model without the effective consent (and perhaps the lead) of the Commonwealth.<sup>171</sup> In my view, there is no reason in principle why the federal origins of the *ADJR Act* confer a monopoly upon the Commonwealth to control the shape or direction of the *ADJR Act* model. Any possible reforms to the *ADJR Act* model should be judged on their merits rather than their origin.

#### VIII SHOULD JUDICIAL REVIEW BE CODIFIED?

The uncritical acceptance by the Law Reform Commission of Western Australia of the benefits of uniformity in judicial review legislation, which was discussed above,<sup>172</sup> invites a rarely asked question. Should there be a statutory mechanism for judicial review? Australian law does not reveal a clear answer. No statutory vehicle for judicial review has been adopted in New South Wales, Western Australia, South Australia or the Northern Territory. While the Northern Territory consistently has a relatively small number of judicial review applications, the same cannot be said of the other jurisdictions that have no statutory vehicle for judicial review.<sup>173</sup> The experience of these states arguably provides support for the proposition that the absence of a statutory form of judicial review does not itself hinder the willingness or ability of people affected by administra-

<sup>170</sup> See Justice R S French, 'Cooperative Federalism: A Constitutional Reality or a Political Slogan?' (2005) 32(2) *Brief* 6; Cheryl Saunders, 'Collaborative Federalism' (2002) 61 *Australian Journal of Public Administration* 69. Saunders concludes that economic and political considerations make increased collaboration in governmental arrangements inevitable: at 69.

<sup>171</sup> See the example given in Aronson, Dyer and Groves, above n 4, 87 where a reform to the *ADJR Act* recommended by the ARC was rejected by the Commonwealth but adopted in the Queensland Act.

<sup>172</sup> See above n 165 and accompanying text.

<sup>173</sup> It is difficult to easily quantify the level of judicial review in different Australian jurisdictions but a cursory glance of the law reports and databases of superior courts indicates that there seems to be little noticeable difference in the level of judicial review decisions between jurisdictions that do or do not have a judicial review statute.

tive decisions to seek judicial review of those decisions. Useful guidance can be taken from the experience of New South Wales.

The Supreme Court of New South Wales has issued an administrative law practice note which outlines the key procedural steps for judicial review applications.<sup>174</sup> This document restates some elements of existing law and amends others, which gives it some of the qualities of a judicial review statute. The practice note has several key features. It is largely directed to clarifying the principles and procedures governing judicial review at common law. Accordingly, the practice note contains no jurisdictional formula such as that used in the *ADJR Act* or the *ALA*. While this approach avoids the difficulties that a statutory jurisdictional formula can yield, it also means the practice note does not expand the existing scope of review. Many other important aspects of judicial review, such as standing and remedies, are not altered or clarified in any significant way by the practice note.

The two most notable features of the practice note are its treatment of the grounds of review and the right to reasons. The practice note contains a clear procedure for applicants in common law judicial review proceedings, which provides applicants with almost all of the benefits of a right to reasons conferred under the various judicial review statutes of other jurisdictions.<sup>175</sup> But this right to reasons differs from those conferred in judicial review statutes in one important respect. It applies only when an application for review has been commenced.<sup>176</sup> The narrow scope of this right to reasons limits the information that a party may obtain prior to commencing proceedings and thereby restricts the ability of parties to decide how to fashion an application for review and, more importantly, whether to commence an application at all.

The practice note restates the existing grounds of judicial review but does not include any new or open-ended grounds, such as the *ADJR Act's* ground of 'otherwise contrary to law',<sup>177</sup> which might facilitate evolution in the grounds of review. This simple reproduction of the existing grounds of review might have an educative effect, particularly for the legal profession.<sup>178</sup> However, that seems a weak justification for including the grounds of review in a practice note. One might even suggest that practitioners should not accept work in an area in which they need prompting about basic principles. A stronger criticism of the practice note is that it does not provide a strong basis for innovation or simplification and

<sup>174</sup> Supreme Court of New South Wales, *Practice Note No SC CL 3 — Supreme Court Common Law Division — Administrative Law List*, 16 July 2007 ('*Practice Note No SC CL 3*'). The previous version of the practice note was Supreme Court of New South Wales, *Practice Note No 119 — Common Law Division — Administrative Law List* (2001) 50 NSWLR 660.

<sup>175</sup> See *Practice Note No SC CL 3*, cl 23.

<sup>176</sup> This is most likely to ensure that the note is within the rule-making power of the Supreme Court as set out in *Supreme Court Act 1970* (NSW) s 124. Section 124 is essentially drafted in terms that provide the Court with power to make and amend rules governing proceedings in the Court. If the practice note enabled applicants who had not commenced proceedings, and might not do so, to obtain reasons, it might not be authorised by s 124.

<sup>177</sup> *ADJR Act* ss 5(1)(j), 6(1)(j), discussed in above n 123 and accompanying text.

<sup>178</sup> This interpretation is suggested in Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 66, 91 n 115. See also Willheim, above n 121, 114.

can easily be overturned by legislation or subsequent practice directions issued by the Supreme Court. Meaningful reform to judicial review requires a more secure foundation.

Whether the *ADJR Act* is the right foundation is debatable. This article has emphasised the procedural benefits of that Act and also its technical flaws, which have become apparent in recent times. An important question that flows from these issues is whether the *ADJR Act* model has focused on procedural reform at the expense of reform to the substantive law of judicial review. Kirby J addressed this possibility in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*.<sup>179</sup> His Honour acknowledged that the impact of the *ADJR Act* was ‘overwhelmingly beneficial’ but this praise was qualified.<sup>180</sup> Kirby J reasoned:

The somewhat arrested development of Australian common law doctrine that followed [the introduction of the *ADJR Act*] reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally.<sup>181</sup>

These remarks imply an acceptance that the *ADJR Act* introduced many procedural changes to judicial review, which are useful reforms in their own right but also recognise that the codification of the existing common law grounds of review may have introduced a new limitation. Kirby J noted that the introduction of the *ADJR Act* marked a point at which Australian administrative law had moved away from that of England,<sup>182</sup> the implication being that many of the innovations which had arisen in English judicial review law had bypassed Australia since the introduction of the *ADJR Act*.<sup>183</sup>

Some comparative guidance can be drawn from England, where many commentators examined the *ADJR Act* during the 1990s to consider the value of

<sup>179</sup> (2003) 77 ALJR 1165.

<sup>180</sup> *Ibid* 1191 [157].

<sup>181</sup> *Ibid* 1193 [166].

<sup>182</sup> *Ibid* 1192–3 [162]–[167]. It is useful to note that many commentators have long cautioned against easy comparative analysis in administrative law due to national differences in constitutional frameworks, political culture and legal history. See, eg, Cheryl Saunders, ‘Apples, Oranges and Comparative Administrative Law’ [2006] *Acta Juridica* 423; Thomas Poole, ‘Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 15, 16–7; Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009) 669, where it is stated that ‘[d]ifferent constitutional systems show a wide range of possible arrangements’ for judicial review.

<sup>183</sup> Other judges have suggested that the growing role of European law has made English law an increasingly unsuitable point of reference for Australian public law: See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 620 [21], where Gummow ACJ and Kiefel J referred to the ‘tectonic shifts’ that had occurred in English public law in recent years. Such remarks suggest the emergence of a doctrinal gulf between Australian and English law. See also Justice W M C Gummow, ‘The Permanent Legacy’ (2000) 28 *Federal Law Review* 177, 180; Chief Justice J J Spigelman, ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724, 732–3. Lord Cooke has viewed such changes in a different way and suggested that the growing European influence on English law means that the common law is becoming less English in character: Lord Robin Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 *International and Comparative Law Quarterly* 273, 273–4.

codification of the grounds of judicial review.<sup>184</sup> The idea of codification initially had a mixed reception in England.<sup>185</sup> Some feared it would shackle the specific grounds of judicial review, and perhaps also the scope of review more generally, by enabling legislative control of judicial review.<sup>186</sup> This concern that codification might narrow both the scope and grounds of review was either dismissed or embraced by others. The supporters of codification suggested that such consequences might be desirable.<sup>187</sup> They also argued that codification could provide useful clarity for those affected by judicial review,<sup>188</sup> and that statutory grounds of review could be carefully crafted with a view to enhancing judicial discretion and encouraging new or expanded grounds of review.<sup>189</sup>

The possibility of codifying the grounds or procedure of judicial review has slipped from public view in England.<sup>190</sup> This may be due to the difficulties which arose from procedural reforms introduced around the time that codification attracted attention. One effect of these procedural reforms was to impose an exclusive procedure for judicial review applications which, in turn, caused many technical problems.<sup>191</sup> This exclusive procedure was roundly criticised but not fully resolved for almost 20 years.<sup>192</sup> The problems of procedural exclusivity affected the debate on codification of judicial review in England in several ways.

<sup>184</sup> The *ADJR Act* is drawn upon at length in Timothy H Jones, 'Judicial Review and Codification' (2000) 20 *Legal Studies* 517 and Diana Woodhouse, *In Pursuit of Good Administration: Ministers, Civil Servants, and Judges* (Clarendon Press, 1997) 200–4.

<sup>185</sup> Useful overviews of the debate on codification during this time are given in Anthony Bradley, 'The Need for Legislative Intervention' (1991) *New Law Journal* 389; Carol Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot' (1996) 2 *European Law Journal* 3; Roderick A Macdonald, 'Recommissioning Law Reform' (1997) 35 *Alberta Law Review* 831; Jones, above n 184.

<sup>186</sup> The most influential exponent of this view was Lord Woolf: Sir Harry Woolf, *Protection of the Public — A New Challenge* (Stevens & Sons, 1990) 32–3. Lord Woolf was mindful that a gap in the coverage of the *ADJR Act* could be overcome by the availability of review under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act*, neither of which has an equivalent in English law.

<sup>187</sup> See, eg, John Griffith, 'Constitutional and Administrative Law' in Peter Archer and Andrew Martin (eds), *More Law Reform Now: A Collection of Essays on Law Reform* (Barry Rose Publishers, 1983) 49, 54–9. Griffith argued that codified grounds of review could control the unnecessary and unstructured discretion which he believed the common law accorded to judges.

<sup>188</sup> See, eg, Woodhouse, above n 184, 228. Woodhouse considered the issue within the context of a wider code of good administrative practice: at 227–32. Lord Woolf also favoured the creation of a code of good practice for judges and decision-makers, though his Lordship favoured a non-statutory code: Woolf, above n 186, 122–3.

<sup>189</sup> An argument made by James Goudie, 'Judicial Review' in David Bean (ed), *Law Reform for All* (Blackstone Press, 1996) 134. Goudie gave an 'untenable conclusion of fact' as an example of a new ground of: at 136.

<sup>190</sup> The issue is not even mentioned in the current editions of any of the leading English works on judicial review.

<sup>191</sup> The issue was a complex one. In essence, the House of Lords interpreted procedural rules as imposing a requirement of exclusivity for judicial review in *O'Reilly v Mackman* [1983] 2 AC 237. Whether this outcome was intended by drafters of the relevant rules of court may be uncertain, but the effect of *O'Reilly v Mackman* was not. It separated public and private law and split the procedural and substantive law governing judicial review. See John Adler, 'Hunting the Chimera — The End of *O'Reilly v Mackman*?' (1993) 13 *Legal Studies* 183.

<sup>192</sup> The consequences of *O'Reilly v Mackman* were slowly narrowed by subsequent judicial decisions and finally overcome by new rules of procedure, as interpreted in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988: see *Civil Procedure Rules 1998* (UK) SI 1998/3132, pt 54.

It greatly distracted attention from reforms to judicial review.<sup>193</sup> The requirement of procedural exclusivity emanated from rules of court, which may have led many to fear the possible consequences of more substantial changes such as codification. At the same time, the many significant innovations in English judicial review in recent times, such as the grounds of proportionality and substantive unfairness, evolved in the common law rather than by legislation.<sup>194</sup> The striking contrast between these advances in the common law and the quagmire of procedural exclusivity must surely have dissuaded many from further statutory reform to judicial review in England.

The extent to which English common law developments in judicial review may be instructive for Australia is increasingly doubtful. The Australian conception of judicial review is increasingly fashioned by constitutional considerations, particularly the apparent limits that the separation of powers doctrine imposes upon the scope of judicial review of administrative action.<sup>195</sup> The conception of the judicial function expounded by the High Court draws a clear, arguably rigid, distinction between judicial and merits review.<sup>196</sup> This distinction in turn appears to preclude the adoption of some recent English developments in judicial review, such as the doctrine of substantive unfairness. When the High Court considered that doctrine, it made clear that the apparent balancing exercise required by the ground of substantive unfairness, by which a court must weigh the requirements of fairness against any factor that may override the expectation that fairness would be accorded,<sup>197</sup> might be incompatible with the prevailing conception of judicial power.<sup>198</sup> The same constitutional objections might be raised to any

<sup>193</sup> When the requirement of procedural exclusivity existed, Sir William Wade suggested it was the most pressing issue in English administrative law of the time: Sir William Wade, *Administrative Law* (Clarendon Press, 6<sup>th</sup> ed, 1988) viii.

<sup>194</sup> Proportionality and substantive unfairness in English public law are examined in Craig, above n 140, ch 19. Although these new grounds of English public law were developed at common law, there is little doubt that their recognition and evolution in English law has been influenced by the *Human Rights Act 1998* (UK) c 42: at 24.

<sup>195</sup> Sir Anthony Mason has suggested that Australian administrative law is distinguished from otherwise comparable jurisdictions in the Commonwealth by the strong influence exerted by the separation of powers doctrine on Australian public law generally and judicial review in particular: Sir Anthony Mason, 'The Break with the Privy Council and the Internationalisation of the Common Law' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 66, 77. The effect of constitutional influences on Australian judicial review doctrine is examined in Matthew Groves, 'Judicial Review of Administrative Action in the High Court of Australia' (2008) 33 *Queen's Law Journal* 327.

<sup>196</sup> Cane, above n 28, suggests that the merits/legality divide was also entrenched by the enactment of the *ADJR Act* and establishment of the federal Administrative Appeals Tribunal ('AAT'). Cane attributes much of the blame to the AAT, the establishment of which he argues 'fragmented administrative law by giving the distinction between judicial review and merits review a unique and rigidifying significance': at 133.

<sup>197</sup> This explanation of substantive unfairness paraphrases the key test provided in the leading case of *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 242 (Lord Woolf MR, for Lord Woolf MR, Mummery and Sedley LJ).

<sup>198</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ), 21–5 [67]–[77] (McHugh and Gummow JJ). Hayne J did not directly examine substantive unfairness, but provided a cautious, arguably even sceptical, view of the procedural version of the doctrine of legitimate expectation, which suggests that his Honour would not embrace the substantive version of the doctrine which underpins substantive unfairness: at 36–9

Australian adoption of proportionality as a separate ground of review, on the basis that the variable intensity of review which lies at the heart of this ground might require courts to undertake a level of scrutiny that veers too close to merits review and therefore the bounds of judicial power for Australian constitutional purposes.<sup>199</sup>

#### IX CONCLUDING OBSERVATIONS

The *ADJR Act* clearly provides many important procedural reforms to judicial review at common law. Many provisions of the *ADJR Act* governing technical matters, such as standing, joinder, the right to reasons and remedies, are clear and sensible and provide a good model for statutory judicial review. There is clear logical force in the adoption of a range of procedural provisions which have worked well at the federal level and offer a better model than the common law. These features of the *ADJR Act* would provide many benefits to those jurisdictions which either do not have a judicial review statute, or those such as Victoria which have a statute that is beset with problems. It would simplify many procedural aspects of judicial review. It would also promote uniformity in Australian administrative law. There is no clear reason why the technical aspects of judicial review on issues such as standing, reasons and remedies should differ significantly between jurisdictions.

But the desire for uniformity should not give way to uncritical acceptance. Several key features of the *ADJR Act* are imperfect. Adoption of the *ADJR Act* model in those jurisdictions which have no such Act would provide an occasion to improve some of the flaws and shortcomings of the *ADJR Act* by the introduction of several improvements. These changes might, in turn, provide a useful model for reform to the *ADJR Act* and those statutes which are based upon it. One such change would be to the means by which both the duty to provide reasons and also the application of the *ADJR Act* itself can be excluded by an amendment to the schedule of the Act. Such exclusions narrow the scope of the *ADJR Act* and should, in my view, be treated with great caution. Any argument that this regime of exclusions should be adopted in any legislation based upon the *ADJR Act*, or retained in the *ADJR Act* and the existing statutes based upon it, presumes that there can be a good reason for any specific exemption from a judicial review statute. If so, there can be no objection to a requirement that such objections be articulated to and scrutinised by an appropriate parliamentary committee. Any examination of existing or proposed exemptions should proceed on the assumption that exemptions require compelling justification.

Any alterations to the jurisdictional formula of the *ADJR Act* would be a more far-reaching reform but there is a strong case for the adoption of a new formula.

[116]–[122]. The same appears true of the even more sceptical stance on the doctrine of legitimate expectation adopted by Callinan J: at 45–8 [140]–[148].

<sup>199</sup> The precise content of proportionality in English law remains unsettled and open to many points of disagreement, which are well explained in Julian Rivers, 'Proportionality and Variable Intensity Review' (2006) 65 *Cambridge Law Journal* 174. On the possible Australian reception of the doctrine, see Priyanga Hettiarachi, 'The Sacred and the Profound: Judicial Review and Rights, Proportionality and Deference to Executive Conduct' (2007) 29 *Australian Bar Review* 223.

The existing *ADJR Act* formula, enabling review of decisions of an administrative character which are made under an enactment, has given rise to difficult interpretive problems that are best avoided by the adoption of an entirely new test. A formula that enabled review of any 'decision or conduct of, or the failure to make a decision or engage in conduct by, an official that affected the rights, interests or legitimate expectations of a person' would bypass many of the problems that have arisen under the current *ADJR Act* formula. If an official were defined as someone who was bound to observe one or more of the rules of natural justice, this jurisdictional formula would depend on a minimal requirement to observe fairness. This would provide a far simpler alternative to the existing formula of the *ADJR Act*. It would also have an intuitive appeal. Decision-makers subject to such a duty to meet a minimum standard of fairness would be hard pressed to argue that they should not also be amenable to review.

A more difficult issue is whether any new version of the *ADJR Act* enacted in those jurisdictions which do not have such a statute should include codified grounds of review. The precise impact of the *ADJR Act's* codification is not easy to determine, though it is quite clear that the open-ended grounds of review included in the *ADJR Act* that might have encouraged or facilitated the evolution of new principles of review have not done so. The absence of any significant innovation in the grounds of judicial review, whether at common law or under the statutory framework in the various Australian jurisdictions which have adopted the *ADJR Act* model, may be due to constitutional limitations upon the scope of review rather than the codification of the grounds in some jurisdictions. It is for this reason that the proposals made in this article — to narrow the scope of any exemptions to a judicial review statute and the simplification and expansion of the reach of that statute by the adoption of a new jurisdictional formula — could provide an important new step in judicial review. If the scope of statutory judicial review were widened and simplified, a strong foundation may be created for substantive innovation. If the jurisdictional formula of the *ADJR Act* were pruned, the Act itself could bear more fruit.