

Civil Litigation Committee  
Civil Litigation Committee  
Public Law and Government  
Committee

Submission to the Administrative Review  
Council:  
Judicial Review in Australia

1 July 2011

**Chair, Civil Litigation Committee, NSW Young Lawyers:** Elias Yamine

**Chair, Public Law and Government Committee, NSW Young Lawyers:** Greg Johnson

**Chair, Submissions Sub-Committee, NSW Young Lawyers Civil Litigation  
Committee and Editor-in-Chief:** Brenda Tronson

**Submission Co-ordinator and General Editor:** Martin del Gallego

**Editors:** Theresa Dinh, Sonya Willis

**Authors:** Patrick Gardner, Harriet Lenigas, Sarah McKeith, Christopher Parkin,  
Ellie Setakeh

NSW Young Lawyers  
Civil Litigation Committee and Public Law and Government Committee  
Level 6, 170 Phillip Street  
Sydney NSW 2000  
[www.younglawyers.com.au](http://www.younglawyers.com.au)

## The Committees

Membership of NSW Young Lawyers is open to young lawyers, either under the age of 36 or in their first five years of practice, and to law students. This submission is made on behalf of the Civil Litigation Committee and the Public Law and Government Committee (together, the **Committees**).

The Civil Litigation Committee consists of members of NSW Young Lawyers who practice or have an interest in civil litigation.

The Public Law and Government Committee consists of members of NSW Young Lawyers who practice or have an interest in public law, and/or who work for government.

Inquiries may be directed to the President of NSW Young Lawyers, Daniel Petrushenko, on 02 9229 7333 (341), to the Chair of the Civil Litigation Committee, Elias Yamine, on 02 8281 7961 or to the Chair of the Public Law and Government Committee, Greg Johnson, on 02 9267 4322.

## Issues addressed in this submission

The Committees have had the opportunity to read and consider *ARC Consultation Paper No 1 – Judicial Review in Australia* (the **Consultation Paper**) published by the Commonwealth Administrative Review Council (the **Council**) in April 2011.

In the Committees' view, the Consultation Paper is timely; review of the present systems in place for judicial review, with an eye to increasing the coherence of the various avenues, is necessary.

In particular, the Committees consider that there is greater scope for use of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) by broadening the matters it covers, making it less restrictive and amending the grounds of judicial review available under it.

Set out below are the Committees' more detailed views in response to the following discussion questions contained in the Consultation Paper.

### Question 1

How are applicants making use of review rights under s 39B(1A)(c) of the *Judiciary Act 1903*, s 75(iii) and/or s 75(i) of the Constitution. In what way, if any, do these avenues offer a broader scope for judicial review than the other avenues of judicial review?

### Question 3

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

### Question 4

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

### Question 6

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

### Question 12

What are the advantages and disadvantages of different approaches to the grounds of judicial review—common law or codification of grounds and/or general

principles? Which approach is to be preferred and why? What grounds should be included in a codified list?

**Question 13**

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

**Question 14**

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

**Question 15**

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

**Question 17**

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

**Question 18**

What form should a statement of reasons take when provided on request under general statutory scheme? What other forms do statements of reasons take?

**Question 19**

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

**Question 21**

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

**Question 22**

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

**Question 27**

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

**Question 28**

What are the reasons for or against relying solely on constitutional judicial review as a general judicial review mechanism for federal judicial review?

## The Current System of Judicial Review

### Question 1:

### Review rights under s 39B(1A)(c) of the Judiciary Act, s 75(iii) and/or s 75(i) of the Constitution

The Committees submit that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) should be broadened to include judicial review matters currently covered by either the *Judiciary Act 1903* (Cth) or the Commonwealth Constitution, to maximise the functionality of the *ADJR Act* and reduce procedural complexity.<sup>1</sup>

The Committees submit that the limitations of the *ADJR Act* identified in the Consultation Paper at paragraphs [4.09] and following are unnecessary as they can, in effect, be avoided by utilising s 39B(1A)(c) of the *Judiciary Act* or ss 75(i) and 75(iii) of the Constitution. This limitation is contrary to the purpose of the *ADJR Act*, which is to overcome the procedural complexities relating to judicial review under the common law.<sup>2</sup>

Despite the shortcomings of the *ADJR Act*, opportunities to use the *Judiciary Act* to circumvent the restrictions in the *ADJR Act* remain rare (possibly due to the right to reasons under the *ADJR Act*). However, s 39B of the *Judiciary Act* has been utilised by an applicant in the 2008 case of *Motor Trades Association of Australia Superannuation Fund Pty Ltd v Australian Prudential Regulation Authority*.<sup>3</sup> The case concerned a decision not to return documents obtained under s 255 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and s 56 of the *Australian Prudential Regulation Authority Act 1998* (Cth). Both Acts were silent on the issue of the return of documents. The applicant sought to enliven the jurisdiction of the Court pursuant to both s 5 of the *ADJR Act* and s 39B(1A)(c) of the *Judiciary Act* to obtain review of the decision not to return the documents. Flick J acknowledged that s 39B(1A)(c) was wider than the *ADJR Act*.<sup>4</sup> However, his Honour concluded that due to the silence in the Acts relating to the return of documents, the decision not to return the documents was neither a 'decision under' the Acts nor a 'matter' that arose under the Acts.<sup>5</sup> His Honour also held that the decision did not affect the applicant's legal rights and interests.<sup>6</sup>

The ambit of the word 'matter' in the context of s 39B(1A)(c) has recently been considered by the High Court in the case of *Edwards v Santos Ltd*.<sup>7</sup> In that case the defendants alleged that they were 'immune from the "right to negotiate provisions of the [Native Title Act]" because of the pre-existing rights based acts provisions of the [Native Title Act]'.<sup>8</sup> The High Court overturned the decisions of the Full Federal Court and the Federal Court and held that it was a 'matter' arising under a federal law for the purposes of s 39B(1A)(c) as 'there is also a matter arising under a federal law if the source of a defence which asserts that the

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<sup>1</sup> Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative law?' (2005) 12 *AJAdminL* 79 at 91.

<sup>2</sup> W B Lane and Simon Young, *Administrative Law in Australia* (2007) at 92 [2.165].

<sup>3</sup> (2008) 169 FCR 483.

<sup>4</sup> *Id* at 491-492 [35].

<sup>5</sup> *Id* at 492 [38].

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

<sup>7</sup> (2011) 275 ALR 489; [2011] HCA 8.

<sup>8</sup> *Id* at 502 [45] per Heydon J with whom French CJ, Gummow, Crennan, Kiefel and Bell JJ agreed at [1].

defendant is immune from a liability or obligation of that defendant is a law of the Commonwealth'.<sup>9</sup>

The Committees also note the case of *Cathay Pacific Airways Ltd v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs*<sup>10</sup> in which the applicant sought relief under both s 5 of the *ADJR Act* and s 39B(1A) of the *Judiciary Act*. Cathay Pacific sought review of a decision of the Minister to grant consent to the applicant in a class action against Cathay Pacific and nine other airlines, to rely on conduct engaged in by the airlines outside of Australia in the class action. However, the Court did not consider the interrelationship between the jurisdictional provisions.

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<sup>9</sup> (2011) 275 ALR 489 at 502 [45] citing *Felton v Mulligan* (1971) 124 CLR 367 at 408; [1972] ALR 33; [1971] HCA 39; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; 218 ALR 677; [2005] HCA 38 at [29].

<sup>10</sup> (2010) 186 FCR 168.

## The Ambit or Scope Review

### Question 3:

#### Statutory judicial review and subordinate legislation

The Committees submit that the *ADJR Act* be amended to allow for judicial review of subordinate legislation where the instrument can be categorised, at least in part, as an administrative decision, as opposed to a strictly judicial or legislative decision.

With regards to hybrid instruments, the Committees consider that a partial characterisation as an administrative decision should render an instrument amenable to judicial review. This is in contrast with the current approach, found in the *Legislative Instruments Act 2003*, which excludes an instrument from judicial review where it has a legislative aspect.<sup>11</sup> The Committees consider that the focus of the enquiry should be on whether an instrument can be characterised, even in part, as an administrative decision. This is consistent with the common law.

However, the Committees are of the view that the *ADJR Act* should not be extended to cover all subordinate legislation. Despite the acknowledged difficulty of characterising some legislative instruments, to extend review under the *ADJR Act* to all subordinate legislation would potentially subject purely legislative instruments to judicial review and create undue pressure on government agencies. Further, such instruments do not always have an effect on legal rights, interests and obligations of individuals. The Committees submit that it is not appropriate for instruments which affect the general populace to be the subject of judicial review for two reasons. First, it is not reflective of the purpose of judicial review, and second, other means of challenge are available.<sup>12</sup>

Having regard to the Committees' views that judicial review should extend to legislative instruments which are administrative in character, but not to all subordinate legislation, the Committees favour the view put by Professor Aronson that the right to reasons under s 13 of the *ADJR Act* should be limited if review is extended to subordinate legislation.<sup>13</sup> However, the Committees recommend that the right to reasons should still apply to any part of a hybrid instrument which can be characterised as an administrative decision.

### Question 4:

#### Review of reports and recommendations by bodies other than final decision maker

The Committees maintain that judicial review should extend to reports and recommendations made by bodies other than the final decision maker where those reports and recommendations have the capacity to affect a person's rights or interests. Further, the Committees submit that judicial review should be extended to non-statutory decisions made by Commonwealth officers, which affect a person's rights or interests.

The Committees recommend the *ADJR Act* be amended to include a provision similar to that found in s 4(b) of the *Judicial Review Act 1991* (Qld), and an adoption of the two part test for determining whether a decision was made 'under

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<sup>11</sup> *Legislative Instruments Act 2003* (Cth), s 5(4).

<sup>12</sup> P A Keane, 'Judicial Review: The courts and the academy' (2008) 82 *AJL* 623 at 634-635.

<sup>13</sup> Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative law?' (2005) 12 *AJAdminL* 79 at 82; Consultation Paper at [411].

an enactment' expounded by Kirby J in his dissenting opinion in *Griffith University v Tang*.<sup>14</sup>

The Committees are also of the view that the *ADJR Act* should match the common law supervision of non-statutory power, even power exercised by a non-government body, provided the power being exercised is still a 'public power',<sup>15</sup> being a power to make decisions which affect the rights and interests of subjects, not the exercise of rights which agencies of the state enjoy in common with other members of the community. For example, the exercise of rights associated with a contract would not constitute an exercise of public power and would not attract judicial review.<sup>16</sup> Considerations of public accountability and equality before the law do not require that the mere exercise by agencies of the community of rights enjoyed by such agencies on behalf of the community should be subject to judicial review.<sup>17</sup>

Although the exercise of a government's contractual power is a public power, it is not the *type* of public power that is or should be the subject of judicial review.<sup>18</sup> However, the courts should be able to review decisions which do not fall within this category, especially where there is non-compliance with statutory procedural requirements.<sup>19</sup>

The Committees suggest that the requirement found in s 3(1)(a) of the *ADJR Act*, that a decision be made 'under an enactment' for it to be a 'decision to which the act applies' be amended to cover all decisions '*in breach* of an enactment'.<sup>20</sup> The Committees suggest the following wording: 'a decision authorised or required by a statute, regardless of whether that decision draws its legal force or effect from that same statute.'

## Question 6: Preferable focus of a test for judicial review jurisdiction

The Committees submit that eligibility for judicial review should apply where a power being exercised is 'public' in nature.

The Committees submit that a decision made by a government agency to enter into or terminate a contract for breach should not be the subject of judicial review despite it being arguably an exercise of a public power as the exercise is private in nature.<sup>21</sup> Further, the Committees submit that the focus of a test for judicial review jurisdiction should be the decision itself and the effect of that decision on the rights and interests of the person it affects, rather than the status of the

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<sup>14</sup> (2005) 221 CLR 99 at 151 [149] (5) per Kirby J. See too the remarks of Gleeson CJ at 111 [22].

<sup>15</sup> Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative law?' (2005) 12 *AJAdminL* 79 at 94.

<sup>16</sup> P A Keane, 'Judicial Review: The courts and the academy' (2008) 82 *AJL* 623 at 633. This appears to be the view of Davies and Einfeld JJ in *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 at 168; see too *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185.

<sup>17</sup> P A Keane (2008), above n16 at 634.

<sup>18</sup> *Id* at 634-635.

<sup>19</sup> Anthony E Cassimatis, 'Statutory judicial review and the requirement of a statutory effect on rights or obligations: "decisions under an enactment"' (2006) 13 *AJAdminL* 169 at 184.

<sup>20</sup> Aronson (2005), above n 15 at 86, 96.

<sup>21</sup> P A Keane (2008), above n 16 at 635; cf Christos Mantziaris and Leighton McDonald, 'Federal judicial review jurisdiction after *Griffith University v Tang*' (2006) 17 *PLR* 22 at 24.

decision maker.<sup>22</sup> The reasoning of the Committees is that agencies of the Crown enjoy the same rights under the law as other persons to enter into contractual relations which are not special to the decision maker.<sup>23</sup>

The Committees are of the view that judicial review should extend to the exercise of statutory or regulatory powers by private persons. This issue was considered by Kirby J in his Honour's dissenting opinion in the case of *NEAT Domestic Trading Pty Ltd v AWB Ltd*.<sup>24</sup> Justice Kirby considered the outcome effected by the majority decision in that case 'as "alarming", occasioning a serious reduction in accountability for the exercise of government power'.<sup>25</sup> The Committees submit that a 'public function' test should be adopted, with the proviso that the relevant exercise of the public function must affect rights and obligations.<sup>26</sup> This accords with the purpose of the *ADJR Act* and of judicial review of administrative action to protect against 'serious administrative injustice'.<sup>27</sup>

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<sup>22</sup> P A Keane, 'Judicial Review: The courts and the academy' (2008) 82 *AJL* 623; cf Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4<sup>th</sup> ed, 2009) at 134; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 583-585 per Brennan J.

<sup>23</sup> P A Keane (2008), above n22 at 634. See too at 633: '[T]he exercise of public power has always been understood as the making of decisions which affect the rights and interests of subjects, not the exercise of rights which agencies of the state enjoy in common with other members of the community'.

<sup>24</sup> (2003) 216 CLR 277.

<sup>25</sup> *Griffith University v Tang* (2005) 221 CLR 99 per Kirby J at 133 [100].

<sup>26</sup> See the discussion in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120; [2000] ACTSC 89 at 146-147 [212]-[220] per Higgins J; see too *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 384-385 [6]-[7] per Spigelman CJ.

<sup>27</sup> Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative law?' (2005) 12 *AJAdminL* 79 at 81.

## Grounds of review

### Question 12: Advantages and disadvantages of different approaches to grounds of judicial review

An advantage to codification is that it allows an applicant to understand the ambit of grounds on which they can seek review of administrative decisions. This enhances accessibility to justice and transparency. The Committees also concur with the comments on codification of grounds of review expressed at paragraphs [4.69] to [4.70] of the Consultation Paper, particularly the criticisms expressed at paragraph [4.69].

In the Committees' view, the adoption of a statute which sets out general principles of judicial review, together with broad grounds on the Canadian model, is the preferred approach.

The use of general principles would be consistent with the current inclusion of objects provisions in many statutes. This is compatible with the approach to statutory interpretation described by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>28</sup> and, indeed, s 15AA of the *Acts Interpretation Act 1901* (Cth).

In relation to the Canadian model as to the grounds of judicial review, the Committees concur with the comments at paragraph [4.76] of the Consultation Paper.

### Question 13: Statutory codes of procedure

It is the Committees' view that codes of *procedure* should be used (especially in areas of law where people subject to administrative decisions may be less likely to be able to access legal representation), but that such codes of procedure should not constitute codes of *procedural fairness*. Rather, the common law and *ADJR Act* should apply to questions of breach of the procedural fairness rule.

As noted in the Consultation Paper, it is common for courts to 'resist legislative restrictions on ... grounds of review' (at paragraph [4.84]). This has certainly been the Committees' experience in the field of migration law, and the committee considers it inevitable in a country with a rich common law tradition, especially given the importance of judicial review (and procedural fairness itself) to the Australian conception of the rule of law.

Accordingly, the Committees submit there should not be any code of procedural fairness.

Conversely, the Committees submit some codification of *procedure* may well be desirable, especially given administrative law should aim to increase the transparency and quality of decision-making, both of which are likely to be achieved by increased accessibility of judicial review. Codes of procedure assist people subject to administrative decisions to assess whether or not correct procedure has been followed. In addition, a code of procedure is likely to assist decision-makers, particularly non-lawyers, to follow correct procedures.

The Committees submit that any code of procedure must not constitute a code of *procedural fairness* as this would not have the flexibility of the common law to develop with the changing requirements of society. The Committees submit that codification of procedural fairness would, therefore, inevitably, fail and the courts would then be forced into increasingly creative interpretations of the code which

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<sup>28</sup> (1998) 194 CLR 355.

would reduce access to justice and increase complexity. An example of this phenomenon is the High Court's decision in *Minister for Immigration and Citizenship v SZIZO*,<sup>29</sup> as a result of which applicants are now required to assess not only whether a decision-maker has followed the correct procedure, but also whether any failure to do so constitutes jurisdictional error.

Further, the approach to procedural fairness described above would be consistent with a 'general principles' approach to the grounds of judicial review generally.

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<sup>29</sup> (2009) 238 CLR 627.

## Right to seek judicial review

### **Question 14: Standing**

The Committees submit that an appropriate test for standing is one which applies to both individuals and organisations and affords standing on the basis of 'special interest' or requires complainants (including organisations) to show that they have been aggrieved by the decision.

The Committees submit that an argument for making judicial standing consistent with the standing requirements under the AAT Act is that this would enable organisations with greater knowledge of the impact of the decision to challenge the decision in the public interest consistent with paragraph [4.96] of the Consultation Paper. The Committees submit that the objectives of organisations (such as environmental organisations) often benefit the public and such organisations are genuinely interested in decisions concerning their objectives. This would also assist in ensuring greater transparency in the making of decisions which have a public impact.

The Committees submit that it would be appropriate to give organisations standing if a decision relates to the objects of the organisation consistent with paragraph [4.100] of the Consultation Paper.

## Judicial Review and Reasons for Decisions

### Question 15: Right to reasons

The Committees submit that administrative decision makers should be subject to a general obligation to prepare a statement of reasons, with specific exemptions where necessary, whenever a decision is prepared.

The Committees support the arguments propounded by Creyke and McMillan, referred to at paragraph [4.115] of the Consultation Paper, in support of a general obligation to provide reasons. In the Committees' view, all administrative decisions should be made with sound reasoning in accordance with relevant principles and standards. The implementation of an obligation on decision makers to provide a statement of reasons at the time of the decision would assist decision makers to deliberate carefully in their decision making and may also help administrative agencies to formulate rules and standards for application in future decision making. Moreover, the introduction of a generalised right to reasons would be consistent with current legal developments in the United Kingdom, New Zealand and Canada (see paragraphs [4.111] and [4.120] of the Consultation Paper).

Importantly, the Committees consider that the present statutory scheme – which provides that reasons requested under statute need only be prepared at the time of the request – is inadequate. In the Committees' view, a general obligation to provide reasons at the time at which a decision is made would enhance the value of the statement of reasons. In particular, the Committees note the practical impediments to producing a complete and accurate statement of reasons at a time period after the decision as outlined in paragraph [4.121] of the Consultation Paper.

Whilst the Committees support the introduction of a generalised right to reasons, the Committees emphasise that certain administrative decisions may need to be exempted by means of specific legislation. Suggested exemptions are outlined in the response to question 17 below.

### Question 17: Exemptions from any obligation to provide reasons

The Committees agree with the views expressed by the Council in Report No. 33 that the exemptions provided in Schedule 2 to the *ADJR Act* should be repealed on the basis that the safeguards in ss 13A and 14 of the *ADJR Act* provide adequate protection against inappropriate disclosure of administrative reasons.

At present, ss 13A and 14 of the *ADJR Act* provide that a statement of reasons does not need to be provided for decisions relating to matters including national defence and security, information obtained in confidence, personal private information and certain commercial interests. The Committees consider that these exemptions are adequate. As such, the Committees submit that there is merit in repealing Schedule 2 to the *ADJR Act* so that the list of exemptions is provided clearly and concisely in the legislation.

### Question 18: Form of statement of reasons

The Committees support the recommendation of the Council at paragraph [4.127] of the Consultation Paper that a statement of reasons should set out the appeal rights available to the applicant. The Committees consider that this is an important requirement to ensure that applicants are informed of the proper process to take if they wish to exercise their rights of review and appeal.

## **Question 19: Consequences for failure to provide adequate reasons**

The Committees consider that the present statutory scheme does not sufficiently provide for the situation where a decision maker fails to respond to a request for reasons.

Section 13(4A)(b) of the *ADJR Act* enables the person making a request for reasons to apply to the Federal Court only where the decision maker has given written notice refusing to provide a statement under s 13(3) of the *ADJR Act*. However, the legislative position is unclear in the situation where a decision maker simply fails to respond to an applicant rather than providing a written refusal.

The Committees consider that any future statutory obligation to provide reasons must specify the consequences of a failure by a decision maker to comply with her or his obligations under the *ADJR Act* to provide a statement of reasons. In the Committees' view, a failure to give reasons for an administrative decision should give rise to an automatic finding of procedural unfairness in favour of the affected party. This suggested consequence reflects the approach of the court in decisions such as *Collins v Repatriation Commission*<sup>30</sup> and emphasises the importance of the obligation to provide reasons in facilitating effective administrative review.

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<sup>30</sup> (1980) 32 ALR 581.

## Court Procedures

### Question 21:

#### Streamlining measures relating to courts

The Committees offer qualified support to the proposal to extend the requirement for compulsory disclosure of previous judicial review applications at paragraph [4.155] of the Consultation Paper.

The Committees submit that the following measures applicable to decisions made under the *Migration Act 1958* (Cth) should not be extended to judicial review applications generally:

- a preference for first-instance hearing of applications under the *ADJR Act* in the Federal Magistrates Court; and
- removing flexibility on time limitations.

The Committees submit that there is no reason in principle to object to the extension of the compulsory disclosure requirement in s 486D of the *Migration Act 1958* (Cth) in judicial review proceedings generally. It is in the interests of efficiency and justice to ensure that multiple proceedings are not brought in respect of a single decision. The proper vehicle for managing unfavourable outcomes for judicial review applications is, generally speaking, through the appeals process, not through fresh hearings in different forums. At present, reviews may be sought under the *ADJR Act* in either the Federal Magistrates Court or the Federal Court and most decisions subject to this form of review may also be brought in the High Court's original jurisdiction under s 75(v) of the Constitution.<sup>31</sup>

The Committees submit, in agreement with the case law referred to in paragraph [4.152] of the Consultation Paper, that more stringent time frames are neither wise nor necessary in general judicial review applications. Further restrictions on time frames for seeking review of a decision or appealing an unfavourable decision of a court or tribunal would only serve to disenfranchise the members of the public that these review mechanisms are designed to protect.

The Committees support the view expressed in paragraph [4.150] of the Consultation Paper that there does not appear to be a need to have general judicial review applications heard in the Federal Magistrates Court.

The Committees submit that the dual requirements on solicitors to not pursue litigation that does not have reasonable prospects of success and to certify that applications do have reasonable prospects of success found in the *Migration Act* should not be extended to all federal judicial review proceedings.

### Question 22:

#### A requirement to dismiss applications at the earliest opportunity?

Generally speaking, the Committees do not believe substantial changes are required in this regard. Of the proposals raised in the Consultation Paper, the Committees submit that only a pre-trial consideration of an application on the papers warrants further consideration. The Committees do not believe that requiring applicants to obtain permission to seek judicial review, pre-action protocols or enabling the Court to undertake own-motion dismissals of claims are warranted.

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<sup>31</sup> See, for example, *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

The Committees submit that adopting the United Kingdom's permission-based approach to judicial review applications would be untenable in the Australian context. The Committees believe that any attempt to require permissions for review applications under the *ADJR Act* or common law would simply prompt unsuccessful applicants to make applications under s 75(v) of the Constitution following the High Court's decision in *Bodruddaza v Minister for Immigration and Multicultural Affairs*.<sup>32</sup> It is therefore likely that a plaintiff could be required to obtain permission to seek judicial review in the High Court's original jurisdiction.

The Committees do not believe that pre-action protocols would offer any meaningful assistance to the Court in exercising its discretion to dismiss claims. The Committees do not consider that a process similar to that of the United Kingdom would necessarily assist the litigation process – certainly not to such an extent that would justify the extra costs associated. Nor do the Committees regard the introduction of a 'genuine steps' style pre-action protocol to be necessary or worthwhile. This is consistent with the Federal Court's efforts to ensure that judicial review applications were exempted from the operation of the *Civil Dispute Resolution Bill 2010* (Cth).<sup>33</sup>

The Committees do not believe that requiring courts to consider own-motion dismissals would be appropriate in the context of judicial review. The Committees are concerned about the prejudice that may result to self-represented applicants. The Committees submit that, if such a requirement were to be introduced, the applicant must be entitled to make submissions to the court in response to the proposed own-motion dismissal. Further, any decision to dismiss an application based on the court's own motion must be a decision that is expressed to be appealable as of right.

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<sup>32</sup> (2007) 228 CLR 651 at 672 [59] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

<sup>33</sup> Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth Parliament, *Civil Dispute Resolution Bill 2010 [Provisions]* (2010) at 35.

## Options for Australia

### Question 27:

#### Role of a statutory review scheme

The Committees submit that, while the constitutional basis for judicial review is an important feature of our legal system, it is well recognised within the courts that there are limits to the efficacy of this system. In particular, Gaudron J noted in *Enfield City Corporation v Development Assessment Commission*<sup>34</sup> that executive and administrative decisions can have an important impact on rights, interests and expectations of individuals, and noted the limitation of prerogative writs to provide adequate remedies to adverse impacts of such a kind.

The genesis of the *ADJR Act*, set out in the Kerr Report,<sup>35</sup> proffers a similar rationale for the *ADJR Act*, including statements such as: 'The objective fact, in the modern world, is that administrators have great power to affect the rights and liberties of citizens and, as well, important duties to perform in the public interest'. Such a view is consistent with historical considerations that constitutional review in Australia does not adequately consider matters of public interest. This is particularly apparent in *NEAT Domestic Trading Pty Ltd v AWB Ltd*<sup>36</sup> and *Griffith University v Tang*.<sup>37</sup>

The Committees take the view that a statutory basis for judicial review affords greater clarity in terms of standing, increased range of available remedies and a broader basis on which matters of public interest can be considered.<sup>38</sup>

The Committees prefer the proposed solution of a less restrictive *ADJR Act* as suggested in paragraphs [5.16] to [5.22] of the Consultation Paper.

### Question 28:

#### Reasons for or against relying solely on constitutional judicial review

Procedural issues and limitations on available remedies under a solely constitutional mechanism for judicial review of administrative decisions are not uncommon problems.

Both these issues were at the core of the Kerr Report, and it was noted by Sir Anthony Mason that '[w]e were mindful that judicial review might result in over-emphasis on form, a tendency which was clearly discernible in the mesh of technicalities which surrounded the remedies by way of prerogative writ'.<sup>39</sup> Such statements suggest that, while there is a clear need to reform the *ADJR Act*,<sup>40</sup> these issues cannot be resolved by relying instead simply on the constitutional basis for review in lieu of any general statutory provisions.

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<sup>34</sup> (2000) 199 CLR 135 at 156-157 [54].

<sup>35</sup> Commonwealth Administrative Review Committee Report, Parl Pap No 144 of 1971 at 106.

<sup>36</sup> (2003) 216 CLR 277.

<sup>37</sup> (2005) 221 CLR 99.

<sup>38</sup> Michael Taggart "Australian Exceptionalism" in Judicial Review' (2008) 36(1) *FLR* 1.

<sup>39</sup> Sir Anthony Mason, 'Administrative Law-Form Versus Substance' (1996) 79 *CBPA* 15.

<sup>40</sup> See Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *ABR* 114.

The Committees submit that courts generally view our Constitution as offering stronger separation of powers than in the USA or Canada,<sup>41</sup> particularly with regard to reservation of judicial powers.<sup>42</sup> This has resulted in very stringent limits on what powers are exercised by judges and in order to offer expeditious and accessible judicial review, our Constitution alone is insufficient.

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<sup>41</sup> Fiona Wheeler, 'Original Intent and the doctrine of the separation of powers in Australia' (1996) 7 *PLR* 96.

<sup>42</sup> For a general discussion regarding importance of this entrenched idea in England, see J W F Allison, *The English Historical Constitution: Continuity, Change and European Effects* (2007) at Chapter 4.