

REFORMING JUDICIAL REVIEW AT THE STATE LEVEL

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Introduction

Change is one of the few constant features of Australian administrative law. The tribunal system has been fashioned and refashioned in most jurisdictions. Freedom of information legislation has also been subject to regular review and reform. By contrast, the framework of judicial review appears to be static. The key features of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *ADJR Act*') have remained largely unchanged since their introduction, even though many parts of that Act have been reviewed and refined over the years. Similarly, the three jurisdictions that have adopted legislation modelled on the *ADJR Act* (Queensland, Tasmania and the ACT) have done little if anything to alter the key features of that scheme.¹ The quite different statutory mechanism of judicial review created by the *Administrative Law Act 1978* (Vic) has also remained largely untouched since its enactment more than 30 years ago. The four jurisdictions that have not enacted a statutory mechanism for judicial review (New South Wales, Western and South Australia and the Northern Territory) appear equally unlikely to adopt any significant change to their schemes of judicial review or to adopt a judicial review statute.

The apparently static nature of the various frameworks for judicial review raises several questions. Why are other elements of the administrative law scheme so much more likely to experience radical reform? Why has the federal *ADJR Act* model proved attractive to some States and Territories but not others? Does the existence of differing schemes for judicial review within our federal system have any effect on the substantive law of judicial review in Australia? Is uniformity on such issues desirable within a federal system?

This paper considers the current standing of judicial review at the State level. It examines the arguments for and against the adoption of the *ADJR Act* model by those jurisdictions that have not already done so. An important question that flows from this issue is whether the various statutory models for judicial review have focussed on procedural reform at the expense of any substantive reform. Another question, which has received virtually no consideration, is whether the States should even have a have a statutory vehicle for judicial review. The final section of this paper draws from the Canadian experience, where the combination of a federal system and a heritage of the English common law that has given rise to a more autonomous common law may appear similar to that of Australia. It is useful to rehearse some of the issues affecting the position of judicial review at the State level and how the federal nature of Australia's constitutional system has or may affect the development of judicial review at the State level.

The Commonwealth Constitution – guiding principle or cage?

Although there is considerable debate about the precise basis of judicial review at common law there seems little disagreement that, for much of its early history, judicial review was a fairly 'bottom up' affair in the sense that it did not begin with a single or coherent principle (a

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top down principle). It instead occurred on a case by case basis without clear reference to a single or guiding principle.² There also seems little disagreement that the same is true of the early phases of judicial review in Australia. It was transmitted as part of Australia's English legal heritage and occurred for many decades without any obvious recourse to a top down principle by which it might be guided or organised. This distinction between top down and bottom up legal reasoning is a simple one and can only be used when subject to many qualifications.³ The main one is that even the most ardent 'bottom upper' must have some semblance of a theoretical basis, even if this only takes the form of an adherence to precedent.⁴ The important point for present purposes is that judicial review evolved far ahead of any coherent justification for it. In this sense it was a classic bottom up affair.⁵ The same may be said for the increasing influence of the Constitution over judicial review in Australia. While the Constitution was adopted long after judicial review had become entrenched in Australia, it also took a considerable time before the full potential effect of the Constitution became apparent upon judicial review in Australia.

In more recent times the Constitution has become a focal point of judicial review and is now clearly the dominant force in Australian administrative law. The growing influence of the Constitution is one consequence of the increased use of the original jurisdiction of the High Court that is entrenched in s75(v) but it is equally a consequence of the privative clauses that have sought to restrict the role of the High Court and other courts of federal jurisdiction. It is no small irony that successive legislative attempts to exclude judicial review have led to the emphatic assertion by the High Court of the entrenched nature of its supervisory position. An equally ironic point is that these repeated attempts to exclude or limit judicial review have provided the platform for a series of cases which have served to reinforce the central role of judicial review within our constitutional structure and, in turn, the role of the Constitution itself. This increased recourse to the Constitution has provided many occasions for the High Court and its observers to assert the central or fundamental role of the High Court and entrenched nature of the jurisdiction of the courts.⁶

Much less attention has been given to the longstanding structural limitations that accompany this entrenched jurisdiction. The most obvious structural limitation in the Constitution of the separation of powers doctrine, which is expressed partly in the text of the Constitution but has been given added force by the High Court's expansive approach to this doctrine. Sir Anthony Mason drew attention to some of the early indications of the possible constitutional influence when he explained that the Constitution provided 'a delineation of government powers rather than a charter of citizen's rights.'⁷ This institutional emphasis on governmental structures provided a natural terrain for the 'strict and complete legalism' that has long been associated with Owen Dixon.⁸ Mason suggested that this legalism laid the foundation for an important limitation on the constitutionally entrenched jurisdiction that the High Court has emphasised so stridently in recent times. Mason has argued that the various principles developed by the High Court, including its constitutionally protected jurisdiction located in s75(v) of the Constitution, are based upon and restricted by 'the limited Australian conception of content of judicial power' upon which the separation of powers doctrine is founded.⁹

The influence of the separation of powers doctrine is reinforced by s73 of the *Constitution*, which establishes the High Court of Australia as the ultimate Australian court of appeal in matters of both federal and state law. Leslie Zines has identified this provision as the 'unifying element in our judicial system.'¹⁰ That conclusion is reinforced by the repeated statements from the High Court that there should be a single or uniform body of Australian common law, despite the various differences between jurisdictions that might arise as a consequence of our federal system.¹¹ In effect, the High Court appears to have reached a position by which it will countenance a level of difference between the Commonwealth and the States by reason of our federal structure but, at the same time, it will remain mindful that those differences should not develop in a way that might overturn the inherent connection between all Australian

jurisdictions that is established by the Constitution. There is, in essence, a federal constitutional leash upon the States.

That leash was tightened dramatically in *Kirk v Industrial Relations Commission of NSW (Kirk)*.¹² In that case the High Court drew together several constitutional threads to hold that State Supreme Courts occupied a constitutionally recognised position which precluded State legislatures from enacting legislation that removed or narrowed core elements of the supervisory jurisdiction of State Supreme Courts. The reasoning of the High Court had several distinct but related parts. The first was the appellate jurisdiction invested in the High Court by s 73 of the Constitution. The Court held that this jurisdiction presumed the continued existence of the State Supreme Courts and also their continued ability to exercise functions which were, at the time of federation, accepted as essential features of State Supreme Courts. One such feature was the supervisory jurisdiction of State Supreme Courts, which provided 'the mechanism for the determination of the limits on the exercise of State executive and judicial power by persons other than the Supreme Court.'¹³ The High Court also suggested that its own constitutional position at the peak of Australia's judicial system, recognised by s 71 of the Constitution, was relevant to the constitutional position of State courts.¹⁴ It follows that this express constitutional recognition of the High Court cannot be undermined by State legislation that would deprive State Supreme Courts of original jurisdiction that would, in turn, deprive the High Court of its appellate jurisdiction. The High Court also made clear that Australia's judicial system was integrated at the constitutional level and also at common law. The now constitutionally entrenched supervisory jurisdiction of the State Supreme Courts was exercisable 'in the end' by the principles determined by the High Court.¹⁵

The High Court accepted that the States could enact legislation to limit or exclude the ability of State courts to review errors of law but only for errors not infected by jurisdictional error.¹⁶ This possibility reinforces the close alignment that *Kirk* drew to judicial review at the State and federal level. The validity of legislation that narrows or excludes judicial review at the federal level has long been determined by reference to the distinction between jurisdictional and non-jurisdictional errors of law. Federal legislation can exclude judicial review of the latter but not the former. That is now the case at the State level. This alignment of federal and State law is not absolute. In other cases the High Court has made it clear that the separation of powers doctrine does not apply to the States with the same force as it does at the federal level, though it clearly has some application to the States. In recent times attention has gone to the incompatibility doctrine which prevents the States from enacting legislation which invests their courts with functions that might be incompatible with the exercise of federal judicial power. Although this doctrine has only been successfully invoked in a small number of cases,¹⁷ it has provided the main focus in recent times for judicial consideration of the potential application of the federal separation of powers doctrine as a limiting factor on State courts.¹⁸

The recent focus on the incompatibility doctrine has distracted attention from the considerable variations in State and federal administrative law that the more limited application of the separation of powers doctrine at the State level has permitted to arise. The strongest examples have arisen in State tribunals, which are not subject to the same restrictions as those established by federal law.¹⁹ Some State tribunals are empowered to make orders that may be enforced directly, in the same manner as is possible for courts.²⁰ At the federal level, it is clear that tribunals cannot be invested with such powers.²¹ The grant of such powers to State tribunals reflects a trend in recent Australian administrative law which has received relatively little attention, which is the extent to which the limited application of the separation of powers doctrine to the States has been exploited by the States by legislation that invests State tribunals with functions that might be regarded, at least in the strict sense, as judicial in character.²² The extent of the latitude that may be granted to State tribunals remains unsettled, though it is clear that for the near future some features of State tribunals will occupy the outer edges of their constitutional limits.²³

Although the federal limits on State administrative tribunals may be relatively unexplored, the same is not true for State courts and their supervisory judicial review jurisdiction. The limited conception of judicial power that Mason traced to the influence of Owen Dixon has many modern adherents who have made clear that this conception of judicial power necessarily limits judicial review. Perhaps the most cited one was Sir Gerard Brennan. In *Attorney-General (NSW) v Quin* ('*Quin*')²⁴ Brennan J offered a conception of the judicial power, which in turn directly informed the nature and role of judicial review, which clearly echoed that of Owen Dixon. Brennan J explained:

If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented must often be considered.²⁵

The current Solicitor-General of Australia – Stephen Gageler SC – has described the reasoning of Brennan J as 'top down reasoning at the highest level.'²⁶ The reason, Gageler explained, is that:

From the constitutional conception of the nature of judicial power, there is derived a single principle which then informs both the scope and content of judicial review. That single principle is the duty of the court to declare and enforce the law.²⁷

The late Justice Selway thought that the issue was not so clear cut. He accepted that the Constitution provided 'the ultimate justification for judicial review and sets its parameters'.²⁸ But, he also suggested that the Constitution 'does not explain the detail' of the operation of judicial review. Selway reasoned:

True it is that the constitutional context means that parliamentary intent as expressed in a statute has primacy over the common law; true it is that the constitutional context means that the courts cannot engage in merits review and are required to differentiate between 'jurisdictional errors' and 'non-jurisdictional errors'. But within these parameters there is still considerable room for debate...²⁹

The extent to which there might be 'room for debate' about the nature and scope of judicial review, because it implies that the constitutional constraints upon judicial review which flow from the separation of power, may be more subtle than many believe. There are several cases which indicate that the latitude identified by Selway is largely illusory.

One is *Corporation of the City of Enfield v Development Assessment Commission* ('*Enfield*').³⁰ In that case the High Court rejected the so-called *Chevron* doctrine³¹ by which American courts accord considerable deference to the decisions of administrative agencies in the determination of jurisdictional facts. A majority of the High Court held that this doctrine of deference was fundamentally incompatible with the limitations that Australia's constitutional arrangements impose upon the executive and its agencies. Two points may be drawn from this conclusion for present purposes. First, the majority relied heavily upon the approach of Brennan J in the *Quin* case as explained above and the demarcation that this approach imposes between the roles of the executive and the courts.³² The *Enfield* case concerned the constitutional limits upon the executive and its agencies, the High Court stressed that the similar considerations imposed corresponding limitations upon the courts. More particularly, the court affirmed that constitutional imperatives precluded the courts from entering issues that formed part of the merits of a decision. A separate but clearly related point may be made about the reach of these constitutional principles. *Enfield* was an appeal from a State court in

a case about a State institution, yet the reasoning of the High Court is clearly infused with the scent of federal constitutional doctrine. It may be argued, therefore, that *Enfield* reinforces two important underlying points of the reasoning adopted by Brennan in the *Quin* case, which is that the High Court does not appear willing to sanction significant doctrinal differences between State and federal administrative law.

Another decision which indicates that there is less latitude within the constitutional boundaries of judicial review than Selway suggested is *Lam's case*.³³ That case is partly known for the hesitant approach that several members of the High Court adopted towards the legitimate expectation; however, for present purposes the more relevant issue was the obvious disapproval the Court expressed for the more dynamic successor to the legitimate expectation that has developed in England in the form of substantive unfairness.³⁴ In short, the doctrine of substantive unfairness draws upon many of the elements of the legitimate expectation in its traditional guise, but extends those notions to the protection of a substantive rather than procedural expectation.³⁵ An interest or expectation that attracts the protection of the doctrine of substantive unfairness may be disappointed, but when English courts determine whether and how this might lawfully be done by a public official, they will 'have the task of weighing the requirements of fairness against any overriding interests relied upon' by the decision-maker.³⁶ Later English decisions have stressed that this doctrine does not enable the court to 'order the authority to honour its promise where to do so would assume the powers of the executive.' Judicial observance of this principle would counter criticisms that substantive unfairness veers towards merits review but it would not overcome the criticisms that the concept of abuse of power upon which substantive unfairness is based is so vague it does not bear close scrutiny. More particularly, the empty nature of the concept means it provides a vessel for judicial perceptions of 'right and wrong' rather than 'lawful or unlawful'.³⁷

Gleeson CJ approached the issue of substantive unfairness as one that raised 'large questions as to the relations between the executive and judicial branches of government'. He concluded that the jurisdiction secured by s75(v) of the Constitution did not 'exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration'.³⁸ McHugh and Gummow JJ, with whom Callinan J agreed on this point,³⁹ acknowledged that the normative values considered by English courts in substantive unfairness and the wider rubric of abuse of power bore some parallel to those used in Australian law, particularly the 'values concerned in general terms with abuse of power by the executive and legislative branches of government in Australian constitutional law.' But they noted 'it would be going much further to give those values an immediate normative operation in applying the Constitution'.⁴⁰ This reasoning suggests that their Honours conception of the separation of powers doctrine precludes judges from undertaking the balancing exercise that English courts have devised to adjudge claims of substantive unfairness. Mason and Gummow JJ also made clear that Australia's constitutional structure demanded careful attention to s75(v) of the Constitution.⁴¹ They reasoned:

Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involve attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.⁴²

Several propositions may be extracted by the above discussion. One is that the limits that have been accepted as part of the Australian conception of the separation of powers doctrine are not simply structural in character. They limit not only the reach of the courts but the nature of the function that the courts may exercise within their constitutionally accepted role. In other words, the separation of powers doctrine limits both the institutions that may exercise supervisory review and the character of that jurisdiction. This influence clearly extends to the nature and content of grounds of judicial review, such as substantive unfairness, which appear

foreclosed in Australian law. If the High Court views matters of State judicial review through a federally tinted lens it is extremely unlikely that significant innovations in the grounds or content of judicial review could be fostered at the State level. At least not if those innovations depart in any significant way from federal constitutional principles.

Similar considerations would appear to preclude innovation in the judicial law of the States through an entirely different source, namely Bills or Charters of Rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter of Rights*') draws heavily from the *Human Rights Act 1998* (UK).⁴³ The English Act has led to many dramatic changes in the judicial review law of that country, such as the adoption of a separate ground of proportionality and a more intense standard of review in cases affecting fundamental rights.⁴⁴ Paul Craig has argued that the overall effect of the English Act has been to provide a 'justification' for a more rights-based approach to administrative law including judicial review.⁴⁵ Craig and other English commentators who advocate this approach essentially seem to believe that the *Human Rights Act 1998* (Eng) provides a basis upon which the courts may call the parliament, the executive and administrative agencies to a stricter standard of judicial review. In simple terms, the *Human Rights Act* constrains the reach of government. At the same time, however, the advocates of this approach do not appear to believe that the human rights legislation imposes any equivalent or significant constraints upon the courts.⁴⁶ The changes to English judicial review need to be understood against this background. English judicial review law has expanded in recent years without any equivalent to the structural constraints imposed in Australia by the Commonwealth Constitution. The main consequence of this difference is that the adoption of human rights legislation in the States of Australia will not itself enable the transmission of many of the changes to judicial review that the English equivalent has fostered. Any such changes in Australia would almost certainly run aground on constitutional reefs.

The ADJR Act model and its limitations

The *ADJR Act* is the statutory vehicle for judicial review at the federal level. The Act introduced several important reforms to judicial review, such as a uniform test for standing, a general right to reasons for decisions to which the Act applied and a set of streamlined remedies. Although these reforms were arguably procedural in character there is little doubt that replacing many of the technical features of the common law process of judicial review with simplified statutory ones made judicial review much more accessible and therefore constituted a significant substantive reform.⁴⁷ The *ADJR Act* did not effect significant changes to the grounds of review and instead appeared to codify the existing common law grounds.⁴⁸ This interpretation of the *ADJR Act* was confirmed in several key cases of the 1980s such as *Kioa v West*.⁴⁹ In that case the High Court divided on the question of whether the duty to observe the requirements of procedural fairness arose from the common law or the statute that conferred the statutory power in issue. Despite this division on key aspects of natural justice, all members of the High Court appeared to adopt a similar view of the role of the *ADJR Act*. No member of the court suggested that questions on the scope of natural justice might be answered or even illuminated by the *ADJR Act*, even though the case at hand was commenced under that Act.⁵⁰ Mason J reached a similar view the following year in his influential judgment in *Minister for Aboriginal Affairs v Peko-Wallsend*⁵¹ when he concluded that the grounds of unreasonableness and relevant/irrelevant considerations were 'substantially declaratory of the common law'.⁵² These suggestions that the *ADJR Act* has codified the common law grounds of review in an almost literal manner have never been seriously questioned or revisited.

It is arguable that the architects of the Act had anticipated this problem 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 power in a way that constitutes an abuse of the power'.⁵³ These grounds do not codify common law grounds of review but they are expressed in sufficiently

open terms that they could embrace new grounds that might arise at common law after the *ADJR Act* commenced. Aronson, Dyer and Groves suggest that the inclusion of these grounds 'acknowledges the common law's capacity to develop new grounds',⁵⁴ though those authors shy away from considering whether and how the Australian common law might do so. In my view, these grounds are so rarely used or even mentioned that they may fairly be described as 'dead letters'.⁵⁵

The Law Reform Commission of Western Australia reached a different conclusion in its report on judicial review of 2002. When the Commission recommended the adoption of an *ADJR Act* model it doubted that the codification of grounds had limited the substantive law of judicial review. It also concluded that, even if codification might exert an inhibiting effect, that possibility could be overcome by the inclusion of a clause that enabled review of a decision on the ground that it was 'otherwise contrary to law'.⁵⁶ Although this proposed ground clearly mirrors one of the existing open ended grounds included in the *ADJR Act* it is useful to note that the Commission did not explain how the ground might work. In addition, the Commission provided no examples of principle or case law where this ground had been invoked.

Kirby J addressed the wider and possibly negative effect of the *ADJR Act* in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*.⁵⁷ While he acknowledged that the impact of the *ADJR Act* was 'overwhelmingly beneficial' his praise of the Act was not unqualified.⁵⁸ Kirby J noted that the introduction of the *ADJR Act* marked a point at which Australian law had moved away from that of England. His Honour reasoned that many of the innovations which had arisen in English judicial review had bypassed Australia since the introduction of the *ADJR Act*. 'The somewhat arrested development of Australian common law doctrine that followed' the *ADJR Act*, Kirby J concluded, 'reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally'.⁵⁹ These remarks imply an acceptance that the *ADJR Act* had provided many useful procedural changes which in themselves greatly reformed judicial review but, at the same time, the codification of the existing common law grounds of review introduced a new limitation. It could also be suggested that this aspect of the *ADJR Act* was amplified by its procedural reforms which, for the first decade or so of its operation, proved an attractive option for applicants.

It is useful to note that the Law Reform Commission of Western Australia had earlier rejected one of the central conclusions of Kirby J and Aronson, namely that the codification of grounds in the *ADJR Act* had likely stifled the development of the substantive principles of judicial review. When the WA Commission considered the adoption of an *ADJR Act* model it concluded, without a detailed discussion of the point, that the law had not been shackled by codification.⁶⁰ The Commission provided the example of review on the ground of denial of natural justice, noting that the *ADJR Act* did not define the rules of natural justice. It reasoned:

accordingly, 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.⁶¹

A review of Victorian law, which recommended the adoption of the *ADJR Act* model appeared considerably less certain about this aspect of that model. While the review supported the codification of the grounds of review, largely in the format used by the *ADJR Act*, it also recommended the inclusion of an additional ground that would enable relief to be granted upon any ground of review not specifically included in the statutory list but which might be available at common law.⁶² This 'common law ground' appeared to offer a more explicit recognition that new grounds of review might evolve outside a statutory mechanism for review and that any such ground should be able to be adopted without difficulty.

Mark Aronson offered a broader criticism of the *ADJR Act* when he argued that the various grounds codified in that Act and the manner of their codification reflected an absence of any wider philosophy in the Act itself. He noted that both the *ADJR Act* and its many statutory grounds of review:

...say nothing about the rule of law, the separation of power, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency or administrative standards, rationality, 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 ADJR commit to liberal democratic principles, pluralism, or civic republicanism.⁶³

Aronson also offered several specific solutions to the perceived limitations of the *ADJR Act*, such as extending both the scope of the Act and its obligation to provide reasons for the decisions to which the Act applied.⁶⁴ He did not, however, favour introducing some form of guiding principle or principles that might fill the apparent philosophical gap that he identified in the passage quoted above. Aronson doubted whether such principles were desirable or perhaps even possible. More particularly, he thought it might be difficult if not impossible to devise any grand or unifying principles that were coherent, workable and of significant value.⁶⁵

Even if such 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 surely face an uncertain fate in the courts. The recent history of Australian migration law indicates that legislation designed to limit or control judicial review will rarely achieve its desired effect and may even achieve the opposite of its intended result.⁶⁶ The question is not whether there would be a judicial response to any legislative attempt to introduce a guiding or grand principle to statutory judicial review, but instead how quickly such legislation might be interred with successive privative clauses.

Aronson also doubted whether the courts might fare any better than the parliamentary drafters. He asked:

To what extent might it be the judiciary's role (or even duty) to explore, 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 expound his or her philosophical underpinnings, and when they do it, are their conclusions "law"?⁶⁷

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.'⁶⁸ The outcome seems to be the same as Dixonian legalism, even if the path is different. Dixon's conception of the limited judicial function led him to conclude that Australian judges do not have the power to venture down the path of these broad normative questions. Aronson hopes they know better.

Kirby J was not so cautious in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*⁶⁹ when he reasoned that a judicial remedy for 'serious administrative injustice' might provide some sort of 'default' or 'last chance' relief in judicial review when no other recognised ground of review might apply. His Honour considered that the courts:

subject to the Constitution or the applicable legislation...reserve to themselves the jurisdiction and power to intervene in extreme circumstances. They do this to uphold the rule of law itself, the maintenance of minimum standards of decision-making and the correction of clear injustices where what has occurred does not truly answer the description of the legal process that the Parliament has laid down.⁷⁰

Several issues were rolled up within this remarkable ambit claim. One is that the invocation of such a jurisdiction in cases of serious injustice harks to a line of recent English cases that have issued relief in cases of 'conspicuous unfairness'.⁷¹ Relief has been granted on the basis of such unfairness in many English cases in recent years, though the principle that supposedly underpins such cases has been questioned. The similarity between Kirby J's wish to grant relief for serious administrative injustice and the English approach is that both would appear to be available to correct serious failings in the standards of decision-making. The English principle of conspicuous unfairness has been criticised on the grounds that it appears to enable a court to issue relief simply because it believes 'something has gone wrong, even if the court cannot quite put its finger on it.'⁷² Kirby J's notion of 'serious administrative injustice' appears as subjective, impressionistic and arguably lacking in any clear legal principle as the English equivalent.

The remedy suggested by Kirby J also appears to have a more obvious weakness in its internal logic. His Honour implied that the grant of relief in cases of serious administrative injustice lay within an orthodox understanding of the scope of judicial power because the impugned conduct did not meet what had been prescribed by parliament. The difficulty with this suggestion is that its emphasis on 'standards' of administrative decision-making appears to venture beyond the traditionally accepted notions of judicial power that Kirby J appeared so anxious to assure that his reasoning remained within.

The Three different State models of judicial review

A striking feature of the judicial review schemes in Australia is their lack of coherence. The *ADJR Act* has been reproduced in the *Administrative Decisions (Judicial Review) Act 1989* (ACT), the *Judicial Review Act 1991* (Qld) and *Judicial Review Act 2000* (Tas). Victoria long ago enacted the *Administrative Law Act 1978* (Vic) which might be described as a 'no frills' form of statutory judicial review which is explained in more detail below. The introduction of *ADJR Act* style legislation has been proposed, though apparently not accepted, in Victoria (in 1999) and Western Australia (in 2002).⁷³ No such reform appears to be currently under consideration in New South Wales, South Australia or the Northern Territory. Judicial review in each of those jurisdictions is available only in its common law form, as governed by rules of court. That same 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.⁷⁴

Adoption of the ADJR Act – Are there benefits in uniformity?

The most recent consideration of the apparent 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. 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.'⁷⁵ The obvious reply to this assertion is that uniformity already exists in the grounds of review, which suggests that this benefit of uniformity is more imagined than real. The other benefit of uniformity that the Commission identified was that it would enable Western Australia (and of course any other jurisdiction that adopted the *ADJR Act* model) to essentially adopt the body of law that had developed in the interpretation of that Act.⁷⁶ The Commission explained that benefit of the *ADJR Act* model in the following terms:

Litigation under that Act is 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.⁷⁷

This reasoning invites several comments. First, the notion that proceedings under the *ADJR Act* are the primary vehicle for judicial review at the federal level takes no account of the role of s75(v) of the Constitution or the provisions of the *Judiciary Act 1903* (Cth) which invest the lower federal courts with an equivalent jurisdiction. In light of the increasing role of those avenues of review, it is somewhat misleading to suggest that the *ADJR Act* exerts some sort of dominant influence at the federal level. If it did, that time has passed. Secondly, the primary argument made in favour of the adoption of the *ADJR Act* appears to be one of convenience. That argument is one of pragmatism rather than principle because it does not provide any critical analysis of the law that would be adopted. Thirdly, adoption of the *ADJR Act* would not only bring the relevant State into alignment with the Commonwealth. It would also align the adopting jurisdiction with those that had already adopted the *ADJR Act* model. Finally, 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 Commonwealth-State relations suggests that goal is often an aspirational one. This last point presents a particular obstacle to further reform to judicial review because, 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 without the effective consent (and perhaps the lead) of the Commonwealth.⁷⁸

A separate and far more controversial point that arises from the almost unquestioning acceptance by the Law Reform Commission of the supposed benefits of uniformity in judicial review legislation is whether such legislation should be adopted. No such scheme has been adopted in New South Wales, South Australia or the Northern Territory. While the Territory appears to have a relatively small number of judicial review applications, the same cannot be said of New South Wales or South Australia. The experience of these States could be argued to provide support for the proposition that the absence of a statutory template for judicial review does not itself hinder the willingness or ability of people affected by administrative decisions to seek judicial review of those decisions. This argument is enhanced in New South Wales by the reversal of the common law in one important area, namely the right to obtain reasons for administrative decisions that was confirmed in *Osmond's case*.⁷⁹

The No-frills statutory model – Victoria's Administrative Law Act 1978

Victoria adopted an entirely different vehicle for statutory judicial review only a year after the *ADJR Act* was enacted. The *Administrative Law Act 1978* (Vic) adopted many of the procedural advantages of the *ADJR Act*, in the form of a simplified approach to standing,⁸⁰ the introduction of a right to reasons for decisions to which the Act applied,⁸¹ and a simplified single remedy in the form of an order to review that essentially reproduces the remedies available at common law, though without the need to apply for a particular order.⁸² The Act did not adopt the *ADJR Act* formula that confers jurisdiction over 'decisions' that are 'of an administrative character' which are made 'under an enactment' but instead enabled decisions of 'tribunals'. A tribunal is defined as any person or body (which is not a court or tribunal presided over by a Supreme Court Judge) who is required to observe one or more rules of natural justice.⁸³

There are many obvious flaws in this scheme. One is that the definition of 'tribunal', which determines the scope of decisions to which the Act applies, excludes any body headed by a Supreme Court judge. That definition excludes the Victorian Civil and Administrative Tribunal and many other bodies, such as the parole board, which are headed by members of the Supreme Court. The definition of tribunal by reference to a requirement to observe the rules of natural justice has also proved uncertain in cases where the nature or extent of any obligation to act fairly by an initial decision-maker is unclear.⁸⁴ Another issue is that the statutory right to gain reasons is qualified by a provision that enables decision-makers to decline to provide reasons if they conclude this is 'against public policy' or that reasons would be against the interests of the person primarily affected by the decision. This provides an uncertain

exemption from the right to obtain reasons. Another flaw is that s4(1) of the Act, which establishes a time limit for making an application, has been held to deprive the Supreme Court of jurisdiction to review under this Act once the prescribed time limit has expired.⁸⁵ Such an inflexible time limit is plainly undesirable, particularly in a statute that was intended to introduce procedural reform. A final flaw is that much of the apparent procedural flexibility introduced by the Act is of little importance since the various writs available through the common law avenue of judicial review were replaced by a single order that can be sought by an originating motion.⁸⁶

Perhaps the most notable flaw of the Victorian scheme is the one that has received no real attention. The Victorian Act did not codify any grounds of judicial review and could, therefore, have side stepped the problems that Aronson suggested had flowed from the codification of existing common law grounds in the *ADJR Act*. The Victorian scheme has not stimulated an energetic or innovative approach to judicial review.⁸⁷ Just as the codification of existing grounds by those jurisdictions which have adopted an *ADJR Act* model appears to have tacitly limited the scope of review to those grounds, the absence of codification does not appear to have provided an impetus in Victoria for a more adventurous approach. The Victorian experience suggests that an entirely pared down version of the *ADJR Act*, which focussed solely on procedural simplicity and reform and did not codify existing grounds of review, might make no difference.

A review of the Victorian legislation in 1999 found little benefit in this scheme. It recommended the adoption of the *ADJR Act* model, in terms that left no doubt that the 1978 Act was regarded as a failure. While this review provided a detailed examination of judicial review and made a strong case for reform, it had the misfortune to be published around the time there was a change of State government. That change of government involved many high profile policy shifts and led to many law reform projects in administrative law and public governance, including changes to FOI legislation and greater independence for independent public bodies such as the Office of Public Prosecutions and the Auditor-General. But the possible reform of judicial review was not one, even though the exclusion and limitation of rights of review to the Supreme Court had attracted considerable attention in the period leading up to the change of government. The proposed changes to judicial review were quietly shelved and have not been revisited.

Some lessons from the Canadian experience of procedural uniformity in administrative law

The Australian and Canadian systems of law and government share many common features, such as a heritage of the English common law and many Westminster traditions such as responsible government, a federal system and a written constitution; however, their systems of administrative law have unfolded in quite different ways. These differences are partly explicable by the absence of any entrenched doctrine of the separation of powers in Canada, which enables Canadian courts and tribunals to undertake a variety of functions that would almost scandalise Australian observers.⁸⁸

Canada has not adopted a statutory vehicle for judicial review such as the *ADJR Act*, though Aronson's criticisms of that Act noted above suggest that the absence of a clear equivalent at the federal level in Canada may not be a matter of regret. But it could be argued that a broad parallel could be drawn between the *ADJR Act* and the *Federal Courts Act RSC 1985 (Can)*. Strictly speaking this Canadian Act does not represent a true parallel to the *ADJR Act* because it deals more generally with the powers of federal courts, but some of the provisions governing judicial review are not unlike the key features of the *ADJR Act*. Section 18(1) of the Canadian Act enables the federal Attorney-General or 'anyone directly affected' by 'the matter in respect of which relief is sought'. This simple formula does not adopt the various requirements of the *ADJR Act* for a 'decision' or 'conduct' that is 'of an administrative

character' and is made 'under an enactment. In the absence of those limiting requirements it is hardly surprising that Canadian law is not replete with decisions about the scope of this right of review.

Earlier this year when the Supreme Court considered the nature and scope of s18 of the *Federal Courts Act* it concluded that any interpretation of the provision:

must be sufficiently elastic to apply to the decisions of hundreds of different 'types' of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not.⁸⁹

In later parts of the same case a majority of the Supreme Court of Canada indicated that the legislature could alter or even oust the common law of judicial review but noted that most Canadian attempts to do so took the form of legislation affecting the grounds of review that could be sought rather than the standard of review applicable to any case (the latter point being a particularly difficult one in Canadian law).⁹⁰

This approach to the *Federal Courts Act* suggests that Canada has struck an interesting balance at the federal level by the introduction of a stripped down statutory codification of judicial review that expresses the basic elements of judicial review but does so in a way that does not constrain the common law. In particular, the brief statutory coverage of the grounds of review and the lack of any generic provision covering the applicable standard of review leaves considerable room for judicial manoeuvre. It could be argued that this approach strikes a 'middle ground' by introducing a bare statutory framework for judicial review, which confirms the statutory jurisdiction of federal courts and articulates the basic elements of that framework but leaves much of the detail, including the detail of the grounds, to the courts. The result is a statutory framework interpreted against a common law background.

An interesting aspect of this scheme is that the courts have not advanced the common law as stridently as in England. An example is the *Mount Sinai* case,⁹¹ where the Supreme Court of Canada rejected the (then) new doctrine of substantive unfairness only a year after it had been decisively recognised in England. The Supreme Court side stepped the English cases that had accepted the possibility of either substantive unfairness or the closely related possibility of estoppel in public law on the grounds that those trends represented 'a level of judicial intervention in government policy that our courts, to date, have not considered appropriate in the absence of a successful challenge under' the Canadian Charter of Rights.⁹² Although the *Mount Sinai* case concerned provincial law, the rejection of substantive unfairness is generally understood in Canada to be one of wider general application. The reasoning in the *Mount Sinai* case suggests that the Canadian courts may approach the apparent latitude that exists for the development of judicial review principles with some moderation.

The Canadian experience at the provincial level

At the provincial level Canada has undertaken a quite different experiment in the codification of its administrative law. Several provinces have adopted some form of model statutory procedures for administrative bodies, some of which could be broadly equated with the American *Administrative Procedure Act 1946* (5 USC). The most widely studied is Ontario's *Statutory Powers Procedure Act 1990*.⁹³ Some form of administrative code has also been adopted in Alberta, Quebec and British Columbia.⁹⁴ These codes have come under sustained criticism on the ground that they are inflexible and therefore counterintuitive because they seek to release administrative decision-makers from many of the constraints that arise from the curial model of adjudication but do so by introducing a different form of inflexibility.⁹⁵ The

movement to codify administrative law in Canada appears to have lost much of its energy. The Canadian provinces appear to have an odd array of statutes that each codify different parts of each province's administrative law system and do so in differing ways. One notable feature of these statutes is that, although they are ostensibly directed to the powers of administrative officials and tribunals they often address the principles that courts must use in applications for judicial review of tribunal decisions, including the applicable standard of review.⁹⁶ In this sense, legislative control that sets standards for administrative tribunals and officials also regularly extends to how those standards may be enforced by the courts.

Another striking feature of these various provincial arrangements is that they are designed to provide codes for either administrative officials or many different tribunals, but they have not encouraged any move to the creation of tribunals of general jurisdiction such as Australia's AAT or its various State counterparts. One commentator has suggested that many of these Acts have not introduced any significant innovation but have instead simply codified the existing common law which may be causing the ossification of administrative law at the provincial level.⁹⁷ This criticism clearly echoes some of the concerns expressed by Aronson about the overall effect of the ADJR Act.

Concluding observations

Several tentative conclusions can be drawn from the above analysis. One is that the influence of the Commonwealth Constitution is in many ways a restrictive one. While the Constitution may preserve the role of the courts, particularly the High Court, and also a minimum standard of judicial review, the doctrine that has been devised to support and protect these principles also serves to limit the role of the courts in the exercise of their supervisory jurisdiction. In particular, it limits the extent to which supervisory judicial review might extend to the perceived merits of decisions as opposed to legal issues. The result is that innovation in judicial review is subject to some significant doctrinal limits. Those limits almost certainly apply equally to the States even though they are not subject to the separation of powers doctrine to the same extent as it applies at the federal level. The difficulty for the States is that the structural limits created at the federal level appear to restrain the capacity of all Australian courts to venture beyond the established grounds of review, particularly if any such venture might tread towards constitutionally dubious territory as appears to be the case with the English principle of substantive unfairness.

The *ADJR Act* appears in some ways to have imposed another obstacle to the possible reform of judicial review at the State level. Many of the procedural reforms effected by the *ADJR Act*, notably the ability to obtain reasons for decisions to which the Act applies and the simplification of traditionally difficult technical issues such as standing and remedies, were clearly important and useful steps forward. At the same time, however, the codification of the grounds of review appears to have inadvertently discouraged any significant development in the substantive law of judicial review. The overall effect of the *ADJR Act* could be argued to have funnelled much of the energy of judicial review down a single path, or at least until the revival of the constitutionally entrenched right of review under s75(v) of the Constitution. The *ADJR Act* presents a particular disadvantage to the States if it is viewed as the preferred or dominant model for judicial review in Australia because that characterisation of the Act necessarily precludes the adoption of different and perhaps more advantageous models. It also provides the Commonwealth with an apparent monopoly upon the future of judicial review, which is a possibility that deserves careful scrutiny particularly in light of the enthusiasm of successive federal governments in their efforts to limit or exclude the scope of review in particular areas.

Endnotes

- 1 Those jurisdictions are, in order of the adoption of an *ADJR Act* style of statutory judicial review: *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas).
- 2 The classic historical analysis notes that judicial review arose as one consequence of the increasing separation of functions between the executive and the courts in England. This occurred during the seventeenth century when the courts began to assert their power to decide the legality of (selected) actions of the executive: Louis Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345. Jaffe and Henderson do not, however, ascribe this as some form of top down doctrine of the separation of powers as it might be understood in modern parlance.
- 3 The taxonomy of top down and bottom up reasoning is mainly deployed in constitutional law. See, eg, Keith Mason, 'What is Wrong With Top-Down Reasoning?' (2004) 78 *Australian Law Journal* 574. The taxonomy, in the context of judicial review, is discussed in Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303.
- 4 This seems the implicit point in Kirby J's pointed suggestion that even the most crude bottom uppers must 'have some concept of the principle by which the analogy is to be discovered' by which they will be guided: *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 397.
- 5 On this point it is useful to note the date of Oliver's influential article which stimulated energetic English debate on the basis of judicial review: Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] *Public Law* 543. The appearance of such a piece around four centuries after judicial review had become part of the English legal landscape, and the uncertainty about the basis of judicial review that it revealed, provides compelling evidence of the bottom up nature of English judicial review.
- 6 The most notable recent example being *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and the voluminous literature which followed that case.
- 7 Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations' (2005) 12 *Australian Journal of Administrative Law* 103, 109.
- 8 The expression is taken from 'Two Constitutions Compared' in Owen Dixon, *Jesting Pilate* (1965) 247. Dixon's legalism and its legacy are discussed in Jeffrey Goldsworthy, 'The Australian Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (2006).
- 9 Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 109. Sir Anthony expressed similar views more recently in Sir Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in Linda Pearson, Carol Harlow and Mike Taggart (eds), *Administrative Law in a Changing State* (2008).
- 10 Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 182.
- 11 See, eg, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 CLR 562-3; *Kruger v Commonwealth* (1997) 190 CLR 1, 175. There is, however, considerable authority which also confirms that Australia's federal system enables a fair level of variation between the States and the Commonwealth in some areas. See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [3] (Gleeson CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [36] (McHugh J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [84] (French CJ), [229] (Kirby J).
- 12 (2010) 239 CLR 531.
- 13 (2010) 239 CLR 531 at [98].
- 14 (2010) 239 CLR 531 at [98].
- 15 (2010) 239 CLR 531 at [99].
- 16 (2010) 239 CLR 531 at [100].
- 17 In *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). The case and its consequences are explained in Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216 and Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15. The doctrine was also successfully invoked in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 and *Totani v South Australia* (2009) 105 SASR 244.
- 18 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club v Commissioner of Police (WA)* (2008) 208 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. Attempts to invoke the incompatibility doctrine failed in all of these cases.
- 19 In *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 at [69] the High Court noted that the distinction between courts and tribunals 'may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.' This cryptic passage might be interpreted as an acceptance of the blend of judicial and administrative functions that has arisen in some State tribunals.
- 20 See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s122; *State Administrative Tribunal Act 2004* (WA) s86.
- 21 This is a consequence of *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 where the High Court held that the power to enforce determinations was an aspect of judicial power that could only be exercised by bodies that met the requirements of a court established under ChIII. The High Court held that any determination of a tribunal could only be made enforceable upon 'an independent exercise of judicial

- power': (1996) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ), 270-1 (Deane, Dawson, Gaudron and McHugh JJ).
- 22 Some of the wider themes in this point are explored in Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 157-65.
- 23 Kennett suggests that the issue might require the High Court to revisit the implications of s77 of the Constitution: Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 160-65.
- 24 (1990) 170 CLR 1.
- 25 (1990) 170 CLR 1, 37.
- 26 Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 307.
- 27 Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 307.
- 28 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 235.
- 29 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 235.
- 30 (2000) 199 CLR 135.
- 31 Established in *Chevron USA Inc v Natural Resources Council Inc* 467 US 837 (1984). The *Chevron* doctrine is explained in Richard Pierce, *Administrative Law Treatise* (4th ed, 2004) 139-191.
- 32 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR [43]-[44] 135, 152-4 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J). A separate but related point is that the deference accorded to administrative agencies by the United States Supreme Court has long been criticised on the ground that it involves a retreat from the sole jurisdiction over legal issues by the courts that was so forcefully asserted in *Marbury v Madison* (1803) 1 Cranch 137; 5 US 87 (and relied upon by Brennan J in *Quin*). The apparent retreat marked by *Chevron* has its supporters. See Cass Sunstein, 'Beyond *Marbury*: The Executive's Power to Say What the Law Is' (2006) 115 *Yale Law Journal* 2850.
- 33 *Minister for Immigration and Multicultural Affairs; Ex parte Lam ('Lam')* (2003) 214 CLR 1.
- 34 The discussion by the High Court of substantive unfairness was somewhat curious given that Lam only relied on a strictly procedural variant of the legitimate expectation.
- 35 The key case was *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] QB 213. That case is examined from an Australian perspective in Cameron Stewart, 'Substantive Unfairness: A New Species of Abuse of Power?' (2000) 28 *Federal Law Review* 617; Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470.
- 36 *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] QB 213, 242.
- 37 Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power: The *Rashid* Case' [2005] *Judicial Review* 281, 285; 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* (2008) 90.
- 38 (2003) 214 CLR 1, [28].
- 39 Callinan J agreed that the legitimate expectation could 'on no view...give rise to substantive rights rather than procedural rights': (2003) 214 CLR 1, [148].
- 40 (2003) 214 CLR 1, [72].
- 41 As opposed to the increasing influence of European law, which McHugh and Gummow JJ suggested had greatly affected the reasoning in *Coughlan*: (2003) 214 CLR 1, [73]-[74].
- 42 (2003) 214 CLR 1, [76]. See also [102].
- 43 On the history and scope of the *Victorian Charter of Rights*, see Priyanga Hettiarachi, 'Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the *Charter of Human Rights and Responsibilities*' (2007) 7 *Oxford University Commonwealth Law Journal* 61.
- 44 It has also almost certainly played a role in the adoption of the doctrine of substantive unfairness in England because substantive unfairness is perhaps the best instance of the increased rights-based focus of judicial review that Craig has identified.
- 45 Paul Craig, *Administrative Law* (6th ed, 2008) 1-025. The suggestion that the *Human Rights Act* 1998 (Eng) provides a 'justification' for rights-based review is somewhat ironic because it might be taken to imply that Craig (and the judges who have so ardently pursued this rights based approach in England) were searching for a convenient basis upon which to affix an approach that may have been waiting in the wings for some time.
- 46 Craig pointedly rejects arguments to the contrary on the basis that 'in a constitutional democracy it is both right and proper for the courts to impose limits on the way in which power is exercised in order to prevent abuse of that power': Paul Craig, *Administrative Law* (6th ed, 2008) 1-034. It does not seem to occur to Craig that similar considerations of democratic pluralist values could support some limits upon the role of the courts as well as the executive and its officials. A similar view appears to be favoured by Jowell, who argues that the *Human Rights Act* 1998 (Eng) has fundamentally altered the relationship between the courts and the parliament, to essentially increase the reach of the courts. Jowell also does not appear to conceive that this new judicial power might or should be accompanied by limits: Jeffrey Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' [2006] *Public Law* 562.

- 47 The history 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* (1998).
- 48 An obvious exception is the 'no evidence' ground in ss 5(1)(h)(3) and 6(1)(h)(3) of the *ADJR Act*. This statutory ground clearly alters the common law equivalent.
- 49 (1985) 159 CLR 550.
- 50 The ground of denial of natural justice is available in ss5(1)(a), 6(1)(a) of the *ADJR Act*.
- 51 (1986) 162 CLR 24.
- 52 (1986) 162 CLR 24 , 39-42.
- 53 These grounds are ss5(1)(j), 6(1)(j) [otherwise contrary to law] and ss5(1)(e)(2)(j), 6(1)(e)(2)(j) [an improper exercise of power amounting to an abuse of power] in the *ADJR Act*.
- 54 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 3.165. Wade reached a similar view many years earlier: HWR Wade, *Constitutional Fundamentals* (revised ed, 1989) 90.
- 55 I used this description in 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 518.
- 56 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23-4.
- 57 (2003) 198 ALR 59.
- 58 (2003) 198 ALR 59, [157].
- 59 (2003) 98 ALR, [157].
- 60 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23.
- 61 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23.
- 62 This was recommended in P Bayne, *Judicial Review in Victoria* (Victorian Attorney-General's Advisory Council, Expert Report No 5, 1999), recommendation 12.
- 63 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 94.
- 64 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96. Aronson suggested that the scope of the Act extend beyond 'decisions of an administrative character'.
- 65 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96.
- 66 The obvious example is the series of attempts to codify the requirements of the hearing rule before the Refugee Review Tribunal and exclude the implication of other requirements of natural justice.
- 67 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96 (emphasis in original) .
- 68 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96.
- 69 (2003) 198 ALR 59.
- 70 (2003) 198 ALR 59 [161].
- 71 The foundation case was *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835 where the House of Lords granted relief to an applicant who claimed unfairness in relation to a tax decision. The Lords relied on a novel mixture of natural justice principles and abuse of power, though they did not elaborate on the latter concept. The reliance in *Preston* upon abuse of power appeared to provide the basis a year later for the grant of relief on the basis of 'conspicuous unfairness' in *R v Inland Revenue Commissioners; Ex parte Unilever plc* [1996] STC 681, 695. The notion of conspicuous unfairness was revised with gusto by the Court of Appeal in *Secretary of State for the Home Department v R (Rashid)* [2005] EWCA Civ 744.
- 72 Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power: The *Rashid* Case' [2005] *Judicial Review* 281, 285.
- 73 This was recommended in P Bayne, *Judicial Review in Victoria* (Victorian Attorney-General's Advisory Council, Expert Report No 5, 1999) and Law Reform Commission of Western Australia, *Report on Judicial Review Administrative Decisions* (Project No 95, 2002).
- 74 The nature of those jurisdictions is explained in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) ch2.
- 75 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 26.
- 76 These benefits were also recognised by the author of the 1999 review of the Victorian scheme in Peter Bayne, 'Reform of Judicial Review – A New Model?' (1996) 79 *Canberra Bulletin of Public Administration* 65, 68-9.
- 77 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 26.
- 78 See the example given in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 2.285 where a reform recommended to the *ADJR Act* by the Administrative Review Council was rejected by the Commonwealth but adopted by Queensland.

- 79 Practice Note SC CL 3 enables applicants for judicial review to obtain reasons for decision. The main drawback of this right is that it is triggered only upon commencement of proceedings for judicial review, which is not required in the various statutory rights to obtain reasons.
- 80 Section 3 of the Act enables 'any person affected' to seek judicial review of a decision to which the Act applies. This approach abolishes the old common distinctions in standing that existed between the various prerogative writs.
- 81 Section 8. This provision is much simpler than the *ADJR Act* equivalent in s13.
- 82 Section 7.
- 83 Section 2.
- 84 This uncertainty can be traced to *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 in which Brennan J suggested that the Victorian Act did not extend to a hearing in which an official advised the ultimate decision-maker. The issue was important in *FAI* because the 'adviser' in the case was a minister and the nominal decision-maker was the Governor in Council. The other members of the High Court did not address this point and it has remained unresolved. Another similarly technical issue surrounding the Victorian Act that remains unresolved is whether the definition of 'tribunal' includes a decision-maker who may not be obliged to meet the requirements of fairness but is subject to a right of review that may attract that obligation. There is authority that the original decision-maker is not a 'tribunal' for the purposes of the *Administrative Law Act 1978* (Vic): *Footscray Football Club Ltd v Commissioner of Payroll Tax* [1983] 1 VR 505.
- 85 *Keller v Bayside City Council* [1996] 1 VR 357; *Quality Packaging Service Pty Ltd v City of Brunswick* [1996] VR 829; *Kuek v Victorian Legal Aid* [1999] 2 VR 331, 336.
- 86 The *Supreme Court Act 1986* (Vic) s3(6) replaced the old common law judgments and prerogative writs with a single order or judgment. The latest version of the originating motion, by which the new order or judgment may be sought, is contained in *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 56.
- 87 This approach was arguably established by early cases which adopted a cautious interpretation of the Act. See Leslie Glick, 'Get Behind Me Satan: Or Some Recent Decisions on the Administrative Law Act 1978' (1980) 12 *Melbourne University Law Review* 417.
- 88 For example, courts may issue advisory opinions about proposed Bills. This possibility was accepted by the Privy Council and then the Supreme Court of Canada: *Attorney-General (Ontario) v Attorney-General (Canada)* [1912] AC 571 (PC); *In re Succession Reference* [1998] 2 SCR 217 (SCC). Aspects of Canadian administrative law are examined from an Australian view in more detail in Matthew Groves, 'The Differing and Disappearing Standards of Judicial Review in Canada' (2009) 16 *Australian Journal of Administrative Law* 211.
- 89 *Canada (Minister for Immigration and Citizenship) v Khosa* [2009] 1 SCR 339, [28] Binnie J (McLachlin CJ, Le Bel, Abella, Charron JJ agreeing).
- 90 *Canada (Minister for Immigration and Citizenship) v Khosa* [2009] 1 SCR 339, [50] Binnie J (McLachlin CJ, Le Bel, Abella, Charron JJ agreeing).
- 91 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 ('*Mount Sinai*').
- 92 *Ibid*, at [27] (Binnie J).
- 93 A useful analysis of these criticisms is given from an Australian view in Margaret Allars, 'A General Tribunal Procedure State for New South Wales?' (1993) 4 *Public Law Review* 19.
- 94 See Alberta's *Administrative Procedures Act RSA 2000*; Quebec's *Administrative Justice Act SQ 1996*; and British Columbia's *Administrative Tribunals Act SBC 2004*.
- 95 An exception would appear to be the scheme adopted in Quebec which consists of several statutes governing administrative agencies and a procedure that is strongly influenced by French administrative law. This scheme is usefully explained in Denis Lemieux, 'Codification of Administrative Law in Quebec' in Grant Huscroft and Mike Taggart (eds), *Inside and Outside Canadian Administrative Law* (2006).
- 96 See, eg, the description of the British Columbia Act given in Diane Flood, Elizabeth Loughran and Richard Rogers, 'British Columbia's New *Administrative Tribunals Act*' (2005) 18 *Canadian Journal of Administrative Law and Practice* 217.
- 97 M Rankin, 'The *Administrative Tribunals Act*: Evaluating Reforms of the Standard of Review and Tribunals' Jurisdiction Over Constitutional Issues' (2005) 18 *Canadian Journal of Administrative Law and Practice* 165. It is useful to note that quite different concerns have been expressed about the equivalent statutes of the various States of the USA, which many commentators argue have been subject to partisan reforms which reflect particular political views about the level of regulation to which administrative agencies should be subject. An informative account is contained in Jim Rossi, 'Politics, Institutions and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs and What More Can We Learn?' (2006) 58 *Administrative Law Review* 961.