TWENTY-ONE YEARS OF THE JUDICIAL REVIEW ACT 1991: ENHANCING ACCESS TO JUSTICE AND PROMOTING LEGAL ACCOUNTABILITY?

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I INTRODUCTION

The *Judicial Review Act 1991 ('JRA')* came into force on 1 June 1992. The Act reflected the contribution of the '*The Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the 'Fitzgerald report')[1] and the *Report on Judicial Review of Administrative Decisions and Actions* by the Electoral and Administrative Commission ('EARC')[2] which documented concerns about access to justice and government accountability in Queensland.

The Fitzgerald and EARC reports addressed perceived shortcomings in the existing system for obtaining judicial review. At that time, in Queensland, judicial review was principally governed by the procedures and remedies (prerogative writs) developed by the common law. This gave rise to much complexity and confusion among lawyers and non-lawyers alike. The EARC report noted that:

> even many practising lawyers are uncertain whether there is a remedy available for a person aggrieved by a government decision, the taking of proceedings is much more expensive than it ought to be, and is fraught with the peril of shipwreck on the reefs of technicality.[3]

Much of this uncertainty and technicality was a consequence of the historical development of the remedies. The Supreme Court's judicial review jurisdiction can be traced back to the common law courts' 'inherent' jurisdiction. Strictly, the Supreme Court's powers are 'implied' from a statutory source; the *Supreme Court Constitution Amendment Act 1861*[4] established a separate Supreme Court of Queensland as a court of record and, subsequently, the *Supreme Court Act 1863*[5] provided that the new court

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1 *Report of a Commission of Inquiry Pursuant to Orders in Council – Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (3 July 1989) – see, especially, s 3.4 (Administrative Review) <http://www.cmc.qld.gov.au/about-us/our-organisation/our-background/fitzgerald-inquiry>.

2 Electoral and Administrative Review Commission (EARC) (Qld), *Judicial Review of Administrative Decisions and Action* (December 1990)

3 Ibid chapter 3, [3.2].

4 25 Vic No 13.

5 27 Vic No 14.

in the Colony of Queensland enjoyed the same jurisdiction as its counterpart in New South Wales. The foundation of that court system was sourced in the *New South Wales Act 1823*[6] and the *Charter of Justice* issued pursuant to that Act. The *Charter of Justice* established a Supreme Court with the same jurisdiction as, relevantly, the court of Kings Bench. Accordingly both State Supreme Courts had power to issue the prerogative writs, including certiorari, prohibition and mandamus. Subsequently, the *Supreme Court Act of 1867*[7] referenced the superior courts in England, providing that the Supreme Court 'in the administration of the law of Queensland shall have the same jurisdiction, power and authority as the Superior Courts of Common Law and the High Court of Chancery in England'.[8] The 'jurisdiction, power and authority' to order equitable remedies (such as injunctions) in a public law context was also thereby conferred on the Supreme Court.[9]

As is well known, the reach of the old prerogative writs was gradually extended by the House of Lords, particularly during the 1960s,[10] covering different forms of government decision-makers (and government action) in addition to the inferior courts. The common law of Australia followed suit. Thus, in principle, individuals could seek judicial review over administrative action (or omission) in the Supreme Court of Queensland; however, as noted above, pursuing an appropriate remedy was fraught with difficulties. Applicants with meritorious legal claims could be left without redress of their grievances due to technicalities associated with the remedies.[11] Concerns about access to justice and government accountability in Queensland were documented in the Fitzgerald report and the EARC report. The Fitzgerald report noted two main problems with administrative review in Queensland: first, the judicial mechanisms for challenging ministerial and administrative decisions were cumbersome and of little practical affect; and, secondly, there were no general mechanisms for a determinative review of the merits of administrative decisions.[12]

Consequently, the Fitzgerald report recommended: (1) simplifying the judicial review process; (2) providing statutorily based remedial powers; (3) broadening the rights of individuals to bring actions; (4) providing a right to reasons (subject to limited exceptions); and, (5) establishing an independent merits review body.[13] Shortly thereafter EARC investigated the perceived shortcomings in the judicial review system, concluding that reform was warranted. EARC recommended adapting provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR)A*') for use in Queensland.[14]

The *Judicial Review Act 1991* (Qld) ('*JRA*') is modelled on its federal counterpart but differs in several respects; namely, the broader range of administrative action that is reviewable,[15] the powers of the court to dismiss inappropriate applications for review[16] and special provisions in relation to litigation costs.[17] Another innovation was

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6 4 Geo IV C 96. The Act was succeeded by the *Australian Courts Act 1828* (UK).
7 31 Vic No 23.
8 *Supreme Court Act of 1867*, s 21. The *Constitution of Queensland 2001* (Qld) omits reference to the English common law heritage (see s 58 - Supreme Court's superior jurisdiction).
9 *Supreme Court Act of 1867*, s 22 (equitable jurisdiction).
10 The landmark decision of the period is *Ridge v Baldwin* [1964] AC 40.
11 See, EARC, above n 2, Chapter 3 [3.2]; and, Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2012) 20.
12 Fitzgerald report, above n 1 [3.4.1].
13 Ibid [3.4.2].
14 EARC report, above n 2, 22 [4.32].
15 *Judicial Review Act 1991* (Qld) ss 4(b), 9, 32.
16 Ibid, ss 13, 14, 48.
17 Ibid, ss 49, 50.

the establishment of parallel procedures for applying for judicial review: Part 3 of the *JRA* established a new statutory procedure for seeking judicial review over administrative action following the *AD(JR)A* model ('statutory review') with a concomitant right to seek reasons; and Part 5 provided a broader avenue of redress (effectively, 'common law review') which enabled individuals to seek relief by way of an order 'in the nature of, and to the same effect as' the writs and, declarations and injunctions, but without an associated right to reasons.

The *JRA* came into force, on 1 June 1992. The legislation is concerned with 'whether the decision is made within the power conferred on the decision-maker, rather than whether the decision is the correct decision in all the circumstances'.[18] The legislation does not provide for review of the 'merits' of administrative decisions, and it is not the court's role to determine whether or not the correct or preferable decision has been made.[19] Comparatively few amendments have been made to the statute; most notable was the insertion of Division 5 (Pt 1) – dealing with the non-application of the Act to specified government owned corporations.[20]

To mark the twenty-first anniversary since the commencement of the *JRA*, this Article critically examines whether the statute has achieved its aims of promoting access to justice and securing legal accountability[21] over public power by: (1) simplifying the procedures for accessing the courts and applying for review; (2) codifying the common law grounds for review; and, (3) by providing for a right to reasons in respect of certain administrative decisions. With reference to Queensland's jurisprudence this Article also considers the veracity of claims that statutory codification may promote legal certainty and transparency but it paralyses the development of the common law of judicial review.

II SIMPLIFYING THE PROCEDURES FOR ACCESSING THE COURTS AND APPLYING FOR REVIEW

A *General scope of statutory review*[22]

Part 3 of the *JRA*[23] employs the jurisdictional formula set out in s 3(1) of the *AD(JR)A 1977* (Cth).[24] Accordingly, if there is a 'decision' of an 'administrative character' made 'under an enactment' then statutory review under Part 3 of the *JRA* is, potentially, available. The *JRA* goes further than the *AD(JR)A* by also permitting

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18 *McGrane v Queensland Parole Board* [2009] QSC 390 [24].

19 For example, see *Markan v Legal Services Commission* [2011] QSC 338 [11]-[12]; and *Ergon Energy Corporation Limited v Rice-McDonald* [2009] QSC 213 [25].

20 See s 18A and schedule 6 (inserted by, respectively, s 20 and s 22 *Queensland Investment Corporation Amendment Act 1994*). Subsequent amendments have progressively extended the reach of this Division to dis-apply the Act in relation to; corporate entitles of local government (s 18B) and, to State and relevant entities carrying out functions under the *Transport Infrastructure Act 1994* (s 18C).

21 There is no reference to 'accountability' or other administrative justice values in the *JRA*; however, the importance of an accountable public administration is stressed in, *inter alia*: the Fitzgerald report (above n 1); and the second reading speeches on the *Judicial Review Bill 1991* - Queensland, *Parliamentary Debates*, Legislative Assembly, 5 December 1991, 3838-3844.

22 This section is drawn from our report of April 2013 on statutory judicial review in the ACT, Queensland and Tasmania that was prepared with the financial support of AIJA.

23 See *Judicial Review Act 1991* (Qld) s 4.

24 Although the *JRA* does not exclude decisions of the State Governor from its scope in a manner equivalent to the exclusion of decisions of the Governor-General in the *AD(JR)A*.

statutory review of certain decisions, conduct and failures to decide under 'non-statutory scheme[s] or program[s]'.

The case law in Queensland has generally followed the relevant decisions applying the *AD(JR)A*. The Supreme Court has attempted to apply the relevant Federal Court and High Court of Australia authorities on 'decision'[25] (and 'conduct'[26]), 'administrative character'[27] and 'under an enactment'.[28] There have, however, been some notable departures from what appears to be required under the *AD(JR)A*.

1 *'Decision' and JRA, s 4(b)*

In *Australian Broadcasting Tribunal v Bond*,[29] Mason CJ, with whom Brennan and Deane JJ agreed, offered the following explanation of the word 'decision' in s 3(1) of the *AD(JR)A*:

> … a reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in the course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.
>
> Another essential quality of a reviewable decision is that it be a substantive determination. …[30]

This interpretation reflected a concern that unless the word 'decision' was given a narrow construction, there was a risk that government decision-making would be frustrated by repeated judicial review applications directed at substantive steps in a decision-maker's reasoning process prior to the making of a final decision. In *Redland Shire Council v Bushcliff Pty Ltd*,[31] Thomas J noted a more general difficulty involved in applying the High Court's approach to 'decision' (developed in the context of judicial review of determinations of an adjudicative and adversarial tribunal) to non-adjudicative administrative bodies:

> The functions in issue in that case were those of a tribunal, and the language shows that Mason C.J. had primarily in mind the determination of issues by tribunals, although the tests are not limited to such bodies. There is some difficulty in directly transposing these statements to decisions by public authorities to engage in exercises that they are generally expected to perform, that is to say in the general non-

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25 Decisions in Queensland applying the High Court's decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 include: *State Bank of New South Wales Ltd v Commissioner of Stamp Duties* [1994] 2 Qd R 661, 668; and *Summerson v Commissioner of Stamp Duties (Qld)* (1995) 95 ATC 4473.

26 See, for example, *Commissioner of the Police Service v Clements* [2006] 1 Qd R 210, 219-220 [26].

27 See, for example, *Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340 [8]-[37].

28 The leading High Court authority on the meaning of the words 'under an enactment' in judicial review legislation is *Griffith University v Tang* (2005) 221 CLR 99, a decision on the *JRA*. In Queensland, there is a specific statutory indication that the *JRA* is to be interpreted, wherever possible, in the same way as the *AD(JR)A* – s 16 of the *JRA*.

29 (1990) 170 CLR 321.

30 (1990) 170 CLR 321, 337.

31 [1997] 2 Qd R 97.

> adjudicative functions of administrative bodies. Most things done by public authorities will affect members of the public, but many of them will not be a determination of an issue or of an individual right. I mention this not to suggest that such activities may not be 'decisions' for the purposes of the *Judicial Review Act*, but to emphasise the difficulty of a direct application of the … statements [in *Bond*] to activity not related to an adjudicating function. The *Judicial Review Act* of course poses a single test irrespective of the nature of the administrative decision.[32]

There is an additional difficulty in applying Mason CJ's interpretation of 'decision' particular to the *JRA*. According to Mason CJ 'a reviewable 'decision' is one for which provision is made by or under a statute.' As noted above, s 4(b) *JRA* extends to decisions made 'under a non-statutory scheme or program'. It is impossible to apply Mason CJ's interpretation of the word 'decision' (i.e. 'provision' must be made for the decision 'by or under a statute') to the word 'decision' as it appears in s 4(b) given that this paragraph expressly applies to decisions made under *non-statutory* schemes or programs.

2 *'Administrative character' and 'managerial' decisions*

Lockhart J considered the words 'decision of an administrative character':

> The expression 'decision of an administrative character' is incapable of precise definition; but in my opinion it includes at least the application of a general policy or rule to particular cases; the making of individual decisions.[33]

Subsequent decisions of the Federal Court and the High Court of Australia have included similar statements.[34] There has been general endorsement of this approach in Queensland.[35] Generally, identifying a decision as either legislative or judicial would preclude a finding that it was of an 'administrative character'.[36] However, there is authority suggesting a 'third antithesis,'[37] alongside legislative and judicial decisions, to decisions of an 'administrative character', namely decisions of a 'managerial kind,' specifically in the context of prison management. In *Bartz v Department of Corrective Services*,[38] the Queensland Supreme Court refused to make an order, under the *JRA*, that a written statement of reasons be given for a decision made by the General Manager of a Queensland correctional centre to refuse a prisoner's request to be designated as a full time student. On the character of the decision made by the General Manager, the Supreme Court made the following observations:

> The … [Department of Corrective Services] contends that the decision not to employ the applicant as he would wish is a managerial decision about prisoners and not one which the courts will review. There is a long line of decisions to the effect that courts

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32 [1997] 2 Qd R 97, 99-100.

33 *Hamblin v Duffy* (1981) 3 ALD 153, 158.

34 See, for example, *Queensland Medical Laboratory v Blewett* (1988) 16 ALD 440, 456; *Minister for Industry and Commerce v Tooheys Limited* (1982) 4 ALD 661, 665-6; and *Griffith University v Tang* (2005) 221 CLR 99, 123.

35 See, for example, *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311, 317.

36 Although see *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74, 83-85 [39]-[44]. Compare *Schwennesen v Minister for Environment & Resource Management* [2010] QCA 340 [7]-[9] and [33]-[34].

37 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [2.480].

38 [2002] 2 Qd R 114.

> will not review decisions pertaining to the management of prisons and prisoners unless bad faith is shown to be present. ... No element of bad faith is alleged.
>
> Section 18(b) [of the *Corrective Services (Administration) Act 1988* (Qld), which dealt with the development and administration of services and programs in prisons to assist prisoners to, *inter alia*, acquire skills that would be useful to prisoners upon release] does not grant the … [prisoner] any entitlement and there could be no relevant expectation that he would be employed as a full-time student at the … [correctional centre] of the kind envisaged in *Kioa v. West* (1985) 159 C.L.R. 550, see *Flynn v. The King* (1949) 79 C.L.R. 1 per Latham C.J. at 5–6 and Dixon J. at 7. It is not for the … [prisoner] alone to decide what is best for him in terms of rehabilitation which binds the [Department of Corrective Services]. The … [Department] must undertake an assessment, both of the individual in general, his place at a particular institution and the general management of all prisoners and staff in the institution.
>
> Permission to engage in full-time study and to be remunerated for it is a privilege. The privileges which pertain to prisoners do not impose correlative duties upon the manager of a prison, *Gray v. Hamburger* [1993] 1 Qd R 595.
>
> It follows that although the decision not to employ the … [prisoner] as a full-time student at the … [correctional centre] is a decision under an enactment it is a decision of a managerial kind which the courts will not review.[39]

Yet it is not clear that these observations were directed at the 'administrative character' requirement. Doubt in this regard arises because, in an earlier passage in the same judgment, the Judge expressly observed that the relevant decisions in this case were, 'in my view, decisions of an administrative character'.[40] Academic commentary on this line of judicial authority has emphasised the danger of running together two quite discrete legal issues, namely: (1) the jurisdictional scope of statutory review determined, *inter alia*, by the meaning of the words 'administrative character'; and (2) the applicability (and scope) of particular grounds of review to the decisions and conduct regarding the administration of prisons.[41] It is suggested that the quoted passages from *Bartz*, especially the reference to the potential for review on the grounds of bad faith, point to *Bartz* being a reflection of this second legal issue. The main difficulty with this reading of the decision, which involved an application for an order requiring the giving of a statement of reasons, is that the grounds of review are formally irrelevant to an entitlement to a statement of reasons.[42] To the extent that the decision in *Bartz* and similar decisions are construed as restricting the scope of the words 'administrative character', they should be seen as inconsistent with the leading judicial authorities on the meaning of those words. As Aronson and Groves suggest, 'the 'managerial' antithesis is ill-advised and unnecessary. Further, it sits poorly with the generally held view that a large part of an 'administrator's' job is to 'manage.''[43]

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39 *Bartz v Department of Corrective Services* [2002] 2 Qd R 114, 117-118 [17]-[20] (White J).

40 *Bartz v Department of Corrective Services* [2002] 2 Qd R 114, 117 [15].

41 See, for example, Gilbert and Lane, who explicitly draw this distinction – *Queensland Administrative Law,* (Loose-leaf, Thomson Reuters, 1994-2013) [1.460]. See also WB Lane and Simon Young, *Administrative Law in Australia* (Lawbook Co., 2007) 79.

42 An applicant for a statement of reasons need not show that the decision in question was tainted by some form of legal error in order to obtain reasons.

43 Aronson and Groves, above n 37 [2.48], footnote 437.

3 *'Under an enactment' and decisions affecting interests and privileges*

The High Court considered the words 'under an enactment' in s 4(a) of the *JRA* in *Griffith University v Tang*.[44] The Court approached of s 4(a) on the basis that the same approach would apply to the same terms in the *AD(JR)A*.[45] Gummow, Callinan and Heydon JJ summarised what was required for a decision to be made 'under an enactment':

> The determination of whether a decision is 'made ... under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made ... under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter existing rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice.[46]

The second criterion has generated the most controversy. The absence of any reference to decisions affecting 'interests' has prompted some to argue that the second criterion precludes decisions that have an effect on mere interests from falling within the scope of the legislation.[47] Kirby J, in dissent in *Tang*, read the joint judgment of Gummow, Callinan and Heydon JJ in this way.[48] The joint judgment should not be read so narrowly.[49] Gummow, Callinan and Heydon JJ expressly acknowledge that a decision affecting the obligations of a decision-maker potentially fall within this second criterion:

> The decisions of which the … [Applicant] complains were authorised, albeit not required, by the University Act. The Committees involved [that made the challenged decisions] depended for their existence and powers upon the delegation by the Council of the University under ss 6 and 11 of the University Act. But that does not mean that the decisions of which the … [Applicant] complains were 'made under' the University Act in the sense required to make them reviewable under the … [*JRA*]. The decisions did not affect legal rights and obligations. They had no impact upon matters to which the University Act gave legal force and effect. The … [Applicant] enjoyed no relevant legal rights and the *University had no obligations under the University Act* with respect to the course of action the latter adopted towards the former.[50]

Thus, provided that there is an effect, deriving from an enactment, on a *decision-maker's* obligations, it matters not whether the decision only affects an *applicant's*

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44 (2005) 221 CLR 99.

45 Subsequent decisions on the *AD(JR)A* have applied *Tang* without any modification. See, for example, *White Industries Australia Ltd v Assistant Commissioner of Taxation* (2007) 160 FCR 298.

46 *Griffith University v Tang* (2005) 221 CLR 99, 130-131 [89].

47 See, for example, Christos Mantziaris and Leighton McDonald, 'Federal judicial review jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22.

48 *Griffith University v Tang* (2005) 221 CLR 99, 152-156 [152]-[164].

49 See, for example PA Keane, 'Judicial review: The courts and the academy' (2008) 82 ALJR 623, 630-631 who argues that decisions affecting interests will nonetheless potentially fall within the majority approach in *Tang*. See also Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 17.

50 *Griffith University v Tang* (2005) 221 CLR 99, 132 [96]. Emphasis added.

interests. This aspect of the reasoning in the joint judgment also appears to have broader implications. To the extent that the second criterion set out above focuses on the obligations of decisions-makers, it appears to be irrelevant whether the challenged decision affects the rights, interests or, indeed, privileges of an applicant.

There are a number of decisions that have sought to apply *Tang* that are difficult to reconcile with this aspect of the joint judgment. For example, in *Palmer v Chief Executive, Qld Corrective Services*,[51] the Queensland Court of Appeal dismissed an appeal by a prisoner who sought judicial review of a decision by the Chief Executive of Corrective Services to allow the prisoner to store a limited number of legal documents in his cell. In relation to the second criterion set out by Gummow, Callinan and Heydon JJ in *Tang*, the Court of observed that although:

> … the refusal to allow the applicant to have all his documents in his cell was a decision required or authorised by the Act or Regulation, it did not relevantly 'confer, alter or otherwise affect' any 'legal rights' of the … [Prisoner].
>
> … s 19 of the Regulations [*Corrective Services Regulation 2006 (Qld)*] describes 'accessing the prisoner's property' as a 'privilege'. Privileges have been found to be distinct from legal rights such that a decision affecting a privilege, rather than a right, is not one 'derived from an enactment' in the *Tang* sense, and is not subject to judicial review. … For this purpose, the parties and the trial judge distinguished between the concept of 'keeping' property and 'accessing' property. The … [prisoner] conceded that accessing property was a privilege but argued keeping property (presumably within a prisoner's cell) was not. For my part I do not think there is a distinction.[52]

Arguably, whilst consideration of whether there was any effect, deriving from an enactment, on the rights of a prisoner was relevant in order to assess whether the second criterion in *Tang* had been met, the Court of Appeal in *Palmer* should have gone on to consider whether there was any effect, deriving from the enactment, on the *obligations* of the relevant prison decision-maker. The possibility of such an effect on the obligations of decision-makers is relevant on the approach taken by Gummow, Callinan and Heydon JJ in *Tang*. Without considering whether there has been an effect on a decision-maker's obligations, it is impossible to properly assess whether the decision was made 'under an enactment'.

The uncertainty surrounding the second criterion in the joint judgment in *Tang* applies equally to the *AD(JR)A*,[53] but what is unique to the *JRA*, is the extension of statutory judicial review to a decision 'under' a 'non-statutory scheme or program' in s 4(b) of the *JRA*. It is to this section that attention will now focus.

4 *The JRA and decisions 'under a non-statutory scheme or program'*

S 4 of the *JRA* extends beyond decisions made 'under an enactment'. The provision also relevantly provides that:

> In this Act—
> decision to which this Act applies means —
> …

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51 [2010] QCA 316.

52 Ibid [28]-[30].

53 Compare, for example, Edmonds J in *Guss v Commissioner of Taxation* (2006) 152 FCR 88, 101 [41], where it is argued that the 'obligation' referred to in *Tang* must be an obligation of the 'person aggrieved … and not the decision-maker'. Edmonds J's views on this issue were referred to, without deciding the issue, in *Nona v Barnes* [2012] QCA 346 [23].

> (b) a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part) —
> (i) out of amounts appropriated by Parliament; or
> (ii) from a tax, charge, fee or levy authorised by or under an enactment.

A provision along these lines was initially proposed by the Administrative Review Council ('ARC') as a potential amendment to the *AD(JR)A*. The ARC sought to extend the coverage of the *AD(JR)A* to ensure it had similar scope to s 75 (v) of the *Constitution*, which entrenches the High Court's original jurisdiction to issue the writs of Prohibition and Mandamus and injunctive relief against 'officers of the Commonwealth'. The close link between what became s 4(b) of the *JRA* and s 75 (v) of the *Constitution* is apparent from the following observations made by the ARC in 1989:

> If the … [*AD(JR) Act 1977* (Cth)] were to be amended to include a decision of an administrative character made by an officer of the Commonwealth in the definition of decision to which the Act applies, it is clear that judicial review would be able to be sought under the Act of several kinds of decision which the Federal Court has not in the past been able to review under the Act but which are potentially susceptible to review under the prerogative writs. …
>
> The benefits of ensuring that the scope of the Act was at least as extensive as the scope of judicial review available under section 75 (v) of the Constitution would include the removal of jurisdictional questions of the kind with which the Federal Court had to deal in … [cases such as *MacDonald Pty Ltd v Hamence* (1983) 1 FCR 45; and *Taranto Pty Ltd v Madigan* (1988) 81 ALR 208]. In the Council's view, it is regrettable that, despite the Act's laudable objective of simplifying judicial review, jurisdictional questions turning on its ambit, which have little or nothing to do with the substance of a person's claim that unlawful administrative action has occurred, appear with some frequency in the case law.[54]

The ARC acknowledged that, with the enactment of s 39B of the *Judiciary Act 1903* (Cth), the differences in scope between the remedies available under the *AD(JR)A* and s 75 (v) of the *Constitution* became less significant.[55] The Council noted that the procedural reform of allowing a combined application under the *AD(JR)A 1977* (Cth) and s 39B of the *Judiciary Act* 'does not, however, constitute a complete answer to the difficulty of obtaining review of particular decisions because any relief under s 39B must run the gauntlet of the technicality and complexity of the rules concerning the prerogative writs.'[56] What became s 4(b) of the *JRA* can, therefore, be seen as a balance between the intention to expand statutory review in a manner consistent with the scope of s 75 (v) while at the same time avoiding the uncertainty surrounding the availability of the writs referred to in s 75 (v).

In light of the views of both the ARC and EARC (which endorsed and adopted the ARC's recommendations in this regard) regarding what became s 4(b) of the *JRA*, the operation of s 4(b) has, understandably, been described as 'disappointing'.[57] The words 'non-statutory scheme or program' have not been interpreted in a manner that has ensured coverage similar to that available by way of the prerogative writs. The

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54 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* (Report No 32, 1989) 29-30.
55 Ibid, 30-31 [114].
56 Ibid.
57 See Lane and Young, above n 41, 94.

section 'has received little judicial consideration'.[58] The most important consideration of the provision has been in *Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads*[59] ('*Bituminous Products*'), *Anghel v Minister for Transport (No 1)* ('*Anghel*')[60] and *Wide Bay Helicopter Rescue Service v Minister for Emergency Services* ('*Wide Bay Helicopter Rescue Service*').[61] In *Anghel* the Supreme Court considered whether s 4(b) applied to a single project (such as a railway line construction), or whether some form of 'repetition of events' was required to fall within the scope of s 4(b). The Supreme Court concluded that the word 'scheme' would encompass a single project, whereas the word 'program' ensured that the provision also covered repetitive processes.[62]

In *Wide Bay Helicopter Rescue Service* there was a suggestion that the requirement of public funding in s 4(b) had to relate to the particular decision the subject of potential review. It is clear from the deliberations of the ARC and the EARC over what became s 4(b) that the public funding requirement in the provision was intended to relate more generally to the scheme or program rather than specifically to the decision the subject of potential judicial review.[63] The broader reading of s 4(b) was confirmed in *Bituminous Products.* Notwithstanding this broader reading of the provision (and the Supreme Court's express consideration of the ARC's and EARC's recommendations in this regard[64]), the decision in *Bituminous Products* generally limited the potential application of s 4(b). The Supreme Court focused on the meaning of the words 'scheme' and 'program', Holmes J observing that:

> … I think one can say, as a general proposition, that the greater the difficulty in identifying a discrete program or scheme, the less likely it is that there exists one. While the statute, unquestionably, is a remedial one, giving redress to those aggrieved by administrative decision making, there is another policy consideration: the avoidance of 'fragmentation of the processes of administrative decision-making … (setting) at risk the efficiency of the administrative process'.[65] One must be on guard against dissecting a given program so as artificially to confer an unwarranted status, as miniature 'programs', on any of its internal arrangements which themselves appear structured or organised.[66]

Among the factors that the Supreme Court considered relevant in deciding whether there existed a 'scheme or program' was whether there were specific, as opposed to general, statutory appropriations and whether the arrangements were 'coherent' or 'systematic' rather than '*ad hoc*'.[67] The Supreme Court also emphasised

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58 *Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads* [2005] 2 Qd R 344, 350 [21]. Other decisions that have considered s 4(b) have included: *Macedab Pty Ltd v Director-General, Department of the Premier, Economic and Trade Development* [1995] QCA 230; *Medtek v Chief Health Officer for Queensland* (1998) 4 QAR 570, 583-4; and *Mikitis v Director General, Department of Justice and Attorney-General* (1999) 5 QAR 123.

59 [2005] 2 Qd R 344.

60 [1995] 1 Qd R 465.

61 (1999) 5 QAR 1.

62 *Anghel v Minister for Transport (No 1)* [1995] 1 Qd R 465, 468.

63 *Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads* [2005] 2 Qd R 344, 351 [22].

64 Ibid, 352 [25].

65 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR. 321, 337 (Mason CJ) [Footnote in original].

66 *Bituminous Products Pty Ltd v General Manager (Road Systems and Engineering), Department of Main Roads* [2005] 2 Qd R 344, 351-352 [24].

67 Ibid, 352 [25]-[28].

the 'non-statutory' focus of s 4(b): consequently, where a scheme or program was connected to a statutory base then, whilst still a question of degree, the statutory connection may be such as to preclude the applicability of s 4(b). According to Holmes J, '[w]hile the remedial intent of the legislation is to be given weight, that cannot be at the expense of logic, language and meaning.'[68] Her Honour concluded that a program could not be characterised as 'non-statutory' where it:

> is required by statute; its minimum content is prescribed by statute; its purpose is to implement strategies whose development in turn is required by statute; statutory powers are conferred on the [decision-maker] for the furtherance of its aims. To describe it as non-statutory would be an exercise in the absurd.[69]

Groves has concluded that 'there is no doubt that s 4(b) has not created a significant extension to the scope of the federal model upon which the Queensland statute is based. For that reason alone it should not be replicated.'[70] The ARC adopted a similar position on the *AD(JR)A*. In its 2012 report the Council did not recommend the adoption of a provision equivalent to s 4(b).[71] Instead, the ARC recommended that the *AD(JR)A* be amended to also allow applicants to seek the remedies enshrined in s 75 (v), namely Prohibition, Mandamus and injunctive relief, via the *AD(JR)A*. There is a certain irony in the making of this recommendation given that, in 1989, the ARC initially proposed what became s 4(b) in order to bring statutory judicial review more closely into line with the remedies available via s 75 (v). S 4(b) reflected a desire to achieve this in a manner that would avoid applicants having to 'run the gauntlet of the technicality and complexity of the rules concerning the prerogative writs.'[72] Whether as a result of the particular form of words used in s 4(b), or due to a failure of litigants (and their advisors) to fully appreciate the potential of s 4(b),[73] or whether as a result of judicial concerns regarding the potential breadth of s 4(b) (or a combination of all three factors), s 4(b) has so far failed to achieve what the ARC and EARC intended. Instead, if the Council's 2012 recommendations are adopted, the 'gauntlet' of the prerogative writs will have to be run whenever the 'under an enactment' requirement cannot be met.

B *General scope of traditional remedies and exclusions from review*

Although EARC recommended that the future *JRA* follow closely the *AD(JR)A*,[74] in one respect the Federal and the State Act parted company; namely, in relation to the treatment of the traditional remedies. Rather than seek to replicate precisely the original jurisdiction of the High Court of Australia, the *AD(JR)A* created distinct remedies having their own jurisdictional formula. Prohibition, Mandamus and injunctions sought via s 75 (v) *Constitution*, and later via s 39B of the *Judiciary Act*, were (and are) subject to distinct rules regarding availability and remain available as separate and distinct remedies. They were unaffected by the enactment of the *AD(JR)A*.

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68 Ibid, 353 [29].
69 Ibid, 344, 353 [29].
70 Matthew Groves, 'Should We Follow the Gospel of the Administrative decisions (Judicial Review) Act 1977 (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 756.
71 Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, 2012), 89 [5.49].
72 Administrative Review Council, above n 54, 30-31 [114].
73 One would have expected, for example, that s 4(b) would have been relied upon in *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343.
74 Section 16 of the *JRA* demonstrates the closeness of the intended relationship.

Conversely, the Queensland Parliament sought to draw into the *JRA* the traditional common law and equitable remedies via Part 5 of the *JRA*. Given recent Constitutional developments, the manner in which EARC recommended this incorporation is noteworthy in two respects. First, EARC expressly recommended that the Supreme Court's inherent jurisdiction to issue injunctive and declaratory relief in public law proceedings remain *outside* Part 5 of the *JRA*.[75] EARC was concerned to avoid the difficulties created by the so-called rule of 'procedural exclusivity' that followed the decision of the House of Lords in *O'Reilly v Mackman*.[76] EARC was keen to ensure that the Supreme Court retained the power to issue injunctive and declaratory relief in public law proceedings outside of the *JRA* and that the incorporation of similar remedies in Part 5 (via ss 43(2) and 47 of the *JRA*) was not used as a basis for arguing that this should no longer be possible.[77] The Queensland Parliament articulated this position in ss 10 and 43(3) of the *JRA*.[78] Secondly, there is the issue of how EARC proposed to deal with the prerogative writs in Queensland. Clause 19(1) of the initial EARC draft bill (which became s 41(1) of the *JRA*) provided that the Supreme Court would 'not have jurisdiction to issue a prerogative writ of mandamus, prohibition or certiorari'. Thomas JA raised concerns about this draft provision with the Parliamentary Committee for Electoral and Administrative Review. Thomas JA expressed himself in the following terms:

> My principal objection to cl.19(1) is that this is an unnecessary legislative interference with the very power of the court to grant prerogative remedies. It is an unnecessary confrontation upon a very sensitive issue. It is in principle undesirable that the prerogative powers of the court be abolished and then restored by legislative concession. I am sure that the drafters of the Bill did not intend this. There is no similar provision in the Federal Act (the A.D.J.R. Act) and there is no need for it. None of the E.A.R.C. reports suggested any intention of withdrawing from the Supreme Court its important power to control inferior courts and statutory tribunals, and the Bill is not truly concerned with the totality of the prerogative powers of the Supreme Court. It is concerned with the legality of the actions of administrative officials. Yet this clause in the Bill would in the first instance abolish these powers.[79]

In response to this submission, Clause 19(1) was changed to provide that the prerogative writs 'shall no longer be issued' - the language found in s 41(1) of the *JRA*.

Thomas JA's concerns are similar to what has, subsequently, been referred to as the 'gravitational pull'[80] exerted on State judicial review by s 75 (v) *Constitution*. In *Kirk v Industrial Court of NSW*[81] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, observed that:

> [t]he supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise

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75 EARC report, above n 2, 144-146.

76 [1983] 2 AC 237. See EARC, ibid, [13.6]-[13.8].

77 This is the essence of the argument that formed the basis of the 'procedural exclusivity' approach taken in relation to reforms to judicial review in England.

78 The Supreme Court also implicitly accepted this position in *Carruthers v Connolly* [1998] 1 Qd R 339.

79 Parliamentary Committee for Electoral and Administrative Review, Parliament of Queensland, Judicial Review of Administrative Decisions and Actions (1990) 9. Thomas JA referred to this 'near confrontation' in Thomas, 'Administrative Jurisdiction: The Jewel in the Crown' (1998) 9 *Public Law Review* 43, 48.

80 See, for example, James Spigelman, 'The centrality of jurisdictional error' (2010) 10 *The Judicial Review* 11.

81 (2010) 239 CLR 531.

> of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. … [Such] observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non jurisdictional error of law appearing on the face of the record is not beyond power.[82]

Notwithstanding Thomas JA's success in having the terms of s 41(1) of the *JRA* varied, the incorporation of the traditional common law and equitable remedies into Part 5 of the *JRA*, and the subjection of review under Parts 3 and 5 to the operation of s 18 and Schedule 1 (exclusions from review) of the *JRA* creates a potential problem in view of *Kirk*. This potential problem has been considered in the light of the 2007 amendments to Schedule 1 to include reference to part 2 division 2 of the *Building and Construction Industry Payments Act 2004 (Qld)* (the '*Payments Act*'). The explanatory notes to the 2007 amendments to Schedule 1 record that:

> [t]he amendment will fully exempt the decisions of adjudicators made under the [*Payments Act*] from review under the *Judicial Review Act 1991*. This amendment is consistent with the objective of the [*Payments Act*] to create a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis.[83]

The Queensland Court of Appeal held[84] (prior to *Kirk*) that the 2007 amendments to the *JRA* meant that 'decisions' under the *Payments Act* were no longer reviewable under either Part 3 or Part 5 of the *JRA*.[85] The implications for the *JRA* of the Schedule 1 exclusions of review have been considered in a number of cases decided after *Kirk*.

S 18(2) provides, relevantly, that 'this Act does not — ... (b) apply to *decisions* made, proposed to be made, or required to be made, under an enactment mentioned in schedule 1, part 2.'[86] The constitutionality of s 18 of the *JRA* has been defended in four different ways:

(i) The first defence of s 18 involves interpreting the word 'decisions' in s 18 in light of the Constitutional principle articulated in *Kirk*. By reading the word 'decisions' in s 18 as not extending to determinations tainted by jurisdictional errors, s 18(2)(b) is said to operate in a

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82 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96], 580-1 [98], 581 [100]. Reliance was place upon *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] where it was held that a State lacks the legislative power to alter the constitution or character of its Supreme Court in such a way that the court ceases to meet the constitutional description of 'the Supreme Court of the State' in Chapter III of the *Constitution*.

83 Reproduced in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, 537 [5].

84 *Bezzina Developers v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495.

85 *Bezzina Developers v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495, 516 [75] (Fraser JA, with whom McMurdo P and Keane JA agreed)).

86 Emphasis added.

manner that is consistent with the rule in *Kirk*. Determinations tainted by jurisdictional error would remain reviewable under the *JRA*;[87]

(ii) The second defence of s 18 and the *JRA* exclusions of judicial review involves reading words into s 18(2) of the *JRA* so that it only applies to restrict review under Part 3 of the *JRA* and has no application to the remedies in Part 5 of the *JRA*;[88]

(iii) A third defence of the constitutionality of s 18 of the *JRA* focuses on the words used in s 18(2)(b) of the *JRA*, namely, '*this Act does not ... apply to* decisions made ... under an enactment mentioned in schedule 1, part 2'.[89] It has been contended that when the *JRA* 'does not apply' by virtue of this provision that includes the non-application of the s 41(1) of the *JRA,* and if s 41(1) is inapplicable then there is no impediment to the Supreme Court issuing the prerogative writs;[90] and

(iv) The final basis for reading s 18 of the *JRA* consistently with *Kirk* involves treating the Supreme Court's inherent jurisdiction to issue injunctive and declaratory relief as sufficient to meet the High Court's requirements in *Kirk*. As noted above, the Supreme Court's inherent jurisdiction to issue injunctive and declaratory relief is unaffected by the *JRA* (including s 18). Given that the action of a decision-maker that is tainted by jurisdictional error is a nullity, a declaration to this effect issued by the Supreme Court in its inherent jurisdiction appears to ensure that the Supreme Court retains its supervisory jurisdiction required by the High Court in *Kirk*.[91]

The first and the fourth ways in which the constitutionality of s 18 and the Schedule 1 exclusions from review under the *JRA* have been defended appear to be the strongest in terms of both legal principle and practicality. The fourth basis depends upon reading the references to the prerogative writs in *Kirk* in functional rather than formal terms. Equitable relief (in the form of injunctive and declaratory relief), in cases of jurisdictional error, appears functionally equivalent to the prerogative writs and, therefore, the inherent jurisdiction to issue equitable remedies allows the Supreme Court to fulfil the constitutional function identified in *Kirk*.

The constitutionality of specific ouster clauses in other Queensland legislation can nonetheless be doubted.[92] The impact of the ruling in *Kirk* will be all the more significant if superior courts expand the scope of what constitutes jurisdictional error. The difficulty and complexity in distinguishing jurisdictional from non-jurisdictional

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87 See *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, 529, 555.

88 See, for example, ibid 542 [29] (Chesterman J). This method of seeking to reconcile s 18(2) raises difficult issues of statutory interpretation. See Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399, 422. The individual privative clauses preserved under s 18(2)(a) of the *JRA* are themselves capable of being read in a manner consistent with the rule in *Kirk*.

89 Emphasis added.

90 *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279 [13] (Fryberg J). This interpretation of s 18(2) is also open to criticism on interpretative and practical grounds. See, for example, *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, 554-555 [75]-[77] (White JA); cf 543 [35]-[36] (Chesterman JA).

91 See, for example, ibid 538 [9] (McMurdo P).

92 See, for example, Groves, above n 88, 420.

errors illustrated by cases such as *Craig v South Australia*[93] does not, however, compel the conclusion that the distinction is not rationally defensible or capable of consistent application. Judicial expansion of jurisdictional error may, however, create such difficulties in the future.

Judicial review has attracted adverse public commentary in the context of adjudications under the *Payments Act* in Queensland, post *Kirk*.[94] Such criticism are an unavoidable consequence of the tension between a commitment to the rule of law and the values of informality, timeliness and industry expertise that inform decision making under legislative schemes such as in the *Payments Act*.

Chesterman JA has referred to 'the salutary power to refuse to entertain applications on the broad grounds described in s 48'.[95] S 48 of the *JRA* provides an apparent means by which to avoid some of the difficulties created by the tension described above. The grounds of summary dismissal set out in s 48 include that: '... it would be inappropriate— (i) for proceedings in relation to the application or claim to be continued; or (ii) to grant the application or claim ...' EARC expressly linked this ground to concerns about the appropriateness of judicial review of committal proceedings potentially fragmenting the criminal process.[96] Concerns were also raised about the potential impact of judicial review on decisions of a 'prosecutorial nature.'[97]

C *Differences in scope of statutory review and traditional remedies and their significance*

The initial response by applicants to the existence of a choice at the federal level between judicial review under the *AD(JR)A* and judicial review via s 39B of the *Judiciary Act 1903* (Cth) appears to have involved a heavy reliance on the *AD(JR)A* rather than the *Judiciary Act*.[98] Table 1 is drawn from statistics published by the ARC in 1989.[99]

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93 (1994) 184 CLR 163, especially 179, where jurisdictional error in the context of tribunals is considered.

94 See, for example, Mark Solomons, 'Crushed by legal bills', *Courier Mail* (7 May 2012) 5.

95 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, 541 [28].

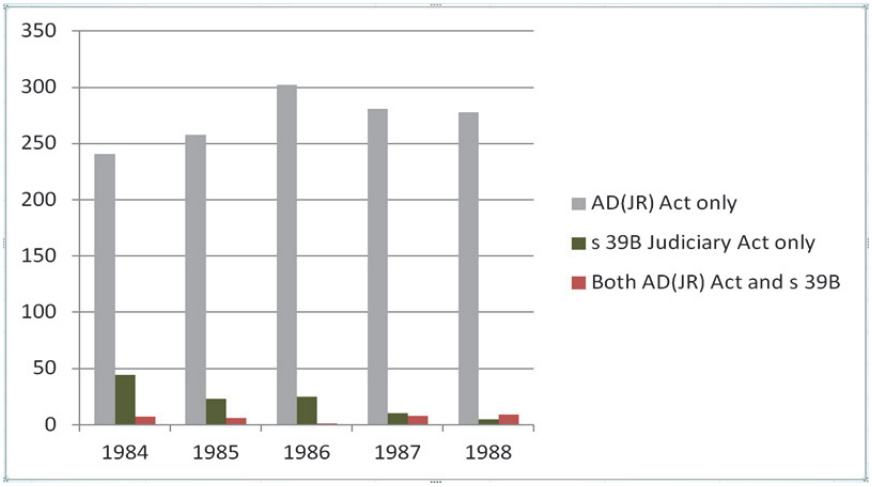
96 EARC report, above n 2 [9.12].

97 Ibid [9.13]. See also *Barrow v Chief Executive, Department of Corrective Services* [2004] 1 Qd R 485, 487 [6]; and *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 [37]-[57].

98 Kirby J observed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157] that the 'effects of the ADJR Act were overwhelmingly beneficial and review of federal administrative action was more commonly pursued under that Act than had been the case under the earlier common law.

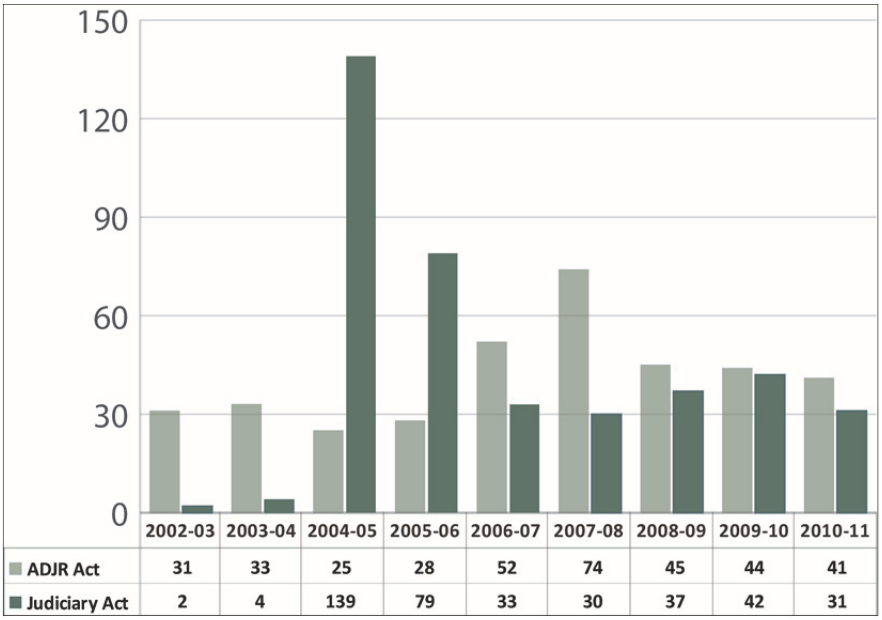
99 Administrative Review Council, above n 54, 18.

Table 1 - Judicial review applications



However, the picture at the federal level appears to have changed dramatically in the past decade. Aronson, Dyer and Groves observed that s 39B of the *Judiciary Act* is 'almost always pleaded cumulatively and in the alternative' to a claim under the *AD(JR)A*.[100] Table 2 is reproduced from the Administrative Review Council's 2012 report.[101]

Table 2
First instance judicial review filings in the Federal Court of Australia (excluding appeals)



	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
ADJR Act	31	33	25	28	52	74	45	44	41
Judiciary Act	2	4	139	79	33	30	37	42	31

[100] Aronson, Dyer and Groves, above n 37, 41.
[101] Administrative Review Council, above n 71, 66.

Undoubtedly, there are multiple reasons for this significant change in practice, but it is difficult not to attribute some of this change to the increasingly technical approach (considered above) taken by the High Court of Australia in relation to the *AD(JR)A* and *JRA*.[102] For example, the High Court's interpretation of s 4(a) of the *JRA* in *Tang*, and the words 'under an enactment' in particular, has both narrowed the scope of review under *AD(JR)A*-inspired legislation, and also created uncertainty regarding the scope of review.

One of the main objectives of the *AD(JR)A* and *JRA* was to avoid applications for judicial review failing on technical grounds because of the choice of the wrong remedy notwithstanding the applicant having a strong legal basis for challenging the exercise of public power.[103] In *Tang*, the application for judicial review under Part 3 of the *JRA* failed for jurisdictional reasons. It appears, however, that the Supreme Court would have had jurisdiction to hear the claim in that case had the applicant sought declaratory relief.[104]

D *Standing*

EARC sought to create a uniform approach to standing in relation to all judicial review remedies in Queensland.[105] Potential developments in relation to standing for particular remedies have created uncertainty in relation to standing under the *JRA*. The liberal approach to standing advocated, for example, by Gaudron, Gummow and Kirby JJ in the context of injunctive relief,[106] appears to have influenced the approach to standing in Queensland. The approach adopted by Chesterman J in the *North Queensland Conservation Council Inc v Queensland Parks and Wildlife Service*[107] seems to have been inspired by these *obiter* comments in *Bateman's Bay*. Chesterman J approached the question of an environmental body's standing under the *JRA* by asking whether [the environmental body's] concern with the litigation is such that its application is not an abuse of process. This in turn involves an enquiry into the nature of the legal proceedings, the nature and extent of [body's] interest in those proceedings and their outcome, and whether any person will be put to expense or inconvenience as a result of the proceedings.[108]

It is not clear whether this approach to the word 'aggrieved' in the *JRA* will be accepted. For example, Crispin J in *Save the Ridge Inc v Australian Capital Territory*[109] has observed that '[a]s tempting as the approach suggested by Chesterman J may be, I must say, with respect, that it appears to go far beyond that adopted in any of the earlier authorities.'[110] Further legislative amendment along the lines of existing

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[102] See, for example, the criticism of Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.

[103] Ellicott Committee suggested that if the Kerr Committee's recommendations were implemented then '[a] person aggrieved will no longer have to run the risk of applying for the wrong remedy' – Australia, Parliament, Report of the Committee of Review on Prerogative Writ Procedure (Ellicott Committee Report), Parl Paper No 56, 1973, 5-6 [19].

[104] Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 16 and 23; and, see DJ Mullan, *Evans, Janisch, Mullan and Risk, Administrative Law: Cases, Text, and Materials* (Emond Montgomery, 5th ed, 2003) 1094.

[105] EARC report, above n 2, Chapter 8, in particular [8.32].

[106] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263 [39].

[107] (2000) 5 QAR 196.

[108] *North Queensland Conservation Council Inc v Queensland Parks and Wildlife Service* (2000) 5 QAR 196 [34].

[109] (2004) 182 FLR 155.

[110] *Save the Ridge Inc v Australian Capital Territory* (2004) 182 FLR 155 [18].

Queensland legislation,[111] and as recommended by the ARC in 2012,[112] may be required in order to reduce the uncertainty in relation to standing.

E *Costs*

EARC made a number of innovative recommendations regarding costs of judicial proceedings seeking review or reasons in respect of action reviewable under the *JRA*. These recommendations were incorporated into ss 49 and 50 of the *JRA*. These sections have not had the influence that EARC appeared to anticipate. The scope of s 50 is surprisingly narrow given its evident purpose. The power to make prospective costs orders under s 49(1)(d) does not appear to have been relied upon in a manner that would maximise the potential benefit of the provision. It is unclear why this provision has not lived up to its potential. The ARC has recommended more modest reform of the *AD(JR)A* in relation to costs.[113]

III CODIFICATION OF THE COMMON LAW

Judicial review applicants under Part 3 of the *JRA* must relate their challenges to administrative action (or inaction) to the grounds stated in ss 20-24 *JRA*.[114] The Supreme Court has stated:

> The grounds for review in s 20 of the Judicial Review Act generally reflect grounds contained in s 5 of the Administrative Decision (Judicial Review) Act 1977 (Cth) which, in turn, generally are 'a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law' (citation omitted).[115]

In relation to the Federal statute, itemising the available grounds of judicial review in legislation has been considered to enhance accessibility to review and produced an educative effect for decision-makers, practitioners and review applicants.[116] Additionally, codification of judicial review provides an opportunity to promote legal certainty and rationalise legal principles. Equally, some jurists have been critical of codification, suggesting that enacting grounds of review may artificially stultify development of the common law.[117] In his submission to EARC, Pincus J opined that setting out the grounds for judicial review in the *AD(JR)A* comprehensively 'stifled the development of the law.'[118] Subsequently, such views were challenged by Aronson who doubted that the *AD(JR)A* had a retardant effect on the growth of judicial review at common law in Australia, pointing to, *inter alia*, the development of 'serious

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111 See the *Marine Parks Act 2004* (Qld) s 140; and *Nature Conservation Act 1992* (Qld) s 173O.

112 See Administrative Review Council, above n 71, Chapter 8.

113 Ibid, Recommendation 15, 191.

114 See *McCarthy v Crime and Misconduct Commission* [2009] QSC 302 [6], where there was no such attempt.

115 *Accused A v Callanan* [2009] QSC 12 [56]. See, also, *Judicial Review Act* 1991 (Qld) s 16 which forges a link between the provisions in the federal and state statutes.

116 Administrative Review Council, above n 71, 127-129.

117 See, John Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 *Federal Law Review* 42, 69; and, J Pennell and Y Shi, 'The Codification of Wednesbury Unreasonableness – A Retardation of the Common Law Ground of Judicial Review in Australia?' (2008) 56 *AIAL Forum* 22.

118 EARC report, above n 2, [5.39]; and, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157], 97 [166] (Kirby J).

irrationality or illogicality'.[119] Aronson's conclusion, that 'the ADJRA's grounds have proven to be sufficiently flexible to reject the charge of ossification',[120] found support from Creyke. However, Creyke identified the emergence of new legal standards of judicial review (for example, a failure to give a 'proper genuine and realistic consideration to a matter' and the 'duty to enquire') as problematical, because the text of the Act no longer represented an accurate guide to the law.[121] Assuming this view is correct then, arguably, an expansion of the grounds of review creates legal uncertainty and compromises transparency, thereby negating a perceived value of codification and the jurisprudence clarifying the statutory standards.[122] However, the *AD(JR)A* (and *JRA*) did not comprehensively and perfectly enumerate common law principles at the time of codification, so there was a degree of uncertainty from the outset. Several grounds were omitted, including the common law rule prohibiting delegation of power, and the difficult subject of non-fettering of discretionary power and administrative estoppel.[123]

The following analysis of statutory review grounds is, necessarily, selective.[124] There are nine principal, 'codified', grounds on which government action may be reviewed (and one ground for inaction), and two of the principal grounds (namely, an improper exercise of power and no evidence) are further sub-divided. The chosen grounds for analysis reflect: first, issues singled out in the EARC report – the application of the fettering of discretion ground, and the extent to which courts should review factual findings;[125] secondly, questions addressed in the 2012 ARC report on federal judicial review – concerning the application of the 'catch-all' grounds, 'emerging' grounds of review, and whether existing grounds required amendment;[126] and, thirdly, relevant academic scholarship. Accordingly, consideration is given to the following grounds of review, summarily described as: non-observance of procedures required by law; acting under dictation; an inflexible application of power without regard to the merits; unreasonableness; no evidence; acting otherwise contrary to law; and abuse of power. Attention is also afforded to whether new criteria for review have been established, as Aronson and Creyke, among others, have claimed.

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119 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12(2) *Australian Journal of Administrative Law* 79, 92.

120 Ibid, 97.

121 Robin Creyke, 'Current and Future Challenges in Judicial Review Jurisdiction: A Comment' (2003) 37 *AIAL Forum* 42, 45.

122 Ibid.

123 Griffiths, above n 117, 56, 69; where Griffiths stated that it would be wrong to assume that the *AD(JR)A* contained all heads of judicial review and that important principles were not mentioned in the Act, albeit the catch-all provisions could capture them; and see EARC report, above n 2 [5.37].

124 For broader coverage see Gilbert and Lane, above n 41 and, generally, Aronson, Dyer and Groves, above n 37.

125 EARC, above n 2, Chapter Five – The Grounds of Review.

126 Administrative Review Council, above n 71, chapter 7 – 'Grounds of Review'; because the *JRA* is, broadly, comparable to the *AD(JR)A* the ARC report raises pertinent matters for judicial review in Queensland.

A *Failure to Observe Procedures Required by Law in Relation to the Making of a Decision*[127]

This category of ground 'could imply that the failure to comply with any statutory step, however small, could invalidate a decision'.[128] Despite its potential breadth of application the Supreme Court has not invalidated administrative action touched by immaterial procedural defects, in circumstances where the consequences of procedural non-compliance are not clearly stated in the statute. Nevertheless, this ground is not tied to procedures that are properly regarded as 'jurisdictional'.[129] Therefore, this legislative standard of review seems broader than the common law equivalent and can sustain challenges to mere (non-jurisdictional) procedural errors. *Mills v Commissioner of the Queensland Police*[130] supports that proposition. The complaint centred on the process employed to promote police officers to the position of Inspector. The applicant contended that the process of short-listing candidates for interview failed to comply with procedures required by the Queensland Police Service's Human Resource Management Manual ('the Manual').[131] Applegarth J found that procedures were not followed and accepted, for the purposes of argument, that non-compliance with the relevant provisions of the Manual did not spell invalidity, thereby rendering all the promotion decisions made, several years before, null and void. His Honour observed:

> A decision may be amenable to judicial review where failure to comply with a procedural requirement, of itself, does not render a subsequent decision invalid. Instead, having established a ground of judicial review, in this case the ground specified in s 20(2)(b) of the JR Act, an issue may arise as to the appropriate relief .[132]

The court determined that the applicant was entitled to declaratory relief; that an order quashing or setting aside all of the appointment decisions made in 2008 would be inappropriate as it would disrupt the police service and necessitate a complex re-assessment of applications by persons who had served as Inspectors for several years.[133]

Awareness of statutory provisions that specify the effect of non-compliance is critical,[134] but frequently legislation does not directly address the consequences of procedural errors. In *Smith v Queensland Corrective Services Commission*, Mackenzie J observed:

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127 *Judicial Review Act 1991* (Qld) ss 20(2)(b), 21(2)(b). The wording of the *JRA* (('*in relation to the making of*') differs slightly from the comparable provision in the s 5(1)(b) *AD(JR)A* ('*in connection with*'); it is unclear whether anything turns on the difference in terminology. Given the tenor of s 16 *JRA* this seems unlikely.

128 Administrative Review Council, above n 71, 137 [7.54]. 'The Explanatory Memorandum to the Bill for what is now the *AD(JR)A* disposes of para (b) with the comment that the 'ground appears self-explanatory'' (*Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 479 (Wilcox J)).

129 . Aronson and Groves, above n 37 [6.230],

130 [2011] QSC 244.

131 Previously, in *Cuttler v J R Browne & Anor* [2010] QCA 346 [33] Muir JA was content to assume that the Manual was a statutory instrument, within the meaning of the *Statutory Instruments Act 1992* (Qld), although it was distinguishable from most, if not all, of the types of instruments listed in s 7(3) of the Act.

132 [2011] QSC 244 [51].

133 [2011] QSC 244 [63]-[65].

134 *Module 2 Pty Ltd v Brisbane City Council* [2006] QCA 226 per Keane JA. See, also *Acts Interpretation Act 1954* (Qld) ss 26 and 49.

> Since *Project Blue Sky Inc. v. Australian Broadcasting Authority* the classification of a provision as mandatory or discretionary is of less importance than deciding whether it was a purpose of the legislation that an act done in breach of the provision should be invalid [citation omitted].[135]

In ascertaining whether the legislative purpose was to invalidate acts that did not comply with statutory requirements, regard is paid to; the language of the text, the subject matter and objects of the statute, and the consequences (and potential inconvenience) for the public for holding void acts done in breach of statutory requirements.[136] The specific provision mandating procedural requirements may be expressed with sufficient clarity to resolve the matter,[137] otherwise, there is no decisive rule or guidance on how to weigh and balance contextual, purposive and policy factors.[138]

Notwithstanding the tenor of *Project Blue Sky v Australian Broadcasting Authority*, the terminology of mandatory/directory and substantial compliance continues to feature in the jurisprudence. In *Module 2 Pty Ltd v Brisbane City Council* the Court of Appeal considered whether a 'trivial' (typographical) error invalidated notices to resume land. At the outset Williams JA observed, straightforwardly, that 'the question will always be one of statutory construction.'[139] His Honour then appeared to modify that position by examining the *degree* of procedural non-compliance in the light of the purpose of the statute, commenting: 'it is usually of significance to evaluate the degree of departure from the statutory requirements. The conclusion will often be reached that substantial compliance with the statutory requirements is sufficient.'[140] With respect, references to the 'substantial compliance' test divert attention from the real issue now, which is ascertaining parliamentary intent. Ultimately, the court directed attention to, *inter alia*, s 10(1C)(b) *Acquisition of Land Act 1967* (Qld) which obliged the Minister to ensure that the local authority had 'taken reasonable steps to comply with s.7 and 8'. The court determined that such 'a provision hypothesises that there has not been strict compliance with s 7.'[141]

In *Jennings v Qld Parole Board*[142] the court considered the difficult question of what consequences flow from the non-observance of a duty to give written reasons for a decision; specifically, whether a failure to comply with s 193(4)(a) *Corrective Services Act 2006* (Qld) ('*CSA*') (read with s 27B of the *Acts Interpretation Act 1954* (Qld)[143]) nullified the Parole Board's determination. Martin J focused on the right to a

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135 [2001] 2 Qd R 77, 84 [38].

136 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 389 [91] (McHugh, Gummow, Kirby and Hayne JJ).

137 See *Caltabiano v Electoral Commission of Queensland* [2009] QCA 182 [6]-[8] (Muir JA), and [92] (Fraser JA) - the express language of Parliament negated the need to examine the legislative context, purpose and policy factors. See also, *McGrane v The Queensland State Parole Board* [2012] QSC 350 [30]-[32] where Boddice J concluded that the ordinary meaning of s 193(3) *Corrective Services Act 2006* (Cth) was consistent with the explanatory note to the Bill that amended the Act in 2009.

138 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 389 [91] cited in *Module 2 Pty Ltd v Brisbane City Council* [2006] QCA 226 [12] (Williams JA) (Keane and Holmes JJA agreeing).

139 [2006] QCA 226 [12] (Keane and Williams JJA, agreeing).

140 Ibid [13].

141 [2006] QCA 226 [13]. Keane JA, concurring, stated s 10(1C)(b) indicated that 'a notice which has not complied with s 7 may be a sufficient foundation for the process of acquisition'.

142 [2007] QSC 364.

143 Section 27B *Acts Interpretation Act 1954* (Qld) delineated the content of a written statement of reasons for a decision.

statement of reasons arising under s 32 *JRA*; when construed in this light the failure to adhere to s 193(4)(a) *CSA* did not 'render an otherwise valid decision, invalid. At most it makes the decision susceptible to a request for a statement of reasons under the Judicial Review Act.'[144] In effect, the availability of a right to obtain reasons for administrative decisions in the *JRA* 'cured' the administrative injustice arising from the non-compliance with s 193(4)(a) *CSA*. It could, perhaps, be argued that the *JRA* and *CSA* are, properly, read together as part of a complementary legislative scheme providing administrative justice.

B *Fettering of Discretion*

Of the nine types of error that are, legislatively, classified as 'improper exercises of power' two relate to the fettering of discretionary power. These two, overlapping, grounds of review speak to the considerable challenge of balancing efficient and consistent decision-making with the need to ensure the merits of individual cases are considered. At common law, uncertainty has arisen in terms of the degree to which a minister may influence the exercise of statutory, discretionary, power through either a power to give directions to officers for which they are 'responsible' or a policy. Specifically, there are doubts over what *weight* public officials should attach to political (ministerial) directions or advice when the particular official is invested with discretionary powers by parliament, and whether a statutory provision allowing for *general* ministerial directions or guidance enable a minister to *direct* a decision maker to the outcome.[145] How best to reconcile the principles of parliamentary supremacy and responsible government has produced a divergence of opinion in the High Court of Australia.[146]

1 *An exercise of a personal discretionary power at the direction or behest of another person ('no dictation')*[147]

In view of the jurisprudential uncertainties mentioned above, the 'no-dictation' ground of review was singled out for attention in the deliberations preceding the EARC report.[148] Reservations were raised about the formulation of the ground and whether it was sufficiently malleable for the courts to take account the relationship between Ministers and officials under a Westminster style system of responsible Ministerial government.[149] However, EARC concluded that the law was sufficiently flexible and saw no reason to alter the requirement that decision makers not fetter their discretion by acting inflexibly.[150]

There is little Queensland jurisprudence that considers the 'no-dictation' principle, and none that squarely considers the authorities that have given rise to

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144 [2007] QSC 364 [49].

145 See, for example, Pam O'Connor, 'Knowing When to Say 'Yes Minister': Ministerial Control of Discretions Vested in Officials' [1998] 5 *Australian Journal of Administrative Law* 168; and, Maria O'Sullivan, 'Failure to exercise discretion or perform duties' in Mark Groves and H.P. Lee, *Australian Administrative Law* (Cambridge University Press, 2007), 255-258.

146 Compare *R v Anderson; ex parte Ipec-Air Ltd* (1965) 113 CLR 177, with *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54. Relatedly, see *Bread Manufacturers (NSW) v Evans*, (1981) 180 CLR 404.

147 *Judicial Review Act 1991* (Qld) s 23(e). sometimes referred to as the, 'no dictation' principle (see *DAR v Queensland Parole Board* [2009] QSC 399 [39]).

148 *Issues Paper No.4.*

149 EARC report, above n 2, 36 [5.45].

150 Ibid [5.50]-[5.52].

uncertainty. However, *Sita Qld Pty Ltd v Beattie*[151] is an atypical case, raising issues about whether the Premier and Treasurer of Queensland exercised their statutory discretion lawfully, in novel circumstances, where the legislation required ministers to act 'jointly' regarding the appropriate response to a report of the Queensland Competition Authority.[152] Essentially, the applicant's allegation was that the Ministers had 'rubber stamped' advice given by departmental officials, with the result that the relevant discretion was not personally exercised.[153] Moreover, the applicant argued that the Premier did not direct his mind to the issues because, in effect, he was overborne by the will of the Treasurer. The court determined that the Treasurer had not simply adopted departmental advice, and while the Premier mainly relied on departmental briefings, he had directed his mind to issues raised in those briefings and the Transport Minster's recommendations.[154] In respect of the latter argument, Williams JA found that the Premier was 'significantly influenced by the consideration that the Treasurer had applied his mind to the detail of the matter for determination',[155] but the Premier concurred with the Treasurer's view only after reading departmental briefing notes, material from the Minister for Transport and considering broader policy implications. Accordingly, the Premier made his own decision and so there was sufficient compliance with the legislative requirements.[156]

2 *An exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case*[157]

In *Ford v Legal Aid Commission*, Thomas JA observed that s 23(f) *JRA* was consistent with common law principles 'under which decision-makers may have regard to a relevant policy but may not treat it as a fixed determinative rule.'[158] The ground 'is not intended to create a means of challenging conclusions reached by a decision-maker, by reviewing the evidence that the decision maker considered, and concluding that the decision is wrong.'[159] The general rule, that informs this statutory ground of review, is familiar: 'anyone who has to exercise a statutory discretion must not 'shut his (or her) ears to an application'.[160] As Gummow J explained in *Khan v Minister for Immigration, Local Government and Ethnic Affairs*:

> what was required of the decision-maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and

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151 [2000] 2 Qd R 433; and, note *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206 [34] where the respondent simply adopted expert evidence without independently making a decision pursuant to s 75 *Corrective Services Act 2000* (Qld). Alternatively, the error could have been on the basis of an unlawful delegation of power contrary to *JRA* s 20(2)(c)-(d).

152 *Queensland Competition Authority Act 1997* (Qld) ss 6(1)(a) and 57(1).

153 [2000] 2 Qd R 433 [20]-[21].

154 Ibid [23].

155 Ibid [29].

156 Ibid [25].

157 *Judicial Review Act 1991* (Qld) s 23(f).

158 [1999] 1 Qd R 267, 272.

159 *McGrane v Queensland Parole* Board [2009] QSC 380 [32] (P Lyons J).

160 See, for example, *Wiggington v Queensland Parole Board* [2010] QSC 59 [29] (Martin J); and, *Liquorland (Australia) Pty Ltd v Treasurer of Queensland* [2002] QSC 154 [59] where Ambrose J observed that the Minister had, correctly, considered and applied the 'Policy Direction for Gambling In Queensland' as a guideline and not 'as a binding fetter upon the exercise of his discretion on the facts before him'.

> realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy.[161]

So, in *Club DP Pty Ltd v Queensland*[162] the club's manager contended the chief executive had fettered his discretion by determining that all adult entertainment permits (AEPs) under the *Liquor Act 1992* were to be advertised. Douglas J determined that, contrary to common law principles[163] and s 23(f) *JRA*, there had been a fettering of discretion because: 'In deciding that all applications for an AEP must be advertised the chief executive has closed his mind to the circumstances individually of each case; and in particular this case.'[164] Douglas J agreed, generally, with the proposition that a chief executive could decide matters in accordance with a pre-stated policy, but concluded that, in the present case, s 118(1)(d) *Liqour Act precluded* that possibility because its terms did not require an AEP to be advertised.[165]

Conversely, what is the position when a policy statement (or, ministerial direction) *has* statutory backing, can relevant 'guidelines' or 'plans' bind and, thereby, fetter a statutory discretion? In *Ford v Legal Aid Commission* the Court of Appeal considered the application of the Commission's statutory power to make 'guidelines' governing the circumstances in which legal assistance might be provided. The issue here was whether, as a matter of statutory construction, the policy could effectively confine or fetter the Commission's statutory discretion. Thomas J (Pincus JA and Dowsett J concurring) held that the Commission could not fetter itself absolutely but it could have regard to the published policy manual. The Commission's refusal to provide legal assistance on the sole ground that the applicant's matter did not fall into any category of case prescribed in the respondent's guidelines was an inflexible exercise of power; the Commission had not directed its attention to all the relevant matters in s 29 *Legal Aid Act 1978*. The 'normal meaning of a 'guideline' would not permit it to override an express statutory requirement.'[166] The case was distinguishable from *Smoker v Pharmacy Restructuring Authority*[167] because, in *Smoker*, there was a statutory requirement that the authority must comply with the relevant guidelines, which was absent in *Ford's case*.[168] Subsequently, *Ford* was distinguished in *Chandler v O'Sullivan* where the terms of the legislation[169] provided authority for the respondent to determine that applicants for promotion to the rank of police Sergeant must have undertaken a Management Development Programme.[170]

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[161] (1987) 14 ALD 291, 292; cited in Gough *v Southern Queensland Regional Parole Board* [2008] QSC 222 [77].
[162] [2000] QSC 256.
[163] *Assignment Party Ltd v Kirby* [1980] Qd R 129, 134.
[164] [2000] QSC 256 [31].
[165] [2000] QSC 256 [34]. Therefore, his Honour was not called upon to express (and did not volunteer) a view on the alternative perspectives in *Ansett* about the application of the 'no dictation' rule.
[166] [1999] 1 Qd R 267, 271. This conclusion was consistent with a line of authority, including *Perder v Lightowler* (1990) 101 ALR 151; and see, *Mulligan v Queensland Community Corrections Board* [2000] QSC 481 [9].
[167] (1994) 53 FCR 287.
[168] [1999] 1 Qd R 267, 272.
[169] *Police Service Administration Act 1990* (Qld) s 5(2)(6)(c).
[170] [2000] QSC 305 [12].

3 *Proper, genuine and realistic consideration of the merits: a general ground of review?*

In *Gough v Southern Queensland Regional Parole Board* the Board fettered its broad discretionary powers when refusing to grant parole. Applegarth J found that the Board had refused to find that the applicant was an acceptable risk to the community because the Board required the applicant to undertake recommended programs. However, the Queensland Correctional Service had failed to deliver recommended programs in a timely fashion despite the applicant's requests to take them. His Honour observed that:

> a proper consideration of the merits of the application required it [the Parole Board] to consider the circumstances in which the applicant had not completed the programs, and the applicant's offer to complete the programs in the community as a condition of his parole. The system having failed the applicant through no fault of his own, the Board should have considered the merits of the applicant's case to undertake the recommended programs in the community.[171]

The Board exercised its discretionary powers inflexibly, in accordance with a policy that parole should not be granted if the applicant had not completed the recommended programs whilst in custody.[172] Applegarth J referred to the requirements of a 'proper consideration of the merits of the [parole] application', adopting the language employed by Gummow J in *Khan's case* (cited above). Likewise, in *Cuzack v Queensland Parole Board*, Boddice J observed:

> The application by the decision-maker of a rule or policy in making its decision rather than a genuine consideration of the application on its merits, amounts to a breach of the requirements of a decision-maker to 'give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy'(citation omitted).[173]

Both Applegarth and Boddice JJ were, respectively, drawing upon the language used by Gummow J as originally intended. Namely, to convey what a lawful process requires and not, as some courts have done, use the expression 'proper, genuine and realistic' to (impermissibly) enter into a merits review.[174] Indeed, in *Stewart v Southern Queensland Regional Parole Board*, White J underlined that the application of the 'proper, genuine and realistic consideration' formulation, to the matter at hand, did not venture into dangerous merits territory.[175]

The question of whether the standard articulated in *Khan's case* has imported a new element of review of general application has divided jurists. The Supreme Court indicated, recently, that 'Gummow J was not purporting to lay down a new principle of administrative law in Khan'.[176] The requirement to give proper, genuine and realistic consideration arose in the context of determining whether a power was exercised in accordance with a rule or policy without regards to the merit of the case. By contrast, Robinson concluded, on balance, that the requirement was a separate ground, referring

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171 [2008] QSC 222 [65].
172 Ibid [77]. Also, see *West v Southern Queensland Regional Parole Board* [2009] QSC 396.
173 [2010] QSC 264 [31]; and, *Wiggington v Queensland Parole Board* [2010] QSC 59 [29].
174 See, R Creyke and John McMillan, *Control of Government Action* (Butterworths, 3rd ed, 2012) 546-551.
175 [2009] QSC 332 [38].
176 *Origin Energy Electricity Ltd & Anor v Queensland Competition Authority* [2012] QSC 414 [93] (Jackson J).

to particular NSW and federal cases.[177] The difficulty presented by the recognition of the 'proper, genuine and realistic consideration of the merits' formula, as a discrete basis for review, is that it invites complaints that effectively go to the merits of an administrative decision. This is the one issue that remains beyond the scope of the courts' supervisory jurisdiction.[178]

The 'proper, genuine and realistic consideration' standard has also been raised in the context of the relevant/irrelevant consideration grounds for review.[179] In *Gibson v Minister for Finance, Natural Resources and the Arts*, the substance of the complaint went to the merits of the Minister's decision. The applicants contended that the Minister's Statement of Reasons revealed that there had not been proper consideration of relevant matters. Henry J observed that it was 'generally accepted that a decision maker's reasons should reflect that there has been genuine and proper consideration of relevant matters' (citation omitted).[180] However, his Honour considered that the claim was not made out on the facts and in view of those mandatory matters the Minister was (statutorily) obliged to consider. Subsequently, in *Origin Energy Electricity Ltd v Queensland Competition Authority*[181] the court rejected the application of the 'proper, genuine and realistic consideration test' in connection with the relevant/irrelevant consideration grounds for statutory review.

4 *Raising an administrative estoppel*

The *JRA* contains no reference to administrative estoppel. This absence is consistent with the general, common law, principle that the exercise of a statutory duty cannot be the subject of an estoppel.[182] The enforcement of estoppels in the administrative context presents difficulties; the doctrine intersects, and creates tension, with the no-fettering ('acting inflexibly') principles. Accordingly, an estoppel cannot be enforced to require a public authority to act *ultra vires*, or fetter its statutory discretion. But recognition of administrative estoppel as a basis for statutory review is not foreclosed, notwithstanding its omission from the *JRA*. Weeks has opined that, in the light of *Minister for Immigration and Kurtovic*[183] and *Attorney-General (NSW) v Quin*, 'the door to public law estoppel is ajar, if only slightly.'[184] He drew encouragement from Mason CJ in *Quin's case*:

> One cannot exclude the possibility that the courts might in some situations grant relief on the basis that a refusal to hold the Executive to a representation by means of estoppel will occasion greater harm to the public interest by causing grave injustice to the individual who acted on the representation than any detriment to that interest that will arise from holding the Executive to its representation and thus narrowing the exercise of its discretion.[185]

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[177] Mark Robinson, 'State of Play – Administrative Law in Review – State and Territory Perspectives' (2011) 65 *Australian Institute of Administrative Law Forum* 43, 47-48. cf J McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335, 361-363.

[178] See, e.g., *Sunshine Coast Broadcasters Pty Ltd v Australian Communications & Media Authority* (2012) 130 ALD 589, 621 [131].

[179] *Judicial Review Act 1991* (Qld) s 23(a)-(b).

[180] [2012] QSC 132 [140]-[141] citing *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1, 14 -15.

[181] [2012] QSC 414 [96]-[97].

[182] *Orthotech Pty Ltd v Minister for Health* [2013] FCA 230 [58].

[183] (1990) 21 FCR 193.

[184] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 *Journal of Equity* 247, 255.

[185] (1990) 170 CLR 1, 18.

The (admittedly sparse) authorities in Queensland offer support for Weeks' view but do not expand upon the tentative statement of principle in *Attorney-General (NSW) v Quin*. In *Wort v Whitsunday SC* the appellant contended that the respondent was estopped from applying an altered planning policy to its land development application. Williams JA observed:

> If the appellant is to succeed in the light of those statements of principle he must establish that the asserted estoppel would not significantly hinder the exercise of the respondent's discretion under s 6.2(2) [of the *Local Government (Planning and Environment) Act* 1990 (Qld)] in the public interest or that failing to hold the respondent to the representation would cause some grave injustice to the appellant which would occasion a greater harm to the public interest than would arise from holding the respondent to its representation.[186]

Furthermore, in *J & MD Milligan Pty Ltd v Queensland Building Services Authority*, Justice Margaret Wilson recognised that, in view of *Attorney-General (NSW) v Quin* and *Wort v Whitsunday SC*, there were limited exceptions to the general principle that estoppel is unavailable to prevent the exercise of a statutory duty or a statutory discretion of a public character; however, the pleaded facts did not provide a foundation for an estoppel-based claim.[187] While these cases suggest that declaratory relief may be available when an estoppel is raised, the question of which particular head of judicial review administrative estoppel may be brought under is unresolved (the adaptive 'catch-all' grounds are logical contenders) and the exceptional circumstances in which it might apply are left open.

C *An exercise of a power that is so unreasonable that no reasonable person could have so exercised the power*[188]

The statutory reference to 'unreasonableness' reflects the Lord Green's oft-cited definition in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[189] Whether the decision was so unreasonable that no reasonable person or body could so exercise the power, is a high threshold to overcome requiring something overwhelming.[190] Accordingly, cases in which administrative decisions are quashed, or held to be void, are very rare.[191] 'Whilst the Wednesbury principle clearly involves a degree of examination of the reasonableness of a decision, it is not a merits review.'[192] Therefore, caution or restraint is routinely expressed by the judiciary for fear of intruding into the executive's domain.[193]

The court in *Saunders v Queensland Community Corrections Board* stated it will be very difficult to establish unreasonableness where the exercise of discretionary

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[186] [2001] QCA 344 [13]: an *appeal* from the Planning and Environment Court.

[187] [2012] QSC 213. The proceedings concerned an application to amend a statement of claim, where the plaintiff sought to introduce a new cause of action - estoppel - and declaratory relief.

[188] *Judicial Review Act 1991* (Qld) s 23(g).

[189] See, for example, *Ashley v Southern Queensland Regional Parole Board* [2010] QSC 437 [2].

[190] *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222 [83] (Applegarth J).

[191] Examples of where unreasonableness has been established include; *Payne v Deer* [2000] 1 Qd R 535 and, *Sunwater v Burdekin Shire Council* (2002) 125 LGERA 23.

[192] *Gibson v Minister for Finance, Natural Resources and the Arts* [2012] QSC 132 [75]; and *Bickle v Chief Executive, Dept. of Corrective Services* [2008] QSC 328 [27].

[193] *Garland v Chief Executive Department of Corrective Services* [2006] QSC 245 [91] (Atkinson J, citing Brennan J in *Attorney-General (NSW) v Quin*).

powers is predicated upon the attainment of a requisite level of administrative 'satisfaction'.[194] That observation followed high authority[195] that recognized the difficulty of establishing unreasonableness where attainment of a particular state of satisfaction turns on matters of opinion, taste, or upon factual matters upon which reasonable minds could reasonably differ. Similarly, in *Tarong Energy Corporation Ltd v South Burnett Regional Council*, the applicants claimed that the local government's power to levy differential general rates had been exercised unlawfully, in circumstances where only the applicant's land was in a particular category and the general rate applied to that category was said to be manifestly unreasonable. Of importance is the court's acceptance that the approach to be taken when manifest unreasonableness is raised is 'affected by the nature of the decision-making undertaken'[196] (i.e. it is context dependant).[197] The court contrasted the 'quasi-legislative' function in setting a tax that was permitted by statute to involve differentiation, with 'quasi-judicial' forms of administrative decision. Accordingly, the court did not take up the applicant's invitation to apply the test for unreasonableness adopted in *Prasad v Minister for Immigration and Ethnic Affairs*[198] because of the different nature of decision-making.

1 *A duty to inquire?*

The *JRA* is silent in respect of a duty to inquire incumbent on administrative decision makers. The juristic basis for the existence of this duty has been described as 'illusive'.[199] It appears that unreasonableness (rather than natural justice) or jurisdictional error[200] encompasses the duty to inquire. The 'relevant considerations' ground may also capture the inquisitorial obligation.[201] Wilcox J characterised the, limited, duty to inquire in *Prasad v Minister for Immigration and Ethnic Affairs*, as follows:

> in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision

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194 [2003] QSC 397 [48]-[49]. To similar effect see, for example, *Keller v Parole Board* [2010] QSC 310 [14] (Boddice J) applying *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 654 [137].

195 *Buck v Bavone* (1975-76) 135 CLR 110, 118 (Gibbs J); and *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 654 (Gummow J).

196 [2011] QSC 74 [78] (Mullins J). Also, see *Duong v South Regional Community Corrections Board* [2004] QSC 261 where the applicant sought review of the Board's decision to refuse Post Prison Community Based Release. Wilson J observed that the reasonableness of the Board's conduct must be judged in the overall context of the decision it was called upon to make (at [20]).

197 The courts are familiar with such an approach, as the Administrative Review Council has noted, the application and content of procedural fairness depends on the decision-making context, above n 71 [7.45].

198 (1985) 6 FCR 155, 169-170: Wilcox J determined that unreasonableness is tested by reference to a consideration of the material that was actually *or constructively* before the decision-maker, together only with such additional facts as the decision-maker would have learned but for any unreasonable conduct by him. His Honour offered the 'tentative' view that a decision would be devoid of plausible justification where a decision-maker unreasonably failed to ascertain relevant facts which they knew to be available.

199 Mark Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34 *Melbourne University Law Review* 231, 247.

200 See, *Craig v South Australia*; (1995) 184 CLR 163 and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 4.

201 See *Petrie v Queensland Community Corrections Board* [2006] QSC 282 [17].

> without making any attempt to obtain that information may properly be described as an exercise of the decision making power in a manner so unreasonable that no reasonable person would have so exercised it.[202]

More recently, in *Minister for Immigration and Citizenship v SZIAI*, the High Court of Australia acknowledged the duty to inquire could arise in certain undefined circumstances, but directed attention away from specific grounds of judicial review, to the more indeterminate concept of jurisdictional error.[203] Following these two cases the Supreme Court has held that the duty to inquire is a very limited obligation, arising exceptionally. In *Gibson v Minister for Finance, Natural Resources and the Arts*, Henry J stated, '[P]lainly it would not be enough that a reviewing Court thinks it might have been sounder … to make further inquiries.'[204] The court also accepted that a duty to make further inquiries can arise, under the duty to consider relevant considerations, where information goes directly to the *'fundamental basis'* for a Minister's decision and is *'readily available'* to the Minister for the asking.[205]

In *Gibson*, in the particular circumstances of the case, the court considered that no duty to inquire arose because materials that were readily available to the Minister were not of *central relevance* to her decision. Furthermore, the *Aboriginal Land Act 1991* (Qld) disclosed no indication as to the considerations or criteria relevant to assessing the suitability for appointment as the grantee of a deed of grant of trust. Henry J observed that:

> while the Minister was obliged to consider the views of Aboriginal people particularly concerned with the land, she was not obliged to agree with any or all such views. To the extent those views included reasons why the appointment was not appropriate, in the absence of any statutory criteria for assessing appropriateness it was a matter for the Minister to determine the weight to be given to those reasons and to consider whether further inquiry into them was warranted.[206]

Similarly, in light of the statutory framework, there was no failure to make inquiries in *Bezzina Developers Pty Ltd v Deemah Stone (Qld)*,[207] In this case there was a question of whether an 'error of law' had been made by an adjudicator in the course of arbitration proceedings carried out under the *Payments Act*. It was argued that an adjudicator had erred by not taking into account an earlier adjudication decision, in circumstances where the second adjudicator was unaware of that earlier determination having not been informed by either party. Fraser JA stated that s 27(2) of the Act did not impose an inquisitorial obligation on an adjudicator:

> it seems most unlikely that the legislature intended that, in circumstances in which neither party has informed the adjudicator of the earlier decision, the adjudicator would be obliged to make enquires to discover if there is an earlier decision, obtain a copy of it, and then prepare a decision that takes the earlier decision into account.[208]

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202 (1985) 6 FCR 155, 169-170.
203 (2009) 259 ALR 429, 436 [25].
204 *Gibson v Minister for Finance, Natural Resources and the Arts* [2012] QSC 132 [133].
205 Ibid, [132]; and, see *Petrie v Queensland Community Corrections Board* [2006] QSC 282 [17] (Philippides J).
206 Ibid [151]. Henry J also pointed to other contextual factors; the statutory obligation to make an appointment, the prolonged history of consultation, and that unanimity of views in the affected community was, seemingly, impossible but not required, [153].
207 [2008] QCA 213.
208 [2008] QCA 213 [15] (McMurdo P and Keane JA concurring, [1]-[2]).

In regards to the nature of the material before a decision maker, where there is some obvious omission or obscurity the duty to inquire arises. [209] In *Cairns City Council v Commissioner of Stamp Duties*, Chesterman J held that it would be wrong 'to say that the decision was improperly made because a fact, taken into account, might be shown to be wrong if further, perhaps extensive, enquiries are made'.[210] However, where a fact was contested and was known, by the decision-maker, to be wrong or questionable, 'it was incumbent upon the decision-maker to make enquires and to take the fact into account only if, after enquiry, the fact appeared accurate.'[211]

In summary, the existence and scope of a 'duty to inquire' turns, primarily, on: (1) statutory construction; (2) the decision-making context - the nature of the administrative action undertaken (contrast an adjudicative function carried out by a tribunal with a 'quasi-legislative' function carried out by a council when setting rates) and, nature of the decision maker (contrast a departmental delegate's decision with specialist administrative tribunals); (3) the nature of the material before the decision-maker; and (4) the importance of the decision to be made and its consequences for the person to whom the decision relates.

2 *Manifest illogicality and irrationality in fact-finding – a new ground of review*

Ordinarily, judicial review does not entail a re-evaluation of the factual findings. It is 'extraordinarily difficult in proceedings for judicial review to challenge findings of fact.'[212] However, the invocation of illogicality or irrationality as a basis for reviewing fact-finding processes crystallised in *Re Minister for Immigration, Multicultural and Indigenous Affairs; ex parte Applicant S20/2002* ('*Applicant S20*'),[213] because unreasonableness was unavailable as a ground of review by virtue of a privative clause in the *Migration Act 1958* (Cth). The decision in *Applicant S20*, and the, subsequent, joint judgment of Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v SGLB* ('SGLB')[214] acknowledged that a want of logic or rationality, in administrative decision-making processes, can give rise to jurisdictional error for the purposes of obtaining relief pursuant to s 75 (v) of the *Constitution*. In short, the position following *SGLB* was that, for the purposes of constitutional judicial review, illogicality or irrationality constituted a discrete basis for jurisdictional error in respect of the determination of jurisdictional facts (not in relation to general 'intra-mural' fact-finding).

The emergence of illogicality and irrationality as heads of review is evident in the statutory review setting. In *CMC v Assistant Commissioner JP Swindells,* the Supreme Court was invited to consider whether, *inter alia*, the Misconduct Tribunal had made factual findings that were unreasonable or illogical. Applegarth J stated that perverse factual findings were reviewable, whether treated as an application of the *Wednesbury* principle or as related principle that permits judicial review of findings of fact for extreme irrationality or illogicality.[215] His Honour carefully expressed the basis upon which findings of fact were reviewable in the particular context of statutory review:

> In the context of judicial review under the *JRA* it is possible to characterise a finding of fact that is perverse as involving an improper exercise of power [i.e. on *Wednesbury*

[209] *Petrie v Queensland Community Corrections Board* [2006] QSC 282 [17].
[210] [2000] 2 Qd R 267, 274 [28].
[211] Ibid [29].
[212] *Gough v Southern Queensland Parole Board* [2008] QSC 222 [79].
[213] (2003) 198 ALR 59, 67-8 [37]; and see *MIMA v Eshetu* (1999) 197 CLR 611, 657 [145]-[147] (Gummow J).
[214] (2004) 78 ALD 224, 232-3 [38].
[215] *CMC v Assistant Commissioner JP Swindells* [2009] QSC 409 [11].

> grounds[216]]. It is also possible to characterise such a perverse finding of fact as involving 'an error of law' within the meaning of s 20(2)(f) of the *JRA*. [citations omitted].[217]

Applegarth J explained how perverse factual findings can, properly, be characterised in terms of 'error of law' for the purposes of statutory review:

> the decision may be one which it would not be possible to reach on the basis of probative evidence without committing a legal error. In that regard, the decision must be one which would not be open upon the application of a legal test, or a required legal standard, such as the standard of proof, to the probative evidence that is accepted by the decision maker.[218]

On the facts the court found that the Misconduct Tribunal had fallen into error when applying the civil standard of proof to probative evidence: specifically, by failing to be 'reasonably satisfied' of the fact that a police officer had assaulted a person while held in a police station. The evidence before the Tribunal permitted only one rational and logical conclusion,[219] and it was perverse for the Tribunal to conclude otherwise.[220]

In *CMC v Assistant Commissioner JP Swindells,* the court stressed that the scope to challenge irrational or illogical findings of fact is strictly limited. Decisions are not exposed to review on the grounds of irrationality or illogicality simply because the reasoning process is open to compelling criticism, or because the ultimate conclusion reached is one which most reasonable decision-makers would not reach.[221] Similarly, in *Sleat v Loof*, Atkinson J observed: '[I]llogicallity or irrationality must be of sufficiently significant degree before it can form the basis of judicial review of administrative action.'[222] Essentially, these opinions affirm that the courts should not employ judicial review as a basis for re-evaluating the facts, or reconsideration of the merits of decisions that they may emphatically disagree with.

After the decision in *Applicant S20*, there was some judicial hesitancy about applying the criteria due to a perceived lack of precision as to the nature and quality of errors characterised as illogical or irrational.[223] Questions about the uncertain nature of this emerging ground were addressed in *Minister for Immigration v SZMDS.*[224] The majority joint judgment of Crennan and Bell JJ observed that not every lapse in logic will give rise to jurisdictional error, and framed the test for illogicality or irrationality in terms of:

> whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusion to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another.[225]

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216 *Judicial Review Act 1991* (Qld) s 23(g).
217 *CMC v Assistant Commissioner JP Swindells* [2009] QSC 409 [13].
218 Ibid [14].
219 Ibid [63], [66].
220 Ibid [70].
221 See also *M v P* [2011] QSC 350 [38].
222 [2008] QSC 286 [53].
223 *Lark v Nolan* [2006] TASSC 12 [39].
224 (2010) 115 ALD 248.
225 Ibid [131].

The dissenting judgment of Gummow ACJ and Kiefel J simply adopted the test explained by Gummow and Hayne JJ in *SGLB*, namely: 'the critical question is whether the determination was irrational, illogical and not based on findings of inferences of fact supported by logical grounds' adding that 'what is characterized as the 'critical question' should not receive an affirmative answer that is lightly given.[226] Arguably, the test formulated by Crennan and Bell JJ is more exacting than that articulated by the dissentients. Baw has argued that the majority test sets the bar too high, 'an almost unobtainable standard because in practice it would only provide a ground of review where the decision-maker was not possessed of a 'reasonable mind' or adopted reasoning self-evidently [illogical].'[227] Indeed, Rares J, has taken the joint judgment to mean that

> even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside.[228]

That is an approach which does not only examine the decision-making path taken to determine whether the process is rational; whether findings or inferences of fact are supported by logical grounds. Rather, the inquiry is also directed to whether a logical or rational mind *could have* made the determination under review, in circumstances where the reasons *do not* reveal rationality or logicality. This is where the two tests adopted by the majority and minority appear to diverge.[229]

This distinction assumes importance in light of the subsequent decision in *QCoal Pty Ltd v Hinchliffe* ('QCoal').[230] A case in which the Governor in Council's decision to approve a Rail Corridor Project, as an infrastructure facility of 'significance, particularly economically or socially'[231] to Australia, Queensland and the region, was challenged as unreasonable. The Governor in Council's approval triggered the Coordinator-General's statutory power to compulsorily acquire the land.

Daubney J referred to the decision requiring an 'evaluative assessment of the significance of the infrastructure facility…, with a requirement that the assessment take into account the potential of the Rail Corridor to contribute to, *inter alia*, economic growth.'[232] His Honour applied the definition for illogicality employed by Crennan and Bell JJ in *SZMDS*.[233] Assuming the test propounded by Crennan and Bell JJ is more stringent than the earlier formulations, in *Applicant S20* and *SGLB*, then the, apparent, divergence of judicial opinion in the High Court, about the criteria to be applied for illogicality or irrationality, now appears to be reflected in Queensland's jurisprudence.

Another important issue to arise from *SZMDS* was the linkage between irrationality/illogicality ground of review to 'jurisdictional fact' determinations.[234] Gummow ACJ and Kiefel J stressed that s 75 (v) of the *Constitution* was the avenue of judicial review under which the issues were considered, and contrasted this avenue for

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226 Ibid [40] and prior to that *Re MIMIA; ex parte Applicant S20/2002* (2003) 198 ALR 59, 71 [53] (McHugh and Gummow JJ).

227 T Baw, 'Sorting Fact From Error' (2011) 49(1) *Law Society Journal* 67, 69.

228 *SZOOR v Minister for Immigration and Citizenship* [2012] 202 FCR 1, 7 [15].

229 Baw also notes the later restatement of the majority's illogicality test in *SZMDS*, *includes* the approach taken in *SGLB*; that is, the decision was not based on findings or inferences of fact supported by logical grounds, see (2010) 115 ALD 248, 278 [135].

230 [2011] QSC 334.

231 *State Development and Public Works Organisation Act 1971* (Qld) ('SDPOWA') s 125(1)(f).

232 [2011] QSC 334 [58], [80].

233 (2010) 240 CLR 611, 647-8 [130]-[131].

234 Ibid [37]-[40] (Gummow ACJ and Kiefel J); and [130]-[131] (Crennan and Bell JJ).

redress with the *AD(JR)A* and its broader focus.[235] Their Honours pointed to the important distinction between jurisdictional fact errors and 'deficiencies in what might be called 'intra-mural' fact finding by the decision maker in the course of the exercise of jurisdiction to make a decision.'[236] In view of that reasoning, the approach taken in *CMC v Assistant Commissioner JP Swindells* appears significant because Applegarth J identified and explained judicial review principles applicable to perverse fact-finding in the statutory review setting. Additionally, his Honour's reasoning is not, expressly, tied to decisions about jurisdictional facts. Therefore, it appears that 'intra-mural' factual determinations, upon which decisions rest, in the course of deciding matters within jurisdiction, may be reviewable for illogicality or irrationality under Part 3 *JRA*.[237]

D *Decisions without justification: no evidence or other material to justify the making of the proposed decision*[238]

The statutory 'no evidence' ground operates alongside[239] 'error of law' where that ground is used, at common law, to impugn decisions made without *any* evidential basis.[240] The legislative provisions were meant to clarify the circumstances in which particular factual errors were of such magnitude that they were properly regarded as legal errors. As Pincus J observed in his submission to EARC:

> If anything should be made clear by a specific statement of grounds, it is the extent to which one can […] [consider whether factual findings are correct - sufficiently based in evidence] on judicial review.[241]

However, the delineation of the no evidence ground has not resulted in greater certainty regarding when factual findings may be judicially reviewed. The inter-relationship between the ground's different components is unsettled and the case-law is unclear on what findings of fact the ground applies to. Accordingly, the ARC has called for reform of the no evidence ground in the *AD(JR)A*.[242] Several issues arise in respect of the statutory 'no evidence' ground; those upon which the Supreme Court has, directly or indirectly, expressed its views are dealt with below.

The first, arguably most important, question, is whether the requirements found in the two 'limbs' in s 24 *JRA*, explain the meaning to be afforded to the basic ground, or whether the linkage is cumulative.[243] The 'cumulative' view of the provisions was adopted in *Curragh Queensland Mining Ltd v Daniel*,[244] whereas in *Minister for*

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235 Ibid [5]-[6]. The point applies to the *JRA* with equal force.
236 Ibid [38].
237 Indeed, there is no discussion of the 'no evidence' ground explicated in s 24(2)(h) *Judicial Review Act 1991* (Qld): paragraph a is analogous to the jurisdictional (fact) error doctrine at common law.
238 *Judicial Review Act 1991* (Qld) ss 20(2)(h), 21(2)(h) and 24.
239 See, for example, *Minister for Immigration v Rajamanikkam* (2002) 210 CLR 222, 240 [54] (Gaudron and McHugh JJ).
240 'Error of law' (whether or not on the face of the record) is, of course, available as a ground of statutory review and encompasses the 'no evidence' ground as it was accepted and applied prior to the advent of judicial review legislation (*The State of Queensland Acting Through Queensland Health v Ball* [2011] QSC 50).
241 EARC report, above n 2 [5.39]. Emphasis in original.
242 Administrative Review Council, above n 71, 140-142; and, see Griffiths, above n 117, 60-62.
243 Aronson and Groves, above n 100, 261-262.
244 (1992) 34 FCR 212.

Immigration and Multicultural Affairs v Rajamanikkam,[245] a majority of the High Court appear to favour the 'expansive' (*qua* explanatory) interpretation, although Kirby J's judgment appears to point both ways. In *Anghel v Minister for Transport (No.1)*, Derrington J adopted the cumulative approach and rejected the proposition that if s 24 *JRA* could be established then the principal ground (s 20(2)(h)) was made out.[246] However, later decisions appear to favour the explanatory line. For example, Atkinson J, has referred to the no evidence ground, in s 20(2)(h) *JRA*, as 'further elucidated in s 24 of the JR Act'.[247] Furthermore, in *P&O Automotive & General Stevedoring Pty Ltd v Chief Executive, Department of Justice and Attorney-General,* the court stated: 'Section 24 of the JR Act provides that this [principal] ground is not made out unless the decision fits into one of two categories.' [248] Recently, the Court of Appeal has, in our view, clearly embraced the expansive (explanatory) approach:

> Under s 20(2)(h) Judicial Review Act the appellant can apply for judicial review on the basis 'that there was no evidence or other material to justify the making of the decision'. *That ground is not made out* in this case *unless* there was no evidence from which Dr Parker could or can reasonably be satisfied that the matter was or is established (s 24(a)(ii) Judicial Review Act) *or* Dr Parker's decision was based on the existence of a particular fact which did not or does not exist (s 24(b) Judicial Review Act) [emphasis supplied].[249]

Secondly, there are unresolved questions about the meaning of 'reasonably satisfied' within s 24(a). In *Garland's case* Atkinson J cited the following passage from *Australian Broadcasting Tribunal v Bond* (with *JRA* provisions added in parenthesis):

> Within the area of operation of par (a)[JR Act s 24(a)] it is enough to show an absence of evidence or material from which the decision maker could reasonably be satisfied that the particular matter was established, that being a lesser burden than that of showing an absence of evidence (or material) to support the decision.

At 359-360 of his judgment, Mason CJ concluded:

> a finding of fact will be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing.[250]

Accordingly, Justice Atkinson adopted the view that the 'reasonably satisfied' requirement in paragraph (a) constitutes a relaxation of the common law's literal approach to 'no evidence', albeit this more relaxed standard applies only in those cases where the establishment of *particular matters* (including decision-makers' *opinions* about the existence of relevant facts) *are required by law*.[251]

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245 (2002) 210 CLR 222.
246 [1995] 1 Qd R 465, 473.
247 *Garland v Chief Executive of Corrective Services* [2006] QSC 245 [77].
248 [2011] QSC 417 [42].
249 *MBR v Parker* [2012] QCA 271 [61] (McMurdo P) (Fraser and White JJA concurring).
250 [2006] QSC 245 [82].
251 Ibid [83] citing *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, 303.

E *'Catch-all' grounds (Otherwise contrary to law, and abuse of power)*[252]

The EARC Report considered that 'catch-all'[253] provisions, such s 5(1)(j) of the *AD(JR)A*, were essential to take account of common law developments and to prevent codification stifling the law's development.[254] The 'otherwise contrary to law' ground is often unparticularised by applicants in written submissions and is then either abandoned in oral submissions or, if agitated, the arguments effectively amount to a re-statement of other available grounds for review. Although the ground provides an avenue through which common law developments may be incorporated or recognised there have, seemingly, been few applications made on this basis in the federal[255] and provincial contexts.

Garland v Chief Executive, Department of Corrective Services is one of a handful of cases where the adaptive potential of the ground has been considered in Queensland. A person serving an indefinite term of imprisonment was issued with a maximum security order. [256] It was argued that the decision was 'otherwise contrary to law' because, *inter alia*, Garland's continued accommodation in the maximum security unit (MSU) was inhumane and so contrary to s 3 *Corrective Services Act* ('CSA'). Section 3 provided that the purpose of corrective services was community safety and crime prevention through humane containment, supervision and rehabilitation of offenders, and that the Act recognised that every member of society had basic human entitlements. Atkinson J considered that international law provided relevant interpretative guidance *vis-à-vis* the concepts of 'humane containment' and 'basic human entitlements'.[257] Her Honour concluded that solitary confinement was not, *per se*, regulated by international law.[258] However, the particular circumstances of confinement could violate the prohibition on torture, inhuman and degrading treatment or punishment, for example. On the facts, her Honour found that the applicant's confinement did not appear to be inhumane in the light of the Standard Guidelines for Corrections in Australia (which were based on international standards), but cautioned that were Garland's confinement to be considered inhumane and, thus, *ultra vires* the power given by the CSA, 'there can be no doubt that the court could properly intervene on an application for judicial review'.[259] Accordingly, the 'otherwise contrary to law' ground was arguable, albeit not established on the facts, because Garland's treatment did not breach international or national guidelines that informed the meaning of the relevant statutory power.[260]

In *CMC v Assistant Commissioner JP Swindells,* the court directed attention to the second 'catch-all' ground - 'any exercise of power in a way that is an abuse of power'[261] - as encompassing perverse or capricious factual findings. Likewise, in *M v*

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252 *Judicial Review Act 1991* (Qld) ss 20(2)(i), 21(2)(i) and 23(i).
253 *Crime and Misconduct Commission v McLennan & Ors* [2008] QSC 23 [5].
254 EARC report, above n 2 [5.42].
255 Administrative Review Council, above n 71, 116 [7.36].
256 Pursuant to the *Corrective Services Act 2000* (Qld) s 47(2)(b)(iii).
257 *Garland v Chief Executive, Department of Corrective Services* [2006] QSC 245 [106].
258 Ibid [107]-[108].
259 Ibid [122].
260 On appeal, Chesterman J (with whom Holmes JA agreed) determined that the specific power to make a maximum security order under s 47 was not subject, in its operation, to s 3, and so it was not a requirement that the Chief Executive of Corrective Services be satisfied that the prisoner be contained humanely if the order was made (*Garland v Chief Executive, Department of Corrective Services* [2006] QCA 568 [21]). McMurdo P agreed, with the proviso that the Chief Executive, in making an order under s 47 *Corrective Services Act 2000* (Qld), 'would remain cognizant of the purpose of the Act set out in s 3' [2].
261 *Judicial Review Act 1991* (Qld) s 23(i).

P, McMeekin J pointed to the potential utility of 'abuse of power', observing that decisions short of a complete absence of evidence 'but displaying perversity might be characterised as an error of law within s 20(2)(f) of the JRA or as an abuse of power within s 20(2)(e) and s 23(i) of the JRA' [citations omitted].[262] These judicial observations support EARC's conclusion that the catch-all grounds provide an avenue through which common law developments may be recognised, even refined, by way of statutory review.

IV A STATUTORY RIGHT TO REASONS

The third aspect of the reforms called for by the Fitzgerald and EARC reports was the establishment of a statutory right to seek a written statement of reasons in respect of administrative decisions. The right to reasons under the *JRA* has generally been welcomed as effective measure to redress the inadequacies of the common law.[263] The right, being tied as it is to the prerequisites for the application of Part 3 of the *JRA*, is subject to the same technicality and uncertainty regarding the scope of review under s 4 of the *JRA* considered above. EARC recommended that the Queensland government monitor the administrative burden created by the enactment of Part 4 of the *JRA* (setting out the right to reasons).[264] It does not appear that this recommendation was implemented by the Queensland government and the costs of producing statements of reasons appear unquantified.[265]

V CONCLUDING OBSERVATIONS

It is 21 years since the coming into force of the *JRA*. To the extent that the Act followed the language of the *AD(JR)A*, its destiny has been tied to the destiny of the Federal statute and the narrow construction it has been given. Accordingly, applications for review may still flounder on the reefs of jurisdictional technicalities. To the extent that the Queensland legislation has departed from the *AD(JR)A* formula by including the traditional remedies in Part 5, it has suffered from additional uncertainties following the High Court's decision in *Kirk*.

Codification has promoted transparency by simply stating the grounds of review in Part 3 of the *JRA*. Legal certainty has also been enhanced, to a degree. The enumerated heads of review provide greater guidance for lawyers and litigants than the slippery concept of jurisdictional error at common law. However, uncertainties remain, attributable to; unresolved judicial differences of opinion about particular grounds, such as 'no evidence' and, emerging grounds, such as the 'duty to inquire' and, illogicality and irrationality in fact-finding. Indeed, the emergence of such grounds

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[262] *M v P* [2011] QSC 350 [40].

[263] See *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 662 and 667-9.

[264] EARC, above n 2, [11.39], [11.69] and [14.40]. Note EARC's very innovative suggestion that the right to reasons should still apply in respect of non-justiciable decisions – [11.32].

[265] A 'right to information' request was lodged by Miss Bianca Kabel, on behalf of the authors, with the Department of Justice and Attorney-General in relation to this recommendation by EARC. The Department replied by letter dated 10 October 2012 stating that the Department held no documents or data collected in accordance with EARC's recommendation. This letter is on file with the authors. The administrative burden of providing written statements of reasons under the *AD(JR)A* does not, however, appear to have been a major issue – see, for example, Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, (Report No 33, 1991) 36.

suggests that codification has not arrested the development of the common law as some have feared. Rather, the evolutionary capacity of the law in Australia is constrained by federal constitutional considerations; namely, the separation of powers doctrine and the rigid distinction between judicial and merits review.

EARC's innovative recommendations have not been embraced in the ways that one might have expected when EARC delivered its report in 1990. Ss 4(b), 49 and 50 have not had the impact that might have been expected. The ARC's 2012 report recommends amendment to the *AD(JR)A* in similar areas to those covered by these provisions of the Queensland Act but has not recommended that provisions such as ss 4(b) and 49 of the *JRA* should be replicated in an amended *AD(JR)A*. If the ARC's recommendations are accepted federally it will be essential for the vitality of the Queensland Act that the success or otherwise of these Federal reforms is carefully assessed. The *JRA* has not operated entirely as EARC anticipated. Fidelity to the spirit of the Fitzgerald Royal Commission report requires careful scrutiny of, and action to correct, weaknesses in the *JRA* and in judicial review more generally in Queensland.