

TASMANIA  
**LAW REFORM**  
INSTITUTE

**Review of the *Judicial Review Act 2000* (Tas)**

ISSUES PAPER NO. 26

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# Contents

Information about the Tasmania Law Reform Institute .....	v
How to respond.....	v
Final Report to the Attorney-General.....	vii
Acknowledgments.....	vii
Background to this Reference .....	viii
Terms of Reference.....	ix
Executive Summary.....	x
List of Questions .....	xx
<b>Part 1: Introduction .....</b>	<b>1</b>
1.1 The aim of the <i>Judicial Review Act 2000</i> (Tas) and the extent to which it has achieved that aim.....	1
<b>Part 2: Purposes of the <i>Judicial Review Act</i>.....</b>	<b>7</b>
2.1 Introduction.....	7
2.2 The purposes of the <i>Judicial Review Act</i> as indicated in the second reading speech and subsequent parliamentary consideration, especially in committee.....	7
2.3 The intended scope of the Act .....	11
2.4 Why the Act failed in its attempt to abolish the prerogative remedies.....	12
2.5 Conclusion .....	15
<b>Part 3: The <i>Judicial Review Act</i> and the Prerogative Remedies.....</b>	<b>16</b>
3.1 Issue 1 – <i>Is it feasible and desirable to abolish the prerogative remedies completely and to replace them with the one simple procedure for judicial review under the Act?</i> .....	16
3.2 Issue 2 – <i>If we decide to retain the prerogative remedies, is legislation required to put them on a firm legal footing?</i> .....	25
Question 1.....	31
Question 2.....	31
<b>Part 4: Limitations on the Scope of Review under the <i>Judicial Review Act 2000</i> (Tas)....</b>	<b>32</b>
4.1 Introduction.....	32
4.2 Issue 3 – <i>Is there jurisdiction under the JRA where the Act in question does not require a decision? If not, should there be jurisdiction in these cases?</i> .....	33
4.3 Issue 4 – <i>Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the JRA? Or should they have some additional characteristics such as being ‘final and operative’?</i> .....	38
Question 3.....	60
Question 4.....	60
<b>Part 5: Decisions under an Enactment .....</b>	<b>61</b>
5.1 Introduction.....	61

5.2 Issue 5: What is an enactment – <i>Should the definition of enactment in s 3 of the JRA be amended to include instruments as well as statutory rules and to make it clear that local government rules and by-laws are enactments although they are not statutory rules?</i> .....	62
Question 5.....	64
5.3 Decisions under an enactment – the current law.....	64
5.4 Issues to which the current law gives rise .....	76
5.5 Issue 6 – <i>Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment?</i> .....	77
Question 6.....	79
5.6 Issue 7 – <i>Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the JRA?</i> .....	79
Question 7.....	88
Question 8.....	88
5.7 Issue 8 – <i>Should a decision made in pursuance of an enactment which affects interests but does not affect anyone’s rights or obligations be a decision under an enactment?</i> .....	88
Question 9.....	92
5.8 Issue 9 – <i>Should a decision made under the general law but given effect to by statute be reviewable?</i> ...	93
Question 10.....	95
5.9 Issue 10 – <i>Are there classes of legislation which should not be considered as an enactment for the purposes of the JRA?</i> .....	95
Question 11.....	97
5.10 Issue 11 – <i>Should the scope of the JRA be extended to cover administrative and governmental decisions whether made under an enactment or not?</i> .....	97
5.11 Issue 12 – <i>If the scope of the JRA is extended to all decisions made in the exercise of public power, should that grant replace or be in addition to the existing grant of power and others suggested in the above discussion?</i> .....	104
Question 12.....	105
Question 13.....	105

## Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself.

The work of the Institute involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other States and the Commonwealth.

The Institute's Director is Associate Professor Terese Henning. The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Tim McCormack (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Dr Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (appointed at the invitation of the Institute Board), Mr Rohan Foon (appointed by the Law Society of Tasmania), Ms Kim Baumeler (appointed at the invitation of the Institute Board) and Ms Rosie Smith (appointed at the invitation of the Institute Board as a member of the Tasmanian Aboriginal community).

The Board oversees the Institute's research, considering each reference before it is accepted, and approving publications before their release.

## How to respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to address any or all of those questions in their submissions.** Respondents can also suggest alternative options for reform or raise other relevant matters in their responses.

There are a number of ways to respond:

- By filling in the Submission Template

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute's webpage: <http://www.utas.edu.au/law-reform/>

- By providing a more detailed response to the Issues Paper

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed and also published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission, and name you as the source of the submission in relevant publications.
2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications, but will not identify you as the source of the submission.
3. Confidential submission – the Institute will not refer to or quote directly from the submission, but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time, by contacting Kira White on (03) 6226 2069 or email [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au). You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions will be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

Electronic submissions should be emailed to: [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au)

Submissions in paper form should be posted to:

Tasmania Law Reform Institute  
Private Bag 89  
Hobart, TAS 7001

Inquiries about the study should be directed to Ms Terese Henning at the above address, or by telephoning (03) 6226 2069, or by email to [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au).

CLOSING DATE FOR RESPONSES: <15 October 2018>

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email [human.ethics@utas.edu.au](mailto:human.ethics@utas.edu.au). The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

## **Final Report to the Attorney-General**

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

## **Acknowledgments**

This Issues Paper was prepared for the Board by Mr Michael Stokes. Valuable contributions in its preparation were provided by the reference group established to provide feedback on the issues it deals with: Mr Benedict Bartl, Professor Matthew Groves, Ms Claire Bookless and Associate Professor Terese Henning. Mr Bruce Newey edited and formatted the final version of this Issues Paper. Work on this reference is being funded by a grant of \$21 345 from the Law Foundation of Tasmania.

## Background to this Reference

In 2016, the Institute received a request, initially from Ben Bartl of the Tenants' Union of Tasmania and, subsequently, also from Community Legal Centres Tasmania and the Law Society of Tasmania, to undertake a review of the *Judicial Review Act 2000* (Tas). In making this request it was submitted that the enactment of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* was heralded as one of the most important legal reforms of the twentieth century.<sup>1</sup> Its objectives were to enhance access to justice for individuals aggrieved by government action or inaction and to promote and affirm the importance of legal accountability for public administration. Subsequently, similar legislation was introduced in other jurisdictions including Tasmania.<sup>2</sup> However, in the almost fifty years since the passing of the Commonwealth Act, the capacity to review government decision-making under this and like legislation has been eroded by decisional law<sup>3</sup> and social change including the significant outsourcing of government work to private and not-for-profit organisations. The transfer of government power in this way means that private bodies undertake decision-making that involves the exercise of 'public' powers and functions and which significantly affects individual's rights and interests but where there is no recourse to judicial review. Additionally, many decisions that are authorised by sources other than statute (for instance, contract law or 'soft' law instruments such as guidelines and policies) are not subject to judicial review. Courts' restrictive readings of judicial review legislation have been criticised extensively as undermining the original intent of the legislation.<sup>4</sup> They eliminate much administrative decision-making from potential judicial review. Additionally, the impact of social change on the effectiveness of the legislation suggests that it is timely to review the Act with a view to its modernisation.

The proponents of the reference submitted that the inability to hold many decision-makers exercising public powers and functions to account is of concern and that amendments to the *Judicial Review Act 2000* (Tas) should be investigated by the Tasmanian Law Reform Institute as a means of reinvigorating transparency and accountability in government decision-making.

The TLRI Board agreed that the TLRI should undertake this reference and Terms of Reference were formalised with its proponents. They are set out below. Mr Michael Stokes agreed to write the Issues Paper on this reference for the TLRI and Mr Dylan Richards agreed to undertake the community consultation and to write the Final Report for the reference. An application was made to the Law Foundation of Tasmania for \$21 345.00 to fund the reference. This application was successful. An expert reference group consisting of Professor Matthew Groves, Mr Benedict Bartl, Ms Claire Bookless and Associate Professor Terese Henning was established to provide feedback and advice during the writing of the Issues Paper.

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<sup>1</sup> *Griffith University v Tang* (2005) 221 CLR 99, 133 (Kirby J).

<sup>2</sup> See *Judicial Review Act 2000* (Tas); *Judicial Review Act 1991* (Qld); *Administrative Decisions (Judicial Review) Act 1989* (ACT). See also the *Administrative Law Act 1978* (Vic).

<sup>3</sup> See for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *Griffith University v Tang* (2005) 221 CLR 99; *King v Director of Housing* [2013] TASSC 9; *Smillie v Legal Aid Commission of Tasmania* [2014] TASSC 19.

<sup>4</sup> Summarised in M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 2–3.

## Terms of Reference

1. Whether there is a need to reform the *Judicial Review Act 2000* (Tas);
2. In the event that reform is warranted, to which decision-makers the *Judicial Review Act 2000* (Tas) should apply;
3. What the test for a reviewable decision should be — for example, whether the test should be that the rules of natural justice apply to the decision-making or whether a public function test should be applied;
4. Who should be able to seek review of a reviewable decision;
5. What should be the relationship between the *Judicial Review Act 2000* (Tas) and the prerogative writs;
6. Any other relevant issues that arise in relation to the terms of reference.

## Executive Summary

### 1. Introduction – the aim of the *Judicial Review Act 2000 (Tas)* and the extent to which it has achieved that aim

This Issues Paper is concerned with a number of issues related to the *Judicial Review Act 2000 (Tas)* (*JRA*). The *JRA* was passed in 2000 with the aim of simplifying the law with respect to judicial review of government action.

The Supreme Court has always had the power to review government action in order to determine whether the government has acted legally or not. The law in this area is complex because the legal standards with which government must comply are complicated and not easy to apply. Although it lists these standards, a useful reform in itself, the *JRA* does not attempt to simplify them or to reduce their number.

Instead, the *JRA* seeks to simplify the rules which determine when an individual who is affected by government action can ask the Court to determine whether that action was authorised by law. Before the *JRA* was enacted, an individual who wanted to challenge the legality of government action had to show that his or her case fell within the scope of one of the old common law remedies, such as mandamus, prohibition and certiorari.

The *JRA* aimed to make it easier for litigants to sue the government by replacing all the old remedies with one simple statutory remedy. This was designed to ensure that old technical limitations on the right to sue did not stop the individual from having the Court determine whether the government action which affected him or her was legal.

However, decisions with respect to the *JRA* and similar legislation in the Commonwealth and in Queensland, (the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ‘*ADJR Act*’ and the *Judicial Review Act 1991 (Qld)*) have imposed a raft of technical limitations on the right to sue under the *JRA*, making it as complex as the old remedies.

The Issues Paper suggests reforms to the *JRA* which restore the original aim of providing a simple way in which an affected individual may challenge the lawfulness of government action. The Paper identifies the limitations which the courts have placed on the scope of judicial review, considers whether those limitations are justified and suggests ways in which those which are not justified may be removed. Because the limitations are complex and technical, the discussion of them and of the ways in which they might be removed is complex and technical.

The most important way in which the *JRA* aimed to simplify judicial review of administrative decision-making was by replacing a number of complicated old common law remedies, mandamus, prohibition, certiorari, quo warranto and scire facias, with a simplified statutory procedure for an order of review.<sup>5</sup>

That attempt failed in part because the Act, if interpreted consistently with that aim, ruled out any possibility of challenging the legality of government action in too many cases. The Tasmanian

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<sup>5</sup> *JRA* s 43.

Supreme Court was not prepared to accept that outcome. It interpreted the *JRA* not as replacing the old remedies with a simplified procedure but as supplementing them with that procedure.

The second reason why the attempt failed is that the constitutional landscape within which the *JRA* operates changed radically in 2010. Before 2010, it was assumed that a State government could limit the scope of a State Supreme Court's power to determine the legality of government action. However, in that year the High Court held in *Kirk v Industrial Relations Commission of New South Wales*<sup>6</sup> ('*Kirk*') that the jurisdiction of a State Supreme Court in this area, as defined by the old common law remedies, was constitutionally protected. Hence, a State parliament had limited power to reduce its scope. That decision entailed that it is impossible for a State parliament to abolish the old remedies unless it provides an alternative remedy equal in scope. As the exact scope of these remedies is not clear and is tending to expand, it is difficult for a parliament to do that.

It is clear that the *JRA* does not replicate the jurisdiction which the old remedies granted the Court. Instead, it is narrower in some crucial respects. Hence the Supreme Court was faced with the option of holding the attempt to abolish the old remedies with a statutory procedure invalid as inconsistent with the Constitution or to interpret the *JRA* as supplementing the old remedies rather than replacing them.

## 2. The *JRA* and the prerogative remedies

### Issue 1

*Is it feasible and desirable to abolish the prerogative remedies completely and to replace them with the one simple procedure for judicial review under the Act?*

#### **A. The abolition of the prerogative remedies, constitutional protection of the supervisory jurisdiction of State Supreme Courts and the role of the *JRA***

This Part of the Issues Paper considers whether the stated aim of the *JRA*, to abolish the old remedies and replace them with a simplified statutory procedure for review, is achievable given that to abolish them constitutionally, it is necessary to replicate the jurisdiction which they grant in full. It concludes that it is not feasible, because the scope of review under those remedies is not well defined and is continuing to expand, making it very difficult to replicate in a statute.

#### **B. Alternatives to abolition of the prerogative remedies**

However, the fact that it may not be possible to replace the old remedies completely does not entail that the passage of the *JRA* was an exercise in futility. It is worthwhile to expand the scope of the *JRA* to provide a simplified alternative to the old remedies because their complex nature adds to the time and expense of litigation. The Issues Paper considers the relationship between the *JRA* and the old remedies, discussing two options. Firstly, it may be possible to incorporate the old remedies into the *JRA*. This is the option the TLRI prefers because it simplifies the law to the greatest extent possible. Secondly, the old remedies may be retained in addition to the *JRA*. This may be the preferred option because it is the one which has been adopted in other jurisdictions.

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<sup>6</sup> (2010) 239 CLR 531.

## Issue 2

### ***If we decide to retain the prerogative remedies, is separate legislation required to put them on a firm legal footing?***

If the old remedies are retained in addition to the *JRA*, they need to be embodied in new legislation. The arguments the Supreme Court relied on to save them after the *JRA*'s attempt to abolish them are weak. They do not provide the remedies with the secure foundation which they need given their constitutional importance since *Kirk*.

## 3. Problems arising in the interpretation of the *JRA*

As noted above, the Issues Paper takes the position that the *JRA* is useful to the extent that it simplifies the law and provides a better remedy than the older remedies. Cases with respect to the Acts on which the *JRA* is modelled, the *ADJR Act* and the *Judicial Review Act 1991* (Qld), have adopted narrow, technical interpretations of some of the key provisions in those Acts, reducing the scope of the jurisdiction which they grant and adding layers of complexity to their application. This has greatly reduced the usefulness of those Acts. And as these narrow, technical interpretations have been followed in Tasmania, they have reduced the scope of the *JRA* and made it more complex than it ought to be.

Parts 4 and 5 of the Issues Paper consider some of these technical interpretations and the problems to which they give rise. These Parts also suggest solutions. Part 4 examines some problems which have arisen in the interpretation of the term 'decision'. This is a key term in the *JRA* and in the *ADJR Act* and in the Queensland *Judicial Review Act 1991*.

## Issue 3

### ***Is there jurisdiction under the JRA where the Act in question does not require a decision? If not, should there be jurisdiction in these cases?***

The first issue with which Part 4 deals involves cases in which there is arguably no administrative decision. Typically, they are cases in which individuals act in a way which changes their legal position with the government, often to their detriment. It is arguable that the *JRA* does not permit review in these cases because it is the behaviour of the citizen, not an administrative decision, which changes their legal position. However, often an administrator needs to decide that the citizen has in fact acted so as to change his or her legal position before the law can be enforced and the Issues Paper argues that that decision ought to be reviewable.

## Issue 4

### ***Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the JRA? Or should they have some additional characteristics such as being 'final and operative'?***

The second set of issues with which Part 4 deals are those raised by the decision of the High Court in *Australian Broadcasting Tribunal v Bond* ('*Bond*').<sup>7</sup> That case decided that not all administrative

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<sup>7</sup> (1990) 170 CLR 321.

decisions made under an enactment are reviewable under the *ADJR Act*. To be reviewable, a decision must be final and operative, at least in a practical sense. The purpose of the requirement that the decision be final and operative was to prevent challenges to every step in complicated administrative procedures which were designed to frustrate the procedure rather than to vindicate the rights of the complainant.

The Issues Paper takes the view that there is no settled interpretation of the requirement that the decision must be final and operative. As a result it has complicated rather than simplified the operation of the *JRA*. It is also not needed in Tasmania because s 13 of the *JRA*, which has no equivalent in the *ADJR Act*, gives the Supreme Court a power to dismiss actions which are premature and designed to disrupt the administrative process. The Issues Paper concludes that s 13 provides a better remedy for the problem of premature and disruptive litigation than does *Bond*. As *Bond* tends to undermine the operation of s 13, the *JRA* should be amended to reverse it. The Issues Paper considers how this could be done.

#### Issue 5

***Should the definition of enactment in s 3 of the JRA be amended to include instruments as well as statutory rules and to make it clear that local government rules and by-laws are enactments although they are not statutory rules?***

Part 5 commences by examining the definition of enactment in s 3 of the *JRA*. That definition limits enactments to Acts and statutory rules. The definition is narrow in some respects in that it excludes local government rules and by-laws from the definition of enactment and may exclude planning instruments as well. However, it is innovative in that prerogative legislation, which is rare but may become more common, falls within the definition. To resolve these issues, the Issues Paper suggests that the definition of enactment be amended to include instruments as well as statutory rules and to ensure that local government by laws are enactments.

#### Issue 6

***Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment?***

The rest of Part 5 focuses on the requirement that to be reviewable, decisions must be made under an enactment, and considers the technicalities which have encrusted that requirement. Those technicalities have been based on the idea that a decision is only made under an enactment if the enactment is the source of the legal power to make the decision. That idea has led to a number of complex and technical restrictions on the scope of review.

For example, it has been used to rule out review under the *ADJR Act* in cases where the Commonwealth statute has not been the source of the power to make the decision but the connection with the statute relied upon has been of a different type. A good example is *Glasson v Parke's Rural Distributions*<sup>8</sup> in which review was denied because Commonwealth legislation set out the parameters of the scheme, but State law conferred the power to make the decision under challenge.

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<sup>8</sup> (1984) 155 CLR 234.

## Issue 7

***Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the JRA?***

The source of power approach tends to exclude review in cases in which the decision is made in the exercise of contractual powers but the power to contract is conferred by statute. The Issues Paper argues that there is no easy answer to these cases and suggests that there should be different approaches to different classes of government contract. It firstly considers tenders and procurement contracts, pointing out the problems surrounding review of such contracts and suggesting that this problem is better dealt with by separate legislation rather than in the *JRA*. The Government Procurement (Judicial Review) Bill 2017 (Cth) provides a good model. Secondly, it considers contracts of employment, and examines the arguments for and against allowing judicial review without coming to a conclusion or making a concrete recommendation.

Finally, the Issues Paper considers contracts and other arrangements for the delivery of government benefits and services. It points out that the recipients of such services are in a weak legal position because they rarely have any binding contract or other legal relationship with the service provider which give them any legal rights. It considers various alternatives which have been suggested before suggesting that review of the decisions of government officers, agents and service providers should be allowed where the decision relates to the spending of government money.

## Issue 8

***Should a decision made in pursuance of an enactment which affects interests but does not affect anyone's rights or obligations be a decision under an enactment?***

After considering review of government contracts, the Issues Paper considers whether review should be extended to cases in which the decision does not affect anyone's rights and duties but does affect the complainant's interests. In *Griffith University v Tang*<sup>9</sup> (*Tang*) the High Court held that decisions which affected interests but did not affect rights and duties were not made under an enactment and hence were not reviewable. The Issues Paper concludes that there is no justification for that limitation on the scope of the *JRA* and that the decision in *Tang* should be reversed. It serves no useful purpose, can cause injustice and makes the law unnecessarily technical, forcing complainants to look for some minor effect on their legal rights in cases in which the decision has a major and obvious impact on their interests.

## Issue 9

***Should a decision made under the general law but given effect to by statute be reviewable?***

The idea that a decision is only made under an enactment if the enactment is the source of the power to make the decision has been used to exclude review where general law rather than an enactment is the source of the power to make a decision, although the enactment attaches legal consequences to the decision which it otherwise would not have. The leading case on this point is *NEAT Domestic*

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<sup>9</sup> (2005) 221 CLR 99.

*Trading v AWB*.<sup>10</sup> In that case, the Wheat Export Authority, a government agency, had no power to permit the export of bulk wheat unless the AWB, a private corporation listed on the stock exchange, gave its approval to the wheat's export. The High Court held that the AWB's decision to refuse to allow the export of wheat in the case in question was not a decision under an enactment because the decision itself was made in the ordinary exercise of the corporation's power rather than under an enactment. The enactment in question merely attached additional legal consequences to the decision.

The Issues Paper argues that the decision is difficult to justify because AWB would have had no reason to make the decision if the Act in question had not given it a power to veto the export of wheat. Without that power, the decision would have been merely an expression of opinion which had no legal consequences.

## Issue 10

### ***Are there classes of legislation which should not be considered as an enactment for the purposes of the JRA?***

The wording of the *JRA* suggests that administrative decisions which meet requirements such as those laid down in the *Bond* and *Tang* tests are reviewable regardless of the type of enactment under which they are made. However, that may not be the case. It is not clear that decisions made by government administrators under private law statutes such as the *Sale of Goods Act 1896* (Tas) and other consumer protection laws or the *Residential Tenancy Act 1997* (Tas) ought to be reviewable. There is an element of arbitrariness in allowing review in these cases because review cannot extend to administrative decisions made under the common law because they are not decisions under an enactment. Whether or not an area of private law has been embodied in a statute depends upon accidents of history. It is arguable that the availability of public law remedies should not depend upon such accidents.

On the other hand, sometimes officials are required to apply private law in a large number of cases in the administration of a government programme. It is arguable that review should be available in such cases and that it is wrong to deny it simply because private law is central to the administration of the programme. The issue arose in the case of *King v Director of Housing* ('*King*'),<sup>11</sup> in which a public housing tenant sought review of a decision not to renew her lease and to evict her. The Court held that the decision was not reviewable because it was made under the general law. However, the general law of landlord and tenant in Tasmania is embodied in a statute, the *Residential Tenancy Act* and the decisions not to renew the lease and to evict her were taken under that Act. The judgments did not explain why these decisions did not qualify as decisions made under an enactment for the purposes of the *JRA*. One can only assume that it was because they were of the view that *JRA* review should not extend to decisions made under private law statutes such as the *Residential Tenancy Act*.

The Issues Paper argues that review under the *JRA* should be available in these cases where, as in *King*, the decision was administrative and made in the implementation of a government programme. If they are not reviewable, it may be very difficult to compel the government to administer such

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<sup>10</sup> (2003) 216 CLR 277.

<sup>11</sup> [2013] TASFC 9.

programmes according to law. If the *JRA* does not apply, complainants will be forced to use the complex old remedies to hold the government accountable.

## Issue 11

### ***Should the scope of the JRA be extended to cover administrative and governmental decisions whether made under an enactment or not?***

The issues discussed above may be seen as aspects of the one bigger issue — should the scope of the *JRA* be extended to all administrative or governmental decisions, whether made under an enactment or not.

Governments have become increasingly reliant on sources of power other than legislation, such as prerogative powers and powers conferred by contracts and other agreements, to implement programmes and to control the delivery of services. Governments also have tended to outsource service delivery to a greater extent than they did in the past.

It is arguable that the rule of law requires that decisions made under prerogative powers and under contract plus decisions of service providers acting on behalf of government should be subject to judicial review. If they are not so subject, there is no way of ensuring that the government and its servants and agents are not exceeding their legal powers. Besides, individuals who are adversely affected by these decisions should have some recourse to an independent procedure for resolving their complaints.

The need to provide a remedy in these cases suggests that the scope of the *JRA* should be extended to cover decisions made in the exercise of non-statutory governmental powers. If the *JRA* were extended to cover the five types of case dealt with above, it would extend judicial review to many situations in which the power on which the government was relying was not a statutory power.

The grounds for review of non-statutory powers are narrower than those available to review statutory powers. However, it would not be valueless. In particular, it could be used to ensure that persons who are adversely affected by the exercise of a non-legislative power are granted procedural fairness, including a right to be heard before a decision is made.

Currently, it is possible to use the old common law remedies to review some decisions made in the exercise of non-statutory powers. However, the scope of these remedies is unclear so that amending the *JRA* to permit review of non-statutory powers would help to clarify the law.

The Issues Paper considers reform proposals put forward by the Administrative Review Council before considering three options for a general provision extending *JRA* review to decisions made in the exercise of non-statutory grants of power:

1. Extending the scope of review to permit review of all decisions of an administrative or public nature.
2. Extending the scope of review to permit review of all decisions of government officers, servants, agents, agencies and service providers.
3. Extending the scope of review to permit review of all decisions which are subject to the requirements of natural justice.

1. *Should the JRA be extended to permit review of all decisions of an administrative or public nature?*

This proposal has the virtue of simplicity. It also focuses attention on what may be the key issue in determining the scope of judicial review — is the decision made in the exercise of public or private power. However, it has been used in the UK to determine the scope of judicial review and has been difficult to apply. The line between public and private is not clear, especially given that governments are tending to rely on private providers to deliver services and have been privatising what were formerly regarded as key government services. Nevertheless, the proposal should not be ruled out simply because it is not easy to distinguish public from private.

2. *Should the JRA be amended to permit review of all decisions of government officers, servants, agents, agencies and service providers?*

A provision extending JRA review to all decisions of government officers, servants, agents, agencies and service providers appears to have the advantage that it does not present the court with the difficult task of distinguishing public from private power. Instead, it presents the court with the easier task of determining whether the decision-maker is a government officer, servant, agent, agency or service provider.

However, a power to review all decisions of government officers, servants, agents, agencies and service providers may be too broad. It extends review without exception to decisions of the named classes of decision-maker, unless they are specifically exempted from review and does not recognise that government officers and agents may make decisions, such as those with respect to many government contracts, which have no public element other than that they are made by a government officer or agent.

It may be necessary to impose some limits to prevent decisions which have no public element other than that they are made by a government officer or agent from being reviewable. The most obvious limitation to impose would be to require that to be reviewable, the decision must be public, administrative or governmental in character. If that limitation were adopted, the proposal becomes very similar to the proposal that review be extended to all decisions of an administrative, public or governmental character. Once this limit is added, the requirement that the decision be made by a government officer, servant, agent or agency seems superfluous and could easily be dropped, so that the two proposals become identical.

Secondly, the requirement that the decision be made by a government officer, servant, agent, agency or service provider is not as clear as it may seem. It would be open for a court to adopt an interpretation of officer, servant, agent, agency, or service provider limiting the phrase to persons who had been appointed as government officers, servants, agencies, and service providers. On this view, persons performing functions on behalf of the government without being appointed as officers, servants, agents or service providers would fall outside the scope of the definition. Their decisions would not be reviewable.

That would be an unnecessary restriction on the scope of review as the availability of review of the decision of a person performing a government function should not depend upon whether they had been appointed as a government officer, servant or agent. Instead, it should depend upon whether the decision is a public or private one.

In conclusion, extending judicial review under the *JRA* to all decisions of a government officer, servant, agent, agency or service provider may not be advisable because the requirement is not sufficient in itself to prevent review of decisions which probably should not be reviewed, such as contractual decisions. It is also open to a narrow technical interpretation which would prevent review of some decisions which ought to be reviewable for no good reason.

3. *Should the JRA be amended to permit review of all decisions which are subject to the requirements of natural justice?*

Section 2 of Victoria's *Administrative Law Act 1978* limits review to situations where the decision-maker is bound by one or more of the rules of natural justice, which include providing a fair hearing, giving notice or acting without bias. Matthew Groves has argued that this formula is a better way of defining the scope of review than the *JRA* formula of administrative decisions made under an enactment.<sup>12</sup> He argues that it is much simpler than the *ADJR* formula because the situations to which the rules of natural justice apply are well understood.

Groves also points out that the scope of natural justice has expanded greatly so that persons whose rights, interests or legitimate expectations are affected by a government decision or action are entitled to natural justice. Hence, allowing judicial review of all decisions where the decision-maker is bound by one or more of the principles of natural justice would allow almost all government decisions affecting individuals to be reviewed.

Defining the scope of review by reference to natural justice also has the potential to enable the courts to avoid the difficult distinction between public and private. Natural justice has long extended to private bodies such as clubs, professional associations and other related private organisations which exercise disciplinary powers such as the power to expel.<sup>13</sup> A broad reading of the natural justice formula could extend judicial review to such bodies, ruling out any need to distinguish public from private.

However, extending judicial review to that extent would create new problems. If natural justice were adopted as the jurisdictional formula in the *JRA*, it could expose clubs and professional bodies to the full gamut of *JRA* grounds for review. That would pose huge problems for clubs and professional bodies, many of which do not have the resources or expertise to operate in accordance with administrative law standards. It would be unreasonable to require them to.

The only way to protect clubs and professional associations from the full gamut of grounds of review is to limit judicial review to the public sphere. The Victorian courts have done that under the *Administrative Law Act*. With one or two exceptions they have limited judicial review under the Act to review of the decisions of public bodies.<sup>14</sup>

Given that the public/private distinction may be needed to prevent judicial review's extension to private bodies with disciplinary and other powers over their members, defining the scope of review by reference to natural justice may have little advantage over defining it by reference to the distinction between public and private power. Reliance on the distinction between public and private power

<sup>12</sup> M Groves, 'Should the *Administrative Law Act 1978* be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 463–5.

<sup>13</sup> The cases are discussed in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Law Book, 6<sup>th</sup> ed, 2017), 496–500.

<sup>14</sup> *Monash University v Berg* [1984] VicRp 30; [1984] VR 383; *Dominik v Eutrope* [1984] Vic R 54; [1984] VR 636; *Davidson v Australian Mensa Inc* (1996) 10 VAR 42.

seems inevitable unless we are prepared to permit judicial review under the *JRA* to extend to private clubs and organisations which possess disciplinary powers over their members.

Hence the best option for extending the *JRA* beyond the situations outlined above is by extending judicial review to decisions and conduct made in the exercise of public power, regardless of its source. The distinction between public and private power remains relevant even if some other jurisdictional test such as natural justice or decisions of public officers, servants, agents, agencies or service providers is adopted. Little is gained by supplementing the requirement that the decision be made in the exercise of public power with additional requirements such as the decision-maker must be subject to the requirements of natural justice or must be a government officer or agent.

## Issue 12

***If the scope of the JRA is extended to all decisions made in the exercise of public power, should that grant of jurisdiction replace or be in addition to the existing grant of power and other grants of jurisdiction suggested in the above discussion?***

If the scope of the *JRA* is extended to all decisions made in the exercise of public power, it will be necessary to decide whether to add the additional grant of jurisdiction to that already in the Act and others proposed in the Issues Paper or to replace the existing and proposed grants of jurisdiction with one broad grant designed to cover all cases.

The second option has the virtue of apparent simplicity. However, it may lead to its own problems. There is much to be gained from keeping the existing jurisdictional formula which is well understood and gives rise to no problems in the majority of cases. It may also be worthwhile to extend that jurisdiction in ways which are designed to overcome specific problems before adding a final general grant.

## List of Questions

The Institute welcomes your response to any individual question or to all questions contained within the Issues Paper.

### Question 1

- (a) Is it sensible and feasible to abolish the prerogative remedies? How could this best be done? Do the advantages of doing so outweigh the disadvantages?
- (b) Is it more sensible and feasible to retain the prerogative remedies? What are the advantages and disadvantages of doing so?
- (c) If so, how is this best done — by incorporation into the *JRA* or by being kept separate? What are the advantages and disadvantages of the two options?

### Question 2

If it is decided to keep the prerogative remedies separate from the *JRA*, is it necessary to put them on a stronger legal footing by embodying them in legislation? Or is their current basis sufficient?

### Question 3

Should the definition of decision be broadened to include a decision or action that is necessary for the implementation of a statutory provision which operates to change the legal position of a person without any administrator having to make a decision so that such decisions are reviewable? If so, how should such a definition be worded?

### Question 4

- (a) Is there a danger that the *JRA* will be used to bring premature or disruptive applications for review? If so, what is the best method of guarding against the danger — limiting the type of challenges which can be brought so as to rule out challenges which are premature and disruptive or giving the courts a discretion to rule out premature and disruptive challenges? Or do we need both methods?
- (b) Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the *JRA*? Or should they have some additional characteristics such as being ‘final and operative’ so that decisions made early in an administrative process are not reviewable, making premature and disruptive challenges more difficult?
- (c) If courts should have a discretion to rule out premature and disruptive challenges, should the concept of decision under an enactment be amended to include a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment?

### Question 5

Should the definition of enactment in s 3 of the *JRA* be amended to include instruments as well as statutory rules to ensure that the definition covers planning provisions and schemes? Should a specific provision be added to the definition to make it clear that local government rules and by-laws are enactments although they are not statutory rules?

**Question 6**

Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment?

**Question 7**

Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the *JRA*?

**Question 8**

Should there be judicial review of decisions made with respect to:

- Tenders and procurement contracts?
- Contracts of employment?
- Contracts and other arrangements entered into in the implementation of a policy, or to deliver a service or benefit?

**Question 9**

Should a decision made in pursuance of an enactment which affects interests but does not affect anyone's rights or obligations be a decision under an enactment?

**Question 10**

Should a decision made under the general law but given effect to by statute be reviewable?

**Question 11**

Are there classes of legislation which should not be considered as an enactment for the purposes of the *JRA*?

**Question 12**

- (a) Should the scope of the *JRA* be extended to cover administrative and governmental decisions whether made under an enactment or not?
- (b) Should the *JRA* be extended to permit review of all decisions of an administrative or public nature?
- (c) Should the *JRA* be amended to permit review of all decisions of government officers, servants, agents, agencies and service providers?
- (d) Should the *JRA* be amended to permit review of all decisions which are subject to the requirements of natural justice?
- (e) Should judicial review under the *JRA* be extended to all decisions and conduct made in the exercise of public power, regardless of its source?

**Question 13**

- (a) If the scope of the *JRA* is extended to all decisions made in the exercise of public power, should that grant replace or be in addition to the existing grant of power and others suggested in the above discussion?

- (b) Should the general grant of jurisdiction over all exercises of public power include but not be limited to jurisdiction with respect to the other more specific grants of jurisdiction which currently exist and which are proposed in this Issues Paper?

## Part 1

# Introduction

### 1.1 The aim of the *Judicial Review Act 2000* (Tas) and the extent to which it has achieved that aim

1.1.1 This Issues Paper is concerned with a number of issues related to the *Judicial Review Act 2000* (Tas) (*JRA*). The *JRA* was passed in 2000 with the aim of simplifying the law with respect to judicial review of government action. The legal position of government is different from that of individuals. Individuals are entitled to do anything which is not legally prohibited. Hence as long as their actions are not prohibited, they do not need to identify a law which authorises or permits their actions. Government actions, on the other hand, are legal only if the government is able to point to a law which authorises the actions in question. If there is no law which authorises the government action, the action is illegal.

1.1.2 The Supreme Court has always had the power to review government action in order to determine whether the government has acted legally or not. The law in this area is complex because the legal standards with which government must comply are complicated and not easy to apply. Although it lists these standards, a useful reform in itself, the *JRA* does not attempt to simplify them or to reduce their number.

1.1.3 Instead, the *JRA* seeks to simplify the rules which determine when an individual who is affected by government action can ask the Court to determine whether that action was authorised by law. Before the *JRA* was enacted, an individual who wanted to challenge the legality of government action had to show that his or her case fell within the scope of one of the old common law remedies, such as mandamus, prohibition and certiorari. Each of these remedies only applied in certain specific situations. A litigant who could not bring his or her case within one of the remedies could not sue, even if he or she could show that the government's action was illegal.

1.1.4 The *JRA* aimed to make it easier for litigants to sue the government by replacing all the old remedies with one simple statutory remedy. This was designed to ensure that old technical limitations on the right to sue did not stop the individual from having the Court determine whether the government action which affected him or her was legal.

1.1.5 However, decisions with respect to the *JRA* and to matching provisions in similar legislation in the Commonwealth (*Administrative Decisions (Judicial Review) Act 1977* ('*ADJR Act*')) and in Queensland (*Judicial Review Act 1991* (Qld)) have imposed a raft of technical limitations on the right to sue under the *JRA*. As a result, it is now not easier to ask the Court to consider the lawfulness of government action under the *JRA* than it is under the old remedies. Both avenues to judicial review are littered with traps for the unwary litigant and with technical limitations which may prevent the Court from determining whether the government has acted unlawfully or not.

1.1.6 The aim of the Issues Paper is to suggest reforms to the *JRA* which restore the original aim of providing a simple way in which an affected individual may challenge the lawfulness of government

action. To do this, the Paper identifies the limitations which the courts have placed on the scope of judicial review, considers whether those limitations are justified and suggests ways in which those which are not justified may be removed. Because the limitations are complex and technical, the discussion of them and of the ways in which they might be removed is complex and technical. This puts the lay person at a disadvantage but cannot be helped.

*1.1.7* The most important way in which the *JRA* aimed to simplify judicial review of administrative decision-making was by replacing a number of complicated old common law remedies, mandamus, prohibition, certiorari, quo warranto and scire facias, with a simplified statutory procedure for an order of review.<sup>15</sup>

*1.1.8* The attempt failed in part because the Act, if interpreted consistently with that aim, ruled out any possibility of challenging the legality of government action in too many cases. The Supreme Court was not prepared to accept that outcome. It interpreted the *JRA* not as replacing the old remedies with a simplified procedure but as supplementing them with that procedure.

*1.1.9* The second reason why the attempt failed is that the constitutional landscape within which the *JRA* operates has changed radically. Before 2010, it was assumed that a State government could limit the scope of a State Supreme Court's power to determine the legality of government action. However, in that year the High Court held that the jurisdiction of a State Supreme Court in this area, as defined by the old common law remedies, was constitutionally protected. Hence, a State parliament had limited power to reduce its scope.

*1.1.10* It is clear that the *JRA* does not replicate the jurisdiction which the old remedies granted the Court. Instead, it is narrower in some crucial respects. Hence the Supreme Court was faced with the option of holding the attempt to abolish the old remedies with a statutory procedure unconstitutional and invalid or to interpret the *JRA* as supplementing the old remedies rather than replacing them. It chose the latter option.

*1.1.11* The failure of the *JRA* to abolish the old remedies raises the issue of whether that goal is achievable and desirable. The Issues Paper concludes that it is not feasible, because the scope of review under those remedies is not well defined and is continuing to expand, making it very difficult to replicate in a statute. This makes it difficult to abolish the remedies without breaching the Constitution.

*1.1.12* However, the fact that it may not be possible to replace the old remedies completely does not entail that the passage of the *JRA* was an exercise in futility. It is worthwhile to expand the scope of the *JRA* to provide a simplified alternative to the old remedies because their complex nature adds to the time and expense of litigation. The Issues Paper considers the relationship between the *JRA* and the old remedies, discussing two options. Firstly, it may be possible to incorporate the old remedies into the *JRA*. This is the option the Paper prefers because it simplifies the law to the greatest extent possible. Secondly, the old remedies may be retained in addition to the *JRA*. This may be the preferred option because it is the one which has been adopted in other jurisdictions.

*1.1.13* The Issues Paper argues that if the old remedies are retained in addition to the *JRA*, they need to be embodied in new legislation. The arguments the Supreme Court relied on to save them after the

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<sup>15</sup> *JRA* s 43.

*JRA*'s attempt to abolish them are weak. They do not provide the remedies with the secure foundation which they need given their constitutional importance.

1.1.14 After considering the relationship between the *JRA* and the old remedies, the Issues Paper considers problems which have arisen in the interpretation of the *JRA* and the legislation on which it is modelled, the *ADJR Act* and the Queensland *Judicial Review 1991*. They have been interpreted in ways which greatly reduce their scope and usefulness. As these interpretations have been followed in Tasmania, they have reduced the scope of the *JRA* and made it more complex than it ought to be.

1.1.15 Parts 4 and 5 consider some of these technical interpretations and the problems to which they give rise. They also suggest solutions. Part 4 examines some problems which have arisen in the interpretation of the term 'decision'. This is a key term in the *JRA* and in the *ADJR Act* and in the Queensland *Judicial Review Act* because those Acts limit review to decisions, conduct in the making of decisions and failure to make decisions.

1.1.16 Part 5 focuses on the requirement that to be reviewable, decisions must be made under an enactment, and considers the technicalities which have encrusted that requirement. Those technicalities have been based on the idea that a decision is only made under an enactment if the enactment is the source of the legal power to make the decision. That idea has led to a number of complex and technical restrictions on the scope of review. The part analyses these restrictions and suggests amendments to deal with them. In doing so, it examines the extent to which *JRA* review should be available to challenge government decisions with respect to the making and implementation of contracts.

1.1.17 The Issues Paper argues that there should be different approaches to different classes of government contract. It firstly considers tenders and procurement contracts, contracts of employment, and contracts and other arrangements for the delivery of government benefits and services.

1.1.18 After considering review of government contracts, the Issues Paper considers whether review should be extended to cases in which the decision does not affect anyone's rights and duties but does affect the complainant's interests. In *Griffith University v Tang*<sup>16</sup> ('*Tang*') the High Court held that decisions which affected interests but did not affect rights and duties were not made under an enactment and hence were not reviewable. The Issues Paper concludes that there is no justification for that limitation on the scope of the *JRA* and that the decision in *Tang* should be reversed.

1.1.19 The idea that a decision is only made under an enactment if the enactment is the source of the power to make the decision has been used to exclude review where general law rather than an enactment is the source of the power to make a decision, although the enactment attaches legal consequences to the decision which it otherwise would not have.

1.1.20 The Issues Paper argues that this approach is difficult to justify because if an enactment had not attached extra legal consequences to the decision, there would have been no point in making it. Hence the *JRA* should be amended to ensure that such decisions are treated as ones made under an enactment.

1.1.21 The wording of the *JRA* suggests that administrative decisions which meet requirements such as those laid down in the *Australian Broadcasting Tribunal v Bond* ('*Bond*')<sup>17</sup> and *Tang* tests are reviewable

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<sup>16</sup> (2005) 221 CLR 99.

<sup>17</sup> (1990) 170 CLR 321.

regardless of the type of enactment under which they are made. However, that may not be the case. It is not clear that decisions made by government administrators under private law statutes such as the *Sale of Goods Act 1896* (Tas) and other consumer protection laws or the *Residential Tenancy Act 1997* (Tas) ought to be reviewable.

1.1.22 The Issues Paper considers the arguments for and against review and concludes that review under the *JRA* should be available in these cases where the decision was administrative and made in the implementation of a government programme. If they are not reviewable, it may be very difficult to compel the government to administer such programmes according to law.

1.1.23 The issues discussed above may be seen as aspects of the one bigger issue — should the scope of the *JRA* be extended to all administrative or governmental decisions, whether made under an enactment or not?

1.1.24 Governments have become increasingly reliant on sources of power other than legislation, such as prerogative powers and powers conferred by contracts and other agreements, to implement programmes and to control the delivery of services. Governments also have tended to outsource service delivery to a greater extent than they did in the past.

1.1.25 It is arguable that the rule of law requires that decisions made under prerogative powers and under contract plus decisions of service providers acting on behalf of government should be subject to judicial review. If they are not so subject, there is no way of ensuring that the government and its servants and agents are not exceeding their legal powers. Besides, individuals who are adversely affected by these decisions should have some recourse to an independent procedure for resolving their complaints.

1.1.26 The need to provide a remedy in these cases suggests that the scope of the *JRA* should be extended to cover decisions made in the exercise of non-statutory governmental powers. If the *JRA* were extended to cover the five types of case dealt with above, it would extend judicial review to many situations in which the power on which the government was relying was not a statutory power.

1.1.27 The Issues Paper considers various reform proposals before concluding that the best option for extending the *JRA* beyond the situations outlined above is by extending judicial review to decisions and conduct made in the exercise of public power, regardless of its source.

1.1.28 If the scope of the *JRA* is extended to all decisions made in the exercise of public power, it will be necessary to decide whether to add the additional grant of jurisdiction to that already in the Act and to others proposed in the Issues Paper or to replace the existing and proposed grants of jurisdiction with one broad grant designed to cover all cases. The Issues Paper adopts the first option because there is much to be gained from keeping the existing jurisdictional formula which is well understood and gives rise to no problems in the majority of cases. It may also be worthwhile to extend that jurisdiction in ways which are designed to overcome specific problems before adding a final general grant.

1.1.29 There are other issues arising under the *JRA* which have not been dealt with in this Issues Paper. In particular, it does not deal with the issue of standing under the *JRA*. It was decided not to cover standing because standing under the *JRA* is an aspect of a much bigger subject, standing in public law in general. Standing in public law needs to be looked at as a whole because each public law remedy has tended to develop its own rules of standing. Those rules vary from the very broad approach

taken in prohibition, in which any person has standing regardless of whether they have an interest in the issue or not, to the narrower interest tests used for mandamus and injunction. A sensible law of standing should adopt a more coherent approach based on when standing is justified rather than on the way each remedy has developed over time. Standing under the *JRA* needs to be fitted into that coherent overall approach. Hence, rather than dealing with standing in this reference, it would be better for the TLRI to be given a separate reference with respect to standing more generally.

*1.1.30* Similarly, the Issues Paper does not consider whether the *JRA* should be extended to judicial as well as administrative decisions. The old remedies of certiorari, mandamus and prohibition empowered the Supreme Court to review the decisions of lower courts. It may seem that the *JRA* should give the court that power as well. However, the Supreme Court's review powers under the old remedies were largely limited to jurisdictional error, that is to ensuring that lower courts acted within their jurisdiction. Although the scope of jurisdictional error is expanding, the role of the Supreme Court in preventing a lower court from exceeding its jurisdiction is different in theory from its role on appeal. In the former case, it is preventing the lower court from exercising powers it does not have, while in the latter case it is simply correcting mistakes.

*1.1.31* The *JRA* allows review for errors of law as well as jurisdictional error. If its scope were extended to cover judicial as well as administrative decisions, it would in effect give the Supreme Court a new and general power to hear appeals from the decisions of lower courts with respect to any error of law. It is not clear how that grant of a general right of appeal would relate to existing appeal rights. As it would extend to errors of law, there is no difference in theory between it and many existing appeal rights. In many cases it would simply duplicate them. Therefore, any proposal to extend review under the *JRA* to judicial decisions needs to be examined as part of a more general consideration of appeals from lower courts.

*1.1.32* One way to simplify the operation of the law with respect to the review of government decisions would be to extend the scope of merits review under the *Magistrates Court (Administrative Appeals Division) Act (2001)* (Tas). That Act, in s 26, permits the Magistrates Court, when determining an administrative appeal, to exercise all of the functions that are conferred or imposed by any relevant enactment on the decision-maker who made the decision. In other words, the Court is empowered to stand in the shoes of the decision-maker and to make what it considers to be the correct decision all things considered. It is able to consider not only whether the decision appealed against is lawful, but also whether, all things considered, it is the best decision.

*1.1.33* Review which considers not only whether a decision is lawful but also whether it is the best decision is often called merits review. Usually, individuals who challenge government decisions prefer merits review to review which is limited to determining whether the decision was lawful. They want the decision remade in their favour, something which a merits review tribunal has the power to do. A court whose role is to determine whether a decision is lawful does not have the power to remake the decision, even if it decides that the decision was not lawful. In that situation, the court's power is limited to setting the decision aside and ordering the official who made it to remake it according to law. There is no guarantee that this will result in a decision in the individual's favour.

*1.1.34* Merits review tends to be simpler, quicker and less expensive than judicial review because it focuses on whether the decision being reviewed was the right one rather than whether it was lawful. Hence it tends to avoid the complex legal issues which arise in judicial review.

1.1.35 Although it has many advantages over review under the *JRA*, merits review under the *Magistrates Court (Administrative Appeals Division) Act* is limited in scope. Section 10 of the *Magistrates Court (Administrative Appeals Division) Act* limits review to decisions which are made under Acts which specifically authorise review. Many Acts do not authorise review. As a result, review under the *Magistrates Court (Administrative Appeals Division) Act* is much narrower in scope than review under the *JRA* which extends to all administrative decisions except those which are specifically exempted from review.

1.1.36 The limited scope of merits review under the *Magistrates Court (Administrative Appeals Division) Act* has created a situation in which review of the legality of a government decision under the *JRA* is often the only remedy available to individuals whom the decision adversely affects. It would simplify review of government decisions if the scope of merits review under the *Magistrates Court (Administrative Appeals Division) Act* were extended so that review under the *JRA* was limited to cases in which the major issue was the legality rather than the merits of the administrative decision.

1.1.37 However, whether the scope of merits review should be extended raises many questions including complex ones about the impact of merits review on the efficiency of government administration. These questions merit a separate paper and hence are not considered in this Issues Paper.

## Part 2

# Purposes of the *Judicial Review Act*

## 2.1 Introduction

2.1.1 This Part of the Issues Paper considers the stated purposes of the *JRA* and the extent to which it has achieved those purposes. It concludes that those purposes were basically procedural and that it was assumed to have little or no impact on the substantive law of judicial review. To that extent, its aims were perceived to be different from the Commonwealth *ADJR Act*, on which it was based.

2.1.2 The Commonwealth Act was intended to make substantive as well as procedural changes to the law of judicial review. It introduced two major changes, abandoning the distinction between jurisdictional errors and other errors of law, allowing review for both, and repealing most privative clauses in Commonwealth legislation.

2.1.3 The State Act also abandoned the distinction between jurisdictional error and other errors of law. As will be shown below, neither the Minister responsible for the Act nor the parliament were aware of the significance of this change. Unlike the Commonwealth Act, it did not repeal most privative clauses but retained them, showing that it was not intended to expand the scope of judicial review to any great extent. In fact, by attempting to repeal the prerogative writs without removing some of the major limitations on judicial review which it copied from the Commonwealth Act, including the limiting of review to review of decisions under an enactment and the requirement that reviewable decisions be of an administrative character, it had the unintended consequence of narrowing the scope of review.

2.1.4 It is not surprising that the Supreme Court found a way to revive the prerogative remedies to permit review in cases where the remedies have traditionally allowed it but the Act denies it, especially in cases where the decision being reviewed is judicial rather than administrative in character. More controversially, the Court has used the prerogative remedies to allow review in cases where review is expressly excluded under the Act. The result is that although the Act clearly intended to abolish them, the prerogative remedies are now used both as an alternative to the Act and as a way of extending review to cases in which it is not available under the Act.

## 2.2 The purposes of the *Judicial Review Act* as indicated in the second reading speech and subsequent parliamentary consideration, especially in committee

2.2.1 The Second Reading Speech of the *JRA* set out its purposes clearly and succinctly. Firstly, it set out the assumptions on which the common law of judicial review was based, the assumption that the courts are to ensure that administrative decisions comply with the law, but not to reconsider the merits of those decisions:

The role of the court is to ensure that decisions comply with the law, so that the rights and interests of individuals are not subjected to unauthorised interference. This role may be distinguished from that of merits review, in that the court is limited to ascertaining whether the decision made was within the range of possible decisions allowed by the law, rather than seeking to reach the correct or preferable decision. In the event that a decision is found to be outside the range acceptable by law, the court can nullify the decision and order that it be remade according to law. Examples of decisions that involve errors of law include decisions made for an improper purpose, decisions made following the denial of procedural fairness, and decisions that are based upon a misinterpretation of legislation.<sup>18</sup>

2.2.2 Secondly, the speech summarised the perceived defects in the common law remedies, each of which was commenced by a separate writ and had its own limits and procedural rules. As a result, the focus of the cases tended to be on the procedural rules and limits rather than on the substantive law:

The grounds on which the Supreme Court can review administrative decisions and the procedures which must be followed are complex and often confusing to lawyers as well as non-lawyers. The reasons for this complexity and confusion lie in the way in which the common law powers of judicial review have developed historically. The procedures and remedies have been developed by the common law on a case-by-case basis over centuries. In the process they have become encrusted with technicalities and fine distinctions which have been dictated more by the course of their historical development than by logic.

Much of the problem with judicial review arises because the common law powers of review have developed around particular procedures, and the remedies which result from those procedures rather than substantive grounds of deficiency in the administrative decisions sought to be reviewed. There are technical rules of law which are associated with the procedures by which the common law remedies must be sought, so that too often the difficulty which a person seeking review and his or her legal advisers face is not whether there is a substantial defect in the decision concerned which would justify review by the courts, but whether the situation can be brought within the scope of an existing procedure, and the remedy available as a result of that procedure.

With the emphasis on procedures and remedies, the substantive law has largely developed as an adjunct to the forms of relief. Another unfortunate consequence of this remedy-oriented approach, is that the merits of the case are sometimes overshadowed by issues of procedure. The technicalities and fine distinctions which relate to the grant of prerogative writs tend to put the focus of judicial review proceedings on the character of the remedy being sought, instead of on the substance of the grievance.<sup>19</sup>

2.2.3 To rid the law of its undue emphasis on procedures and remedies, the Act abolished the common law writs. As it was later argued that the Act did not intend to abolish the common law remedies completely, it is fair to point out that the Second Reading Speech makes it plain that this was the Act's intention: 'The bill overcomes these problems by abolishing the use of certain prerogative writs and providing for an order of review by the Supreme Court.'<sup>20</sup>

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<sup>18</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 20 April 2000, Part 2, 40–108.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

2.2.4 The speech outlined the remedies which the Act adopted to cure the weaknesses in the common law, which were to adopt a new simplified procedure covering the whole of judicial review, including decisions which have been made, decisions in the process of being made and failure to make a decision, to abolish the old common law remedies and to set out the substantive grounds of review. The aim was to simplify administrative law and to make it more accessible, moving the focus from the procedural law surrounding the old writs to the substantive law. To demonstrate that the focus was now on the substantive law and to educate the public and the profession, the Act listed the grounds of review:

The bill covers decisions which have been made, decisions in the process of being made, and where a person has a duty to make a decision but has failed to do so. Other administrative acts which can be challenged include the making of reports and recommendations required by legislation and conduct engaged in for the purposes of making a decision. The bill covers a wide range of administrative decisions. The equivalent provisions in the Commonwealth act have been interpreted widely and the legislative phrases describing the range of reviewable decisions lend themselves to a flexible interpretation. The advantages of this simplified procedure are as follows:

- (a) it will allow the court in judicial review proceedings to focus on the substance of an applicant's grievance free of technical issues as to the availability of common law remedies;
- (b) it will provide for an array of flexible, remedial powers; and
- (c) by describing the most important grounds of review in summary form and reasonably comprehensive language, it will have an educational and presentational advantage for administrators and citizens as to the matters that would render an administrative decision contrary to law.<sup>21</sup>

2.2.5 The Minister responsible for the Bill, the Hon Peter Patmore, the Minister for Justice, saw the major benefits of the Bill as procedural; the Second Reading Speech made no mention of the major substantive reforms which the Bill made to the substantive law of judicial review, especially the extension of review to all errors of law. With one exception, the old writs had limited judicial review to jurisdictional errors, that is errors which were so serious that they fell outside the powers or the jurisdiction of the administrator. Errors which fell within the jurisdiction of the administrator could not be challenged unless they were apparent on the face of the record of the decision. The new Act extended review to all errors of law, whether or not they were jurisdictional and whether or not they were apparent on the face of the record. This reform expanded the scope of judicial review considerably and removed many technical limitations. It is surprising that the Minister made no mention of this reform. He did not mention the many fine distinctions and complexities surrounding the notion of jurisdictional error and error of law on the face of the record as defects in the old remedies or mention their removal from the new Act.<sup>22</sup> In fact, he did not seem to be aware of the change, stating in committee that there was nothing new in the Act and that all it did was to simplify

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<sup>21</sup> Ibid.

<sup>22</sup> The *JRA* ss 17 and 18(2)(a)–(e) list various forms of jurisdictional error, but (f) and (i) extend review to other errors of law whether or not they are jurisdictional and whether or not they appear on the face of the record.

what was already there.<sup>23</sup> He added that the best way to describe the Act was that cl 18 of the Bill (s 17 of the Act) is certiorari, cl 19 (s 18 of the Act) is prohibition and cl 20 (s 19 of the Act) is mandamus.<sup>24</sup>

2.2.6 The Minister did not see the Act as in any way guaranteeing judicial review. Although it extended judicial review to decisions which were not previously reviewable, such as decisions of the Governor in Council,<sup>25</sup> unlike the Commonwealth Act,<sup>26</sup> it did not repeal privative clauses in other legislation. Instead, Schedule 2 listed Acts containing privative clauses and s 15(2) of the Act stated that the Act did not affect their operation, thus retaining the limits they imposed on judicial review.<sup>27</sup> Retaining the privative clauses was consistent with the view that the Act's effects were procedural and that it made no changes to the substantive law of judicial review. To this extent, the Act and the reforms it was intended to implement were narrower than those of the Commonwealth *ADJR Act* which had and was intended to have substantive and procedural effects.

2.2.7 Although the *JRA* was not intended to have the impact on the substantive law which the *ADJR Act* had, it was intended to have a greater impact on procedural law than did the Commonwealth Act. The Commonwealth Act did not attempt to repeal the prerogative remedies, probably because two of them, mandamus and prohibition, are entrenched in the Constitution, s 75(v).<sup>28</sup> Instead, it was hoped that they would become obsolete as litigants came to rely on the simpler and more comprehensive remedies which the Act provided. However, that proved not to be the case and the Commonwealth Parliament added s 39B to the *Judiciary Act 1903*, giving the Federal Court power to review the actions and decisions of Commonwealth officers by means of prohibition, mandamus and injunction.<sup>29</sup>

2.2.8 The debates tend to show that the Act, especially the attempt to abolish the prerogative remedies, was ill-conceived. No one, apart from Don Wing MLC, seemed to have had any understanding of the implications of their abolition. Nor was there any appreciation of the problems to which the interpretation of key terms such as 'decision',<sup>30</sup> 'administrative character'<sup>31</sup> and 'under an

<sup>23</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 20 April 2000, Part 2, 40–108.

<sup>24</sup> *Ibid* Part 2, 38–114.

<sup>25</sup> *JRA* ss 9, 41.

<sup>26</sup> The *ADJR Act* s 4 stated that the Act applied notwithstanding anything in any other legislation, effectively repealing existing privative clauses.

<sup>27</sup> See Tasmania, *Parliamentary Debates*, House of Assembly, 20 April 2000, Part 2, 46–114 for the Minister's explanation of these provisions.

<sup>28</sup> The *ADJR Act* contains no equivalent of s 43 of the Tasmanian Act, abolishing the prerogative remedies. In that context, s 10, which states that the rights the Act gives are in addition to, not in derogation from any other rights to review which the person may have, preserve the common law remedies alongside those in the Act. The Federal Court, which possesses no common law jurisdiction but only such jurisdiction as statute confers on it, has been given jurisdiction with respect to mandamus and prohibition: *Judiciary Act 1903* (Cth) s 39B(1).

<sup>29</sup> Review under s 39B has grown to such an extent compared with review under the *ADJR Act* that some members of the Federal Court have questioned the continued value of the *ADJR Act*. See, eg, Justice Alan Robertson, 'The Administrative Law Jurisdiction of the Federal Court – Is the AD(JR) Act Still Important?' (2003) 24 *Australian Bar Review* 89.

<sup>30</sup> In *Bond* (1990) 170 CLR 321, the High Court decided that only 'final and operative' decisions were reviewable. Until that decision, the Federal Court had interpreted the term more broadly; *Lamb v Moss* (1983) 49 ALR 533. The implications of *Bond* are considered in detail in Parts 4 and 5.

<sup>31</sup> 'Administrative' powers and decisions are to be distinguished from those which are legislative and judicial.

enactment<sup>32</sup> had given rise, let alone any consideration of changes made to similar Acts in other jurisdictions to deal with the problems.

## 2.3 The intended scope of the Act

2.3.1 Section 43 of the *JRA* abolished many of the prerogative writs in Tasmania. That section reads: ‘The prerogative writs of mandamus, prohibition, certiorari, quo warranto and scire facias are no longer to be issued by the Court.’

2.3.2 The Act, in s 48 and Schedule 4 also repealed Part 7 of the *Supreme Court Civil Procedure Act 1932*, which regulated the Supreme Court’s power with respect to these remedies. These provisions were designed to abolish the prerogative remedies so that the only remedies available for challenging the lawfulness of government actions would be orders under the *JRA* itself.

2.3.3 It is worth noting, given the constitutional importance of habeas corpus in enabling a person to challenge the legality of an arrest or taking into custody, that s 43 does not purport to abolish it.<sup>33</sup> If it had done so, it probably would be invalid to that extent. In *Kirk v Industrial Relations Commission of New South Wales* (*Kirk*), the High Court held that it was beyond the constitutional competence of a State parliament to abolish habeas corpus because it is a constitutionally protected defining characteristic of State Supreme Courts.<sup>34</sup>

2.3.4 Section 43 is in almost identical terms to s 41(1) of the Queensland *Judicial Review Act 1991*.<sup>35</sup> However, the effect of the two provisions differs. The Queensland provision is limited to procedure and does not abolish the remedies, only the writs as a means of obtaining the remedies. Section 41(2) makes that clear by substituting orders in the nature of mandamus, prohibition and certiorari for the writs. The Tasmanian Act contains no equivalent provision providing an alternative procedure for obtaining the prerogative remedies. Instead, its repeal of Part VII of the *Supreme Court Civil Procedure Act* which, as noted above, regulated the Supreme Court’s power with respect to the remedies, demonstrates an intention to abolish the remedies rather than to regulate the procedure for obtaining them.

2.3.5 Schedules 1 and 2 of the *JRA* limit the court’s power to review under the Act. Schedule 1 lists classes of decision, including decisions with respect to the investigation and prosecution of offences, tax assessments, and some decisions made under a range of Acts including the *Integrity Commission Act 2009* (Tas), the *Coroners Act 1995* (Tas) and the *Industrial Relations Act 1984* (Tas). Section 4(2) of the *JRA* excludes these decisions from the definition of decisions to which the Act applies, excluding them from review under the Act. As Don Wing MLC pointed out in the Legislative Council debate on the Bill, these exclusions coupled with the repeal of the prerogative remedies made it impossible for a

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<sup>32</sup> Problems had arisen in determining whether a decision was made ‘under an enactment’ especially in cases where there was an alternative source of the legal power to make the decision, such as a contract. However, it did not become clear just how problematic the requirement that the decision be ‘under an enactment’ was until *Tang* (2005) 221 CLR 99, some five years after the *JRA* was passed.

<sup>33</sup> Section 43 does not extend to habeas corpus and the Act did not change any provisions in the *Supreme Court Civil Procedure Act 1932* referring to habeas corpus, such as ss 9 and 12.

<sup>34</sup> (2010) 239 CLR 531, 581 [98].

<sup>35</sup> Section 41 is narrower in scope, only abolishing the writs of mandamus, prohibition and certiorari.

taxpayer to challenge the legal validity of a tax assessment in court.<sup>36</sup> The same held true for the other excluded decisions. In response, the Deputy Leader for the Government, Doug Parkinson, MLC, made it clear that it was the government's intention to rule out legal challenges in these cases.<sup>37</sup>

2.3.6 A Schedule similar to Schedule 1 was added to the Commonwealth Act in 1980.<sup>38</sup> Both list classes of decisions to which the Act does not apply. However, the Commonwealth Schedule differs in effect from Schedule 1 of the Tasmanian Act. The Commonwealth Act does not purport to abolish the prerogative remedies, something the Commonwealth has no constitutional power to do. Hence, including a class of decisions in the Schedule only excludes review under the Act, not review under the prerogative remedies. However, because the Tasmanian Act was intended to abolish the remedies, inclusion of a class of decisions in Schedule 1 was designed to make those decisions unreviewable, as Doug Parkinson MLC's comments make clear.

2.3.7 Schedule 2 of the *JRA* lists Acts which provide for no review or limited review of decisions, including the *Anti-Discrimination Act 1998* (Tas), the *Associations Incorporation Act 1964* (Tas), the *Electoral Act 2004* (Tas), the *Magistrates Court (Civil Division) Act 1992* (Tas), the *Magistrates Court (Small Claims Division) Act 1989* (Tas) and the *State Policies and Projects Act 1993* (Tas). Section 15(2) of the Act provides that the Act has no effect on the operation of these laws, thus retaining any limits on the jurisdiction of the Supreme Court which those Acts contained. Although Schedule 2 was not discussed in the parliamentary debates on the Bill, no doubt the government intended that it, like Schedule 1, would exclude or limit the review powers of the Supreme Court under the Act.

## 2.4 Why the Act failed in its attempt to abolish the prerogative remedies

2.4.1 Soon after the adoption of the Act, it was discovered that it had the unintended consequence of leaving persons who wanted to challenge a government decision made before the Act was passed, but who had not commenced litigation when the Act came into effect, without any remedy.<sup>39</sup> The Act stated in s 17(3) that it did not apply to any decisions made before it came into effect, but s 43 abolished the prerogative writs from the date it commenced. Hence, it was not possible to challenge a decision made before the Act commenced unless the challenge was initiated before the Act came into effect.<sup>40</sup>

2.4.2 In *Tasman Quest v Evans* ('*Tasman Quest*'),<sup>41</sup> the Full Court of the Supreme Court concluded that parliament had not intended to make decisions made before the Act came into effect unreviewable once the Act commenced but had simply failed to consider the issue.<sup>42</sup> The Court ensured that these decisions were reviewable by adopting a narrow, literal reading of s 43 of the Act. It held that as s 43 only referred to the prerogative writs, it did not abolish the power to quash a decision under s 627(2)(a)

<sup>36</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 4 July 2000, Part 1, 1–36.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Administrative Decisions (Judicial Review) Amendment Act 1980* (Cth), s 10 and Sch 1.

<sup>39</sup> *Tasman Quest v Evans* [2003] TASSC 110.

<sup>40</sup> *Ibid* [8]. The equitable remedies of injunction and declaration remained available. Whether they provided a solution to the dilemma the court faced is considered below.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* [8].

of the *Supreme Court Rules 2000* (Tas) where a complainant had sought relief similar to certiorari, mandamus or prohibition under Rule 623.

2.4.3 Although there are doubts as to the correctness of this decision,<sup>43</sup> the result is consistent with the High Court's approach to interpreting attempts to deprive State Supreme Courts of their supervisory jurisdiction in *Darling Casino v NSW Casino Control Authority*.<sup>44</sup> In that case, the High Court held that 'privative clauses, whether in State or Commonwealth legislation, are construed "by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied"'.<sup>45</sup>

2.4.4 The Court has followed *Tasman Quest* in later cases to allow prerogative remedies in situations in which it has limited or no jurisdiction under the *JRA*. As Estcourt J pointed out in *R v Tasmanian Industrial Commission ex parte the Minister Administering the State Service Act 2000* ('*Tasmanian Industrial Commission Case*'),<sup>46</sup> since the decision in *Kirk*<sup>47</sup> the Court has had little option but to find a way of enabling itself to exercise review for jurisdictional error because that case decided that:

Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.<sup>48</sup>

2.4.5 The way which he chose was to follow the decision in *Tasman Quest* that prerogative orders remained available under Part 26 of the *Supreme Court Rules* in those cases which were exempt from review under the *JRA*.<sup>49</sup>

2.4.6 The Supreme Court has relied on the decision in *Tasman Quest* that the Act did not completely abolish the prerogative remedies both to allow the prerogative remedies as an alternative to review under the Act and to justify review where it is not available under the Act. In some of the cases, such as *R v Resource Management and Planning Appeal Tribunal; ex parte North West Rendering*,<sup>50</sup> and *Branch-Allen v Easther*,<sup>51</sup> review may have been available under the Act, but the Court simply followed *Tasman Quest* in allowing the prerogative remedies as an alternative. In others, such as *Abblitt v The Anti-Discrimination Commissioner*,<sup>52</sup> *Stannix v Police Review Board*,<sup>53</sup> and *Oates v Parole Board*,<sup>54</sup> the Act and the prerogative remedies were both pleaded. In *Swanton v Resource Management and Planning Appeal Tribunal*,<sup>55</sup> Pearce J

<sup>43</sup> The doubts are discussed at Issue 2, *if we decide to retain the prerogative remedies, is legislation needed to put them on a firm legal footing?*

<sup>44</sup> (1997) 19 CLR 602.

<sup>45</sup> *Ibid.*

<sup>46</sup> [2015] TASSC 54.

<sup>47</sup> [2010] HCA 1; (2010) 239 CLR 531.

<sup>48</sup> *Ibid* [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) quoted in *R v Tasmanian Industrial Commission* [2015] TASSC 54, [7].

<sup>49</sup> [2015] TASSC 54, [6].

<sup>50</sup> [2005] TASSC 8, [25]. The legislation under which the Tribunal operates and the decisions of the Tribunal are not exempt from review under Schedules 1 and 2 of the Act.

<sup>51</sup> [2016] TASSC 29, 124. The case concerned proceedings before a Board of Enquiry set up under the *Local Government Act 1993* (Tas) which is not exempted from review under Schedules 1 and 2 of the Act.

<sup>52</sup> [2016] TASSC 12.

<sup>53</sup> [2016] TASSC 59.

<sup>54</sup> [2013] TASSC 10.

<sup>55</sup> [2015] TASSC 6, [25].

took the view that the prerogative remedies are an alternative to the *JRA* to its logical conclusion, holding that, in that case at least, the fact that the prerogative remedies provided effective relief was a good reason for denying relief under s 12(b) of the Act. That section permits the Court to refuse relief under the Act where ‘adequate provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by the Court or another court or a tribunal, an authority or a person’.

2.4.7 In other cases, the Court has used the prerogative remedies to provide review in situations which fall outside the scope of the Act. The most obvious of these is where the challenge is to a decision of a lower court, which makes decisions of a judicial rather than administrative character. Hence, in *Anthony v Maxam Australia Pty Ltd; R v Registrar of the Magistrates Court of Tasmania at Burnie*,<sup>56</sup> certiorari was used to challenge the decision of a magistrate. In *Von Stalheim v Anti-Discrimination Commissioner & Anor*,<sup>57</sup> the Court suggested the prerogative remedies as the basis for orders which may have fallen outside the scope of the *JRA*. Similarly, in *Swanton v Resource Management and Planning Appeal Tribunal*,<sup>58</sup> the Court held that the prerogative remedies were available in a case in which there were doubts about the application of the Act because the decision may have been of a judicial rather than an administrative character.<sup>59</sup>

2.4.8 In *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd*,<sup>60</sup> and *R v Macdessi; ex parte Walton*,<sup>61</sup> the Court granted certiorari to quash the decision of an adjudicator whose role was to settle disputes as to payment under the *Building and Construction Industry Security of Payment Act 2009* and in *R v Pettersson; ex parte Fenshaw Pty Ltd*<sup>62</sup> the Court accepted that certiorari was available for that purpose. Although the judgments do not discuss the issue, the cases may have been framed under Part 26 of the *Supreme Court Rules* rather than under the Act because of concerns that the decision being reviewed was judicial and hence fell outside the scope of the Act. The fact that decisions settling disputes under the *Building and Construction Industry Security of Payment Act 2009* are ‘adjudications’ is not a bar to certiorari<sup>63</sup> although it almost certainly rules out review under the Act.

2.4.9 Perhaps the most controversial use of the prerogative remedies has been to allow review of decisions which have been expressly excluded from review under the *JRA*. As discussed above, the *JRA* contains two Schedules limiting the Court’s power to review under the Act, Schedules 1 and 2. Schedule 1 lists classes of decision which are excluded from review under the Act. The effect was to make these decisions unreviewable.<sup>64</sup>

2.4.10 Schedule 2, as noted above, lists Acts which provide for no review or limited review of decisions. The Act has no effect on the operation of these laws, thus retaining any limits on the

<sup>56</sup> [2012] TASSC 42.

<sup>57</sup> [2005] TASSC 134, [15]. Evans J made this suggestion although the *Anti-Discrimination Act 1998* is listed in Schedule 2.

<sup>58</sup> [2015] TASSC 6, [24].

<sup>59</sup> Section 4(1) of the *Judicial Review Act* limits review under the Act to decisions of an administrative character.

<sup>60</sup> [2013] TASSC 3.

<sup>61</sup> [2014] TASSC 64.

<sup>62</sup> [2015] TASSC 33.

<sup>63</sup> *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3, [4].

<sup>64</sup> The effect of Schedule 1 is discussed in detail in Part 2.1 above.

jurisdiction of the Supreme Court which those Acts contained. No doubt the government intended that it, like Schedule 1, would exclude or limit the review powers of the Supreme Court.

2.4.11 In the *Tasmanian Industrial Commission Case*,<sup>65</sup> Estcourt J held that certiorari was available to quash a decision of the industrial Commission made under the *Industrial Relations Act 1984* (Tas), although all decisions made under that Act are exempt from *JRA* review by s 4 and Schedule 1 of the latter Act. In doing so, he merely commented that: “The prosecutor has made application to this Court for relief in the nature of certiorari as the *Judicial Review Act 2000* is not engaged in the case of the decision purported to be made by President Abey.”<sup>66</sup>

2.4.12 He did not consider why the Act was not engaged, in particular whether that evinced an intention that decisions made under the *Industrial Relations Act 1984* (Tas) should not be subject to judicial review. However, as pointed out above, he had to find a way for the Court to exercise review for jurisdictional error because it is beyond the powers of a State parliament to legislate to remove that power from the State Supreme Court.

## 2.5 Conclusion

2.5.1 The *JRA* intended to abolish the prerogative remedies and replace them with remedies under the *JRA* Act. However, because that led to a significant and probably unintended reduction in the scope of judicial review, the Supreme Court found that the *JRA* had not abolished the prerogative remedies, only the writs. Cases since 2012 suggest that it may not be constitutionally possible to abolish the prerogative remedies or at least the jurisdiction to determine the legality of government action which they confer on the Supreme Court.

2.5.2 The failure of the attempt to abolish the prerogative remedies in the *JRA* and the basis on which the Supreme Court revived the remedies places the law in Tasmania in an unsatisfactory position, especially given the constitutional significance which the High Court has attached to those remedies. It gives rise to a number of issues relating to the feasibility of abolishing the prerogative remedies and if they are not abolished, how they should relate to the *JRA*. These issues are considered in the next Part.

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<sup>65</sup> [2015] TASSC 54.

<sup>66</sup> *Ibid* [5].

## Part 3

# The *Judicial Review Act* and the Prerogative Remedies

## 3.1 Issue 1

*Is it feasible and desirable to abolish the prerogative remedies completely and to replace them with the one simple procedure for judicial review under the Act?*

3.1.1 Section 43 of the *JRA* attempts to abolish the prerogative writs. For reasons set out in Part 2, that attempt failed, the Supreme Court holding that the effect of the section was procedural, preventing the issue of the writs but not the making of orders of certiorari, mandamus and prohibition under Part 27 of the *Supreme Court Rules 2000*. This part of the Issues Paper considers whether the aim of the Act to abolish the prerogative remedies is feasible and desirable and whether it should be pursued again in any revision of the *JRA*.

3.1.2 The major reason for abolishing the prerogative remedies when the Act was passed in 2000 was to simplify procedures.<sup>67</sup> That remains a desirable goal. In his Second Reading Speech, the Attorney-General made the point that the remedies were arcane and complex, not well understood by lawyers, let alone members of the public.<sup>68</sup> The *Supreme Court Civil Procedure Act 1932* (Tas), Part 7 and the *Supreme Court Rules 2000* Part 26 had removed some of the complexities but some remained.

3.1.3 Even if all the complexities surrounding the writs are removed, it is arguable that while the remedies remain as an alternative to the *JRA*, the law remains more complex than it need be because litigants must choose which remedy to pursue or pursue both. Even if the scope of the *JRA* is expanded so that it covers most cases, there will be cases in which the prerogative remedies remain the better or only alternative. There will also be cases in which it is not clear which remedy is the better, the *JRA* or the prerogative remedies.

3.1.4 However, there are constitutional difficulties which make the goal of simplification by repealing the prerogative remedies difficult to achieve. It may be simpler to expand the scope of the Act to cover most cases but to retain the remedies to ensure constitutional compliance if holes are found in the Act. As the modern history of judicial review in Australia suggests that it is difficult to predict in advance whether holes exist, caution on this issue seems sensible. Alternatively, it may be better to incorporate the remedies in the Act so that it meets all constitutional requirements.

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<sup>67</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 20 April 2000, Part 2, 40–108, *Judicial Review Bill* Second Reading Speech, considered in detail in Part 2, especially [2.2.1]–[2.2.6].

<sup>68</sup> *Ibid.*

## A. The abolition of the prerogative remedies and constitutional protection of the supervisory jurisdiction of State Supreme Courts

3.1.5 The constitutional landscape has changed since the *JRA* was enacted in 2000. At that time, constitutional orthodoxy was that a State parliament had the power to amend or repeal aspects of the jurisdiction of the Supreme Court of the State concerned, including its jurisdiction to review the legality of government action.<sup>69</sup> However, in *Kirk* in 2010, the High Court held that the supervisory jurisdiction of a State Supreme Court to invalidate government decisions and actions and the decisions of lower courts and tribunals for jurisdictional error was a constitutionally protected characteristic of such courts.<sup>70</sup> As a result, the Tasmanian parliament no longer has the power to remove or limit the jurisdiction of the Supreme Court to review government and lower court decisions for jurisdictional error.<sup>71</sup>

3.1.6 The key aspects of *Kirk* are clear, but the detail is not. In essence, *Kirk* prevents the abolition of the jurisdiction of the Supreme Court to invalidate government decisions and actions for jurisdictional error, but does not rule out the abolition of the traditional mechanism for exercising that jurisdiction, the prerogative writs. They may be abolished as long as the Court is given some other mechanism for exercising the jurisdiction, such as orders having the same effect as the writs. In *Kirk*, the plurality of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that:

A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and, as explained further in these reasons, also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.<sup>72</sup>

3.1.7 Despite the reference to prohibition, mandamus and certiorari, the focus of the passage is the power of the Supreme Courts to confine inferior courts and tribunals within the limits of their authority and to correct any jurisdictional errors which those courts and tribunals may make.<sup>73</sup> The passage permits the abolition of the prerogative remedies, as long as the Supreme Court retains the power to grant relief with respect to jurisdictional error ‘in the nature of’ these remedies.<sup>74</sup> Later passages in the judgment similarly emphasise that the Constitution entrenches the supervisory jurisdiction of State Supreme Courts to correct jurisdictional errors as exercised by the grant of prerogative relief or orders in the nature of that relief.<sup>75</sup> In the view of the Tasmania Law Reform Institute, the paragraphs stress that it is the supervisory jurisdiction which is entrenched, rather than the prerogative remedies which simply define the scope of the entrenched jurisdiction. However, the abolition of the prerogative remedies will only be constitutional if the Act confers as wide a jurisdiction over jurisdictional error as that conferred by the prerogative remedies. Because *Kirk* makes it clear that those remedies define the

<sup>69</sup> Before the passage of the *Australia Acts 1986*, the Tasmanian parliament could not alter the scope of the jurisdiction which the *Australian Courts Act 1828* granted to the Tasmanian Supreme Court because that Act was Imperial legislation applying to the State by paramount force under s 2 of the *Colonial Laws Validity Act 1865*. Section 2 of the *Australia Act* removed the remaining limitations on State legislative power and s 3 of the Act repealed the *Colonial Laws Validity Act*, thus leaving the State parliament free to alter or repeal the grant of jurisdiction to the Tasmanian Supreme Court in the *Australian Courts Act 1828*.

<sup>70</sup> *Kirk* (2010) 239 CLR 531.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* [55].

<sup>73</sup> *Ibid* [98]–[99].

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

scope of the constitutionally protected supervisory jurisdiction and because, for reasons set out below, the scope of that jurisdiction is not clear and is unlikely to be clarified in the future, it will be very difficult to define that jurisdiction without reference to those remedies. Hence it may be sensible to retain those remedies in some form or other.

3.1.8 The above quote also makes it clear that *Kirk* gives constitutional status and protection to the concept of jurisdictional error. That is emphasised later in the judgment, where the Court stated:

the 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.<sup>76</sup>

3.1.9 When the *JRA* was adopted, the drafters followed the Commonwealth *ADJR Act* in allowing review for errors of law whether or not they were jurisdictional. Although it does not seem to have been an explicit aim of the drafters of the *JRA* and no mention was made of it in the Second Reading Speech, the *JRA* had the potential to reduce greatly the importance of jurisdictional error in Tasmanian administrative law. That would have been a major improvement, because the indeterminacy of the concept adds to the uncertainty of the law of judicial review. Although the categories of jurisdictional error are expanding, the concept is ill-defined and difficult to apply. As the High Court said in *Kirk*, ‘it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error’.<sup>77</sup>

3.1.10 The scope of jurisdictional error differs depending on whether the decision-maker is an inferior court or a tribunal or some other type of decision-maker.<sup>78</sup> Inferior courts can commit two types of jurisdictional error. Firstly, it is jurisdictional error for an inferior court to claim jurisdiction which it does not possess or to deny jurisdiction which they in fact have. Secondly, it is jurisdictional error if inferior courts exceed the limits to the jurisdiction which they do in fact have or exercise that jurisdiction improperly:

An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.<sup>79</sup>

3.1.11 Tribunals and other decision-makers are in a different position. Unlike courts, as a general rule they do not have any jurisdiction to make errors of law. As a result, most errors of law which they make are jurisdictional errors:

At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the

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<sup>76</sup> Ibid [100].

<sup>77</sup> Ibid [71].

<sup>78</sup> *Craig v SA* (1995) 184 CLR 163, [10].

<sup>79</sup> Ibid [11].

law. ... If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.<sup>80</sup>

3.1.12 At the Commonwealth level, because of the constitutional entrenchment of the separation of powers, and in particular, because only a court constituted in accordance with Chapter 3 of the Constitution may exercise judicial power, tribunals and other executive decision-makers cannot be given the jurisdiction to make final, binding determinations of the law. Hence they cannot be given jurisdiction to make errors of law which bind until set aside, but their errors of law are jurisdictional.

3.1.13 State Constitutions, on the other hand, do not entrench a strict separation of powers. Hence it is not so easy to distinguish between the jurisdiction of courts and tribunals at a State level, because State legislation may authorise a tribunal to authoritatively determine questions of law and hence to make an order or decision otherwise than in accordance with law.<sup>81</sup>

3.1.14 Although the concept of jurisdictional error is ill-defined and *Kirk* deliberately left its precise scope unclear,<sup>82</sup> since *Kirk* it has marked the boundary of State legislative power, the States having the power to prevent review for errors of law but not for jurisdictional error.<sup>83</sup> Whether or not the *JRA* attempts to abolish the prerogative remedies, any attempt to reform the *JRA* must take into account the newly acquired constitutional significance of jurisdictional error.

3.1.15 Assuming that the Constitution permits the abolition of the prerogative remedies, one factor which favours their abolition is that there is substantial overlap between them and the remedies which the *JRA* provides. Prohibition allows the Supreme Court to order an official, tribunal or lower court not to purport to exercise a power or to make a decision which it does not have jurisdiction to make. Mandamus permits the Court to order an official, tribunal or lower court to exercise a power or make a decision which they have a legal duty to exercise or make and certiorari authorises the Court to quash decisions by an official, tribunal or lower court which are tainted by jurisdictional error.

3.1.16 Sections 17, 18 and 19 of the *JRA* give the Supreme Court power to make orders which are similar to those which can be made under the prerogative remedies. In some respects, the Act confers a broader jurisdiction than the old remedies because it confers jurisdiction with respect to errors of law, whether or not they are jurisdictional and whether or not they appear on the face of the record.<sup>84</sup> This is irrelevant to the constitutionality of any attempt to abolish the prerogative remedies.

3.1.17 In other respects, the jurisdiction conferred by the *JRA* is narrower than that conferred by the prerogative remedies. The *JRA* only confers jurisdiction over decisions under an enactment whereas in the United Kingdom certiorari may now be used to review the exercise of prerogative and other

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<sup>80</sup> Ibid [14].

<sup>81</sup> Ibid 179 [58], referred to in *Kirk* (2010) 239 CLR 531, [68].

<sup>82</sup> *Kirk* (2010) 239 CLR 531, [71], [73].

<sup>83</sup> Ibid [100], quoted above at [3.1.8].

<sup>84</sup> *JRA* s 17.

public powers.<sup>85</sup> As Australian courts may well follow the UK on this point, it may be unconstitutional to abolish the prerogative remedies without extending jurisdiction under the Act to decisions other than those made under an enactment, such as decisions made in the exercise of the prerogative.

3.1.18 The Act is also limited in its scope to decisions of an administrative character, whereas the prerogative remedies extend to decisions of inferior courts and of other officials who are acting judicially. Historically, certiorari and prohibition were limited to the control of inferior courts and similar bodies. Although they have now been extended in scope to other tribunals,<sup>86</sup> they play an important role in ensuring that inferior courts do not exceed their jurisdiction. In *Kirk*, the High Court held that the power of State Supreme Courts to enforce the legal limits on the powers of the State executive and State courts other than the Supreme Courts themselves, was a defining characteristic of those courts under the Constitution. Hence, State parliaments have no power to abolish it.<sup>87</sup> Therefore, if the writs are abolished, the Act needs to be amended so that it provides for review of decisions of a judicial as well as of an administrative character. Otherwise, it would result in a breach of the Constitution.

3.1.19 The Act also only applies to decisions, conduct relating to decisions and failure to make decisions. This has raised problems with respect to cases in which no decision is legally required or could be made. Cases of this sort tend to fall into a number of classes, including cases in which the decision-maker wrongly believed that the Act they were implementing required a decision and cases in which statutes are self-executing, in the sense that no decision is required for legal consequences to follow. Situations in which no decision is required or could be made are discussed in detail in Part 4.

3.1.20 The prerogative remedies may be available in some of these cases. For example, in *QGC v Bygrave (No 2)*,<sup>88</sup> Reeves J held that a decision which the Delegate purported to make under the *Native Title Act 1993* (Cth) was not made ‘under an enactment’ for the purposes of s 5 of the *ADJR Act* because that Act did not require or authorise any decision on the issue in question.<sup>89</sup> However, he held that he had jurisdiction under s 39B of the *Judiciary Act (1903)* (Cth) and made orders quashing the decision and ordering the official in question to perform the duties required by the Act.<sup>90</sup> Although he did not name the orders, they are clearly orders of certiorari and mandamus respectively, no doubt issued pursuant to the power which s 23 of the *Federal Court of Australia Act 1976* (Cth) confers on the Federal Court to make such orders as it thinks appropriate.

3.1.21 Extending the scope of the *JRA* to situations where the enactment in question does not require a decision, and to decisions other than those made under an enactment are major changes which have been considered at length in Parts 4 and 5. It is not clear whether adopting these changes will be sufficient to ensure that the Supreme Court retains all of its constitutionally protected supervisory jurisdiction if the writs are abolished. It is difficult to guarantee that will be the case, regardless of the

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<sup>85</sup> *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374; *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] QB 815.

<sup>86</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, It is not clear how far certiorari extends beyond courts or whether all tribunals are subject to it: *Craig v SA* (1995) 184 CLR 163, 174–5.

<sup>87</sup> *Kirk* (2010) 239 CLR 531, [98]–[100].

<sup>88</sup> (2010) 189 FCR 412.

<sup>89</sup> *Ibid* [32]–[33].

<sup>90</sup> *Ibid* [121].

extent to which the scope of the *JRA* is extended because the prerogative remedies are common law remedies which can be adapted to new situations which we may not foresee.

3.1.22 Past experience suggests that it is very difficult to predict jurisdictional changes and that entrenching rigid limits with respect to jurisdiction in an Act such as the *JRA* may lead to the Act's being sidelined or evaded. For example, the Commonwealth *ADJR Act* embodied the then well-settled common law rule that decisions of the Queen's representative, the Governor-General, were not reviewable.<sup>91</sup> A few years later, the High Court reversed the old rule, holding that the decisions of the Queen's representative in a State, the Governor, were reviewable.<sup>92</sup> Because of reluctance to legislate to extend the jurisdiction of the courts, the *ADJR Act* has yet to catch up with the common law on this point. It is one reason for doubts as to the Act's continued relevance.

3.1.23 Besides, the *JRA* and the prerogative remedies which define the scope of the Supreme Court's constitutionally protected supervisory jurisdiction use different criteria for determining when a government action is reviewable. The *JRA* focuses on whether there has been a decision, conduct relating to a decision or failure to make a decision, while the prerogative remedies focus on whether there have been certain types of jurisdictional error, error in refusing to perform a legal duty, error in making a decision or exercising a power, and error in assuming jurisdiction which one does not have. Although there is considerable overlap, there may always be cases where the prerogative remedies are available but the *JRA* fails to provide a remedy.

3.1.24 For these reasons, even if the scope of the *JRA* is extended in the ways outlined, there may always be cases which fall within the Supreme Court's constitutionally protected jurisdiction over jurisdictional error where the *JRA* does not provide a remedy. Because review for jurisdictional error is now constitutionally protected, any proposal to abolish the prerogative remedies may run into constitutional difficulties unless it allows for review in all cases of jurisdictional error.

## **B. Alternatives to abolition of the prerogative remedies**

3.1.25 As noted in the Introduction, the main reason for abolishing the prerogative remedies was to simplify the law. There are two ways in which that may be achieved while avoiding the constitutional difficulties to which abolishing the remedies may give rise. The first is to extend the scope of the *JRA* to cover almost all conceivable cases while leaving the remedies as a safety net to catch any cases which fall outside the scope of the *JRA*. The second is to incorporate the prerogative remedies into the *JRA* itself.

### ***Issue 1(1) – Should the scope of the JRA be extended with the prerogative remedies kept as a safety net?***

3.1.26 Retaining the prerogative remedies as a safety net has the advantage that it is consistent with the administrative law reforms which have been enacted in the rest of the country. Only Tasmania has attempted to abolish the prerogative remedies, and for reasons dealt with in Part 2, that attempt failed. All other jurisdictions which have introduced an Act regulating judicial review have retained the prerogative remedies as an alternative.

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<sup>91</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1)(c).

<sup>92</sup> *FAI v Winneke* (1982) 151 CLR 342.

3.1.27 The Commonwealth, which was the first jurisdiction to reform the law of judicial review, had no alternative because s 75(v) of the Constitution entrenches two of the prerogative remedies, mandamus and prohibition. The Commonwealth Act, the *ADJR Act*, recognises this by stating in s 10 that the rights which the Act confers are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the court, by another court, or by another tribunal, authority or person. The section goes much further than retaining the prerogative remedies in order to avoid constitutional invalidity. It embodies a deliberate decision that the *ADJR Act* remedies were to be in addition to any other remedies available, whether in a court or in some other forum.

3.1.28 Other State and Territory legislation has followed the Commonwealth model in retaining other existing review rights. Both the Queensland and the ACT Acts, which are modelled on the *ADJR Act*, contain a provision similar to s 10 of the *ADJR Act*.<sup>93</sup> Both Acts go further by making it clear that the prerogative and other remedies exist side by side with the Act. Section 10(2) of the Queensland Act states that ‘the existence of a remedy by way of an application for review does not exclude any jurisdiction of the [Supreme] court to grant other relief,’ including prerogative relief, while the ACT Act, s 8(3) makes it clear that other rights to review include the prerogative orders as well as the declaration and injunction.

3.1.29 The Queensland *Judicial Review Act 1991* not only retains the prerogative remedies but reforms them by replacing the writs with ‘prerogative orders’.<sup>94</sup> This is a procedural reform, the effects of which are similar to those of the *Supreme Court Rules 2000* (Tas) Part 26. It allows the Court to provide the most appropriate prerogative remedy, whether that was the remedy sought. It does not amount to incorporation of the prerogative remedies into the Act in the sense discussed below as the remedies must still be separately pleaded.

3.1.30 The Victorian *Administrative Law Act 1978* introduced procedural reforms, providing a simplified form of review in cases involving ‘decisions’ by tribunals but did not purport to abolish or provide an alternative to the prerogative and equitable remedies. It created no new remedies but expressly retained the prerogative and equitable remedies, empowering the Court in cases brought under the Act to grant remedies in the nature of certiorari, mandamus, prohibition, quo warranto, injunction or declaration but not exercise any other jurisdiction or power or grant any other remedy.<sup>95</sup> After the Act was passed it remained possible, and given the narrow scope of the Act, necessary, to bring common law actions for the prerogative remedies. As the *Supreme Court Act 1986* (Vic) simplified the procedure for bringing such actions,<sup>96</sup> replacing the old writs with orders, there is no longer much procedural advantage in relying on the *Administrative Law Act 1978*.

3.1.31 The *JRA* follows the Commonwealth *ADJR Act* to the extent that, in general, the review rights which it confers do not replace but are in addition to other rights to review.<sup>97</sup> However, as noted above, the *JRA* makes an exception of the prerogative writs. Instead of retaining them as an alternative, it

<sup>93</sup> *Judicial Review Act 1991* (Qld) s 10(1); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 8.

<sup>94</sup> *Judicial Review Act 1991* (Qld) Part 5.

<sup>95</sup> *Administrative Law Act 1978* (Vic) s 7.

<sup>96</sup> *Supreme Court Act 1986* (Vic) s 3(6); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 56.01. The apparent decline in the *Administrative Law Act* is explained in Groves, above n 12.

<sup>97</sup> *JRA* s 10.

sought to repeal them.<sup>98</sup> Part 2 above explains why the Supreme Court refused to accept their repeal and how it revived them.

3.1.32 It is arguable that Tasmania should put the prerogative remedies on a firmer legal footing as alternatives to the *JRA* in order to ensure that its approach is consistent with that of the Commonwealth and the other States. If the scope of the *JRA* is widened as suggested above, they could act as a safety net, permitting review in cases which fall outside the scope of the *JRA* but within the constitutionally protected supervisory jurisdiction of the State Supreme Court. It may be necessary to establish that safety net to ensure that legislation with respect to judicial review in Tasmania confers on the Supreme Court all the jurisdiction necessary to ensure that it is able to exercise its constitutionally guaranteed supervisory jurisdiction. Otherwise, we will again risk the Courts' imposing their own solution, as they did in *Tasman Quest*.

3.1.33 There is a risk in retaining the prerogative remedies as a safety net. The risk is that they will become the preferred alternative, so that the *JRA* is rarely used. This has happened at the Commonwealth level, where the alternative jurisdiction based on the prerogative writs conferred by s 39B of the *Judiciary Act* has become as popular if not more popular than the *ADJR Act*.<sup>99</sup>

3.1.34 It is arguable that there are advantages in allowing competition between alternative remedies. Traditionally, the law developed as a result of competition between differing remedies such as trespass and case. In Commonwealth administrative law, it may be that having s 39B of the *Judiciary Act 1903* available as an alternative to the *ADJR Act* has permitted the law of judicial review to continue to evolve and has prevented it from ossifying as it was in the 1970's.

3.1.35 Having alternative remedies available comes at a cost, especially if neither is available in every case. It adds to the complexity and hence to the expense of litigation. That is not in the interests of citizens who wish to challenge government action which affects them or of the public at large, who must ultimately foot the bill where the government or a government agency are involved.

3.1.36 Having alternative remedies requires that the alternatives be separately pleaded. Where it is not clear which is the appropriate remedy, both may need to be pleaded. Usually, if one alternative is not pleaded, it is not available. As a result, there will be the occasional case in which the complainant will fail without the merits of the case being considered because he or she selected the wrong remedy. If changes to the *JRA* are well drafted, such cases may be rare. But if the *JRA* is extended successfully to cover most cases, lawyers will tend to rely on it alone rather than plead the prerogative remedies, making it more likely that the remedies will not be pleaded in cases which fall outside the scope of the *JRA*.

### ***Issue 1(2) – Should the prerogative writs be incorporated into the JRA?***

3.1.37 The second alternative is to incorporate the prerogative remedies into the *JRA* itself. If this can be done, it will ensure that the *JRA* itself confers on the Supreme Court all the supervisory jurisdiction which the Constitution requires the Court to have. As that jurisdiction is conferred by the *JRA* itself, the prerogative remedies will not exist as separate alternatives and hence will not have to

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<sup>98</sup> *JRA* s 43.

<sup>99</sup> Administrative Review Council (ARC), *Federal Judicial Review in Australia*, Report 50 (2012).

be separately pleaded. To that extent, this alternative is superior to that of retaining the prerogative remedies as separate remedies outside the scope of the *JRA*.

3.1.38 Another advantage of incorporating the prerogative remedies into the *JRA* is that it limits the opportunity for persons to bring more than one action in order to delay government action which affects their interests. The *JRA* as it has been interpreted, is like similar legislation in other jurisdictions in that it does not replace the prerogative and other remedies, but supplements them.<sup>100</sup> This raises the possibility that a person will seek multiple remedies to maximise their chances of success and to frustrate government action.

3.1.39 The drafters of the *JRA* anticipated this possibility and gave the courts a power to dismiss an action under the *JRA* if the complainant had sought another remedy or if another adequate remedy was available,<sup>101</sup> and gave the court a power to dismiss an action for a remedy other than those available under the *JRA* if an action had been brought under the *JRA*.<sup>102</sup> The exercise of these powers takes time and adds to the expense of litigation. Incorporating the prerogative remedies into the *JRA* reduces the opportunity for such multiple actions. Hence it makes it more difficult for litigants to frustrate government action by bringing multiple actions and reduces the delay and expense involved in dealing with such situations.

3.1.40 A simple way to incorporate the prerogative remedies into the *JRA* is to add an additional grant of jurisdiction in every case in which a prerogative remedy would have been available. The Administrative Review Council (ARC) made a similar recommendation with respect to expanding the scope of the *ADJR Act* to encompass the High Court's jurisdiction under s 75(v) of the Constitution. If the *ADJR Act* were expanded in that way, the ARC noted that it would enable applicants to bring their action under the *ADJR Act* without having to plead s 39B of the *Judiciary Act 1903* (Cth) in the alternative.<sup>103</sup>

3.1.41 It may be necessary to ensure that a grant of jurisdiction in all cases in which a prerogative remedy would have been available is not limited to decisions, conduct relating to decisions and failure to make decisions as the prerogative remedies may be available to review cases which fall outside these categories. Besides, the categories reflect the *ADJR Act* and we should not assume that the common law will evolve to sit comfortably with them. To ensure that the grant is not limited in these ways, it should be in a separate section of the *JRA* rather than in ss 17, 18 or 19.

3.1.42 It may also be necessary to ensure that the grant is not limited to administrative decisions as prerogative writs have traditionally been available to challenge the judicial decisions of lower courts. *Kirk* emphasised that the power of the State Supreme Court to supervise the jurisdiction of lower courts was part of the constitutionally protected jurisdiction of the Supreme Court.<sup>104</sup> As limiting the jurisdiction of the court to administrative decisions would prevent review of many decisions of inferior courts, which are judicial rather than administrative in nature, it has the potential to be unconstitutional.

<sup>100</sup> *JRA* s 10. Section 43 was intended to abolish the prerogative remedies completely, but as explained above (see [2.4.1]–[2.4.12]), was not interpreted so as to do that.

<sup>101</sup> *JRA* s 12.

<sup>102</sup> *JRA* s 11. These provisions were copied from the *ADJR Act* s 10(2). Similar provisions are found in the *Judicial Review Act* (Qld), ss 11 and 12.

<sup>103</sup> ARC, above n 99, 12.

<sup>104</sup> *Kirk* (2010) 239 CLR 531, [98]–[100].

Hence it would be sensible to incorporate the totality of the supervisory jurisdiction of the Supreme Court into the *JRA*, regardless of the nature of the decision appealed from.

3.1.43 At the same time, the prerogative remedies should not be confined to a separate part of the Act as is the case under the Queensland *Judicial Review Act 1991*. That is not true incorporation and does not confer any advantages over and above those which would be gained by re-establishing the prerogative remedies in their own separate Act. In particular, they would have to be pleaded in the alternative.

## 3.2 Issue 2

***If we decide to retain the prerogative remedies, is legislation required to put them on a firm legal footing?***

3.2.1 There are good reasons for providing a firm legal foundation for the prerogative remedies if we decide to retain them. *Kirk*<sup>105</sup> held that State Supreme Courts have a constitutionally guaranteed power to review State government decisions for jurisdictional error, a power which State parliaments cannot abolish. In those cases which fall outside the scope of the *JRA*, the prerogative remedies may be the only remedies available to challenge government decisions for jurisdictional error.<sup>106</sup>

3.2.2 The current legal basis for the prerogative remedies lies in Part 26 of the *Supreme Court Rules 2000*, subordinate legislation made under the *Supreme Court Civil Procedure Act 1932*. It is clear that s 43 of the Act was intended to abolish the prerogative remedies and it is arguable that as a result Part 26 of the *Supreme Court Rules* is no longer valid.

3.2.3 Even if we ignore the doubts about the validity of Part 26 of the *Supreme Court Rules*, there are good reasons for embodying the prerogative remedies in an Act of parliament. As noted, they are constitutionally important, as the only remedy in many cases for the citizen who wishes to challenge government action for jurisdictional error. Hence, it is not appropriate that their legal foundation is in a statutory rule which is much more easily changed than is an Act of parliament.

3.2.4 Besides, there is need to clarify the constitutional relationship between parliament and the Supreme Court in Tasmania. As noted above, parliament does not have the constitutional power to take from the Supreme Court its power to review government action for jurisdictional error. But parliament clearly has the constitutional power to deny the Court the power to review government action for other errors of law. It is not clear that Supreme Court is recognising that. There are intimations that certiorari may be available to correct errors of law on the face of the record as well as jurisdictional errors in cases where the Act ruled out review. Legislation may be needed to clarify the situation so that parliament's intention to exercise its constitutional power to exclude review other than for jurisdictional error is not ignored.

3.2.5 If parliament legislates to place the prerogative remedies on a solid legal foundation, it can fashion that foundation and define the relationship between it and the courts within the constitutional framework which *Kirk* established. Currently, it has surrendered that power to the Supreme Court with

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<sup>105</sup> (2010) 239 CLR 531.

<sup>106</sup> Injunctions and declarations may also be available but they are not used frequently in Tasmanian administrative law.

results which defeat its intentions, not only about the prerogative writs but also about exclusions from review. Legislation is likely to lead to a better outcome from the government’s perspective.

### ***The current legal status of the prerogative remedies***

3.2.6 The current legal basis for the prerogative remedies in Tasmania is weak, easily changed and open to challenge. As noted above, The *Judicial Review Act* s 43 abolished the prerogative writs of prohibition, mandamus, certiorari, scire facias and quo warranto in Tasmania and repealed Part VII of the *Supreme Court Civil Procedure Act 1932* regulating the Supreme Court’s powers with respect to these writs.

3.2.7 In *Tasman Quest*,<sup>107</sup> the government argued that the combined effect of these provisions was to abolish the prerogative remedies in Tasmania. The Court rejected the argument, holding that s 43’s effect was limited to procedure, taking away the Supreme Court’s power to issue writs of mandamus, certiorari and prohibition, but not affecting its power to make orders similar to mandamus, certiorari and prohibition under the *Supreme Court Rules 2000*, Part 26 – Relief Similar to Certiorari, Mandamus and Prohibition and Writs of Habeas Corpus.

3.2.8 The Court’s reasons for this conclusion were not strong. The government argued that Part 26 of the *Supreme Court Rules* were invalidated by the *JRA*. It had a strong argument. The *Supreme Court Rules* are made under the *Supreme Court Civil Procedure Act 1932*, s 197, which is a power, ‘to make rules not inconsistent with and for the purposes of this Act ... with respect to any part of the jurisdiction of the Court (original or appellate) which is subject to this Act’. After the *Judicial Review Act* repealed the provisions of the *Supreme Court Civil Procedure Act 1932*, regulating the prerogative remedies, it is arguable that judicial review in general and the prerogative writs in particular ceased to be subject to the *Supreme Court Civil Procedure Act*. Hence, there is a strong argument that Part 26 of the *Supreme Court Rules* is no longer for the purposes of the Act or with respect to any part of the jurisdiction of the Supreme Court which is subject to that Act. If that is the case, Part 26 of the *Supreme Court Rules* is no longer authorised by the Act and is invalid.

3.2.9 In *Tasman Quest*, the Supreme Court appeared to recognise the strength of this argument because it sought to base Part 26 of the Rules on the *Australian Courts Act 1828*. That Act conferred all the powers and jurisdiction of the English Superior Courts on the Tasmanian Supreme Court, including the power of the Court of Kings Bench to issue the prerogative writs.<sup>108</sup> The Court held that as that Act remained in force in Tasmania, Part 26 of the Rules also remained in force:

Since the 1828 Act remains in force, the jurisdiction to grant relief in the nature of certiorari under r 627(2)(a) has survived the commencement of the *Judicial Review Act*.

3.2.10 This argument is difficult to accept. The *Australian Courts Act 1828* was British imperial legislation applying in Australia. As the *Supreme Court Rules* are an exercise of the rule making power conferred by the *Supreme Court Civil Procedure Act 1932*, their validity depends upon their consistency

<sup>107</sup> [2003] TASSC 110 (31 October 2003).

<sup>108</sup> Section 3.

with that Act. It is not to the point that rules with a similar content could have been made under other legislation or be seen as implementing that legislation.

3.2.11 Besides, since the passage of the *Australia Acts 1986*, the Tasmanian Parliament has had full power to amend or repeal Imperial legislation applying in the State,<sup>109</sup> Hence, when the *JRA* was passed, the Tasmanian Parliament had full power to amend or repeal the *Australian Courts Act 1828*. No special procedure was required to do so. Section 43 of the *JRA*, which abolishes the prerogative writs, does so in very general language, which, if given its natural meaning, appears wide enough to repeal the grant of jurisdiction to issue the prerogative writs which the *Australian Courts Act* conferred.

3.2.12 However, the High Court in recent cases has applied the principle that privative clauses, and, by implication, other legislation limiting or ousting the supervisory jurisdiction of the courts, is to be interpreted by reference to a presumption ‘that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.’<sup>110</sup> It is arguable that the principle requires that the supervisory grant of jurisdiction in the *Australian Courts Act* can only be repealed by express reference to the Act, not just to the supervisory jurisdiction it confers. On this view, ss 43 and 48 of the *JRA* are sufficient to repeal the provisions regulating mandamus, prohibition and certiorari in the *Supreme Court Civil Procedure Act* because they expressly refer to those provisions, but not to repeal the power to grant the prerogative writs in the *Australian Courts Act*.

3.2.13 The difficulty this argument faces is that it leaves s 43 of the *JRA* with no work to do. Section 48 and Schedule 4 are sufficient in themselves to repeal the provisions with respect to mandamus, prohibition and certiorari in the *Supreme Court Civil Procedure Act*. If s 43 does not repeal the grant of jurisdiction with respect to these remedies in the *Australian Courts Act*, it does nothing. As it was clearly intended to be an important provision, that conclusion is difficult to justify.

3.2.14 Even if we accept the argument that s 43 does not repeal the grant of jurisdiction with respect to the prerogative remedies in the *Australian Courts Act*, it is not sufficient to preserve the power to make prerogative orders conferred by the *Supreme Court Rules* from repeal. Their repeal or invalidity follows the repeal of those parts of the *Supreme Court Civil Procedure Act* dealing with the Court’s jurisdiction with reference to the prerogative writs. Instead, the argument would preserve the prerogative writs in the form they took when the *Australian Courts Act* was enacted in 1828 with all the procedural and other traps which encumbered them at that time.

3.2.15 These considerations cast doubt on the reasoning in *Tasman Quest*. However, the decision may be defensible on the grounds that a State parliament does not have the constitutional power to deprive the Supreme Court of the State of its ability to grant relief for jurisdictional error,<sup>111</sup> or to impose limits on the administrative authority of a body with the intention that any breach of those limits would lead to invalidity and at the same time, deprive the Supreme Court of the State of the authority to declare and enforce those limits.<sup>112</sup> Estcourt J came to that conclusion in the *Tasmanian Industrial Commission Case*.<sup>113</sup>

<sup>109</sup> *Australia Act 1986* s (3)(2).

<sup>110</sup> *Darling Casino v NSW Casino Control Authority* (1997) 19 CLR 602.

<sup>111</sup> *Kirk* (2010) 239 CLR 531, [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>112</sup> *Duncan v Independent Commission against Corruption* [2015] HCA 32, [35] (Gageler J) (*‘Duncan’*).

<sup>113</sup> [2015] TASSC 54, [7]–[8].

3.2.16 The *JRA* allows for review for lack of jurisdiction and for errors of law, including jurisdictional error.<sup>114</sup> Therefore, it may seem that it confers more than enough jurisdiction on the Supreme Court to meet the constitutional requirements set out in *Kirk* and *Duncan*. However, it does not permit judicial review of all decisions, being limited to administrative decisions under an enactment. Besides, it contains a list of decisions which are exempt from review in Schedule 1 and a list of Acts to which it does not apply in Schedule 2. Either these exemptions from review are unconstitutional and invalid or the Constitution requires that prerogative review remain available for jurisdictional error in these cases.

3.2.17 Estcourt J in the *Tasmanian Industrial Commission Case* chose the latter alternative, accepting the correctness of the decision in *Tasman Quest* that Part 26 of the *Supreme Court Rules* survived despite the repeal of Part VII of the *Supreme Court Civil Procedure Act 1932*, on which they depended for their validity. A better argument may have been that s 43 of the *JRA* abolishing the prerogative writs and that part of Schedule 4 which repealed the provisions of the *Supreme Court Civil Procedure Act* regulating the prerogative writs were invalid under the *Kirk* doctrine. By protecting the provisions on which Part 26 of the *Supreme Court Rules* depend for their validity it would also have saved those provisions.

3.2.18 Estcourt J probably accepted the conclusion in *Tasman Quest* despite the flaws in the reasoning because it has been accepted in a number of later decisions, including *R v Resource Management and Planning Appeal Tribunal; ex parte North West Rendering*,<sup>115</sup> *Von Stalheim v Anti-Discrimination Commissioner & Anor*,<sup>116</sup> *Civil Aviation Safety Authority v Illingworth*,<sup>117</sup> *Branch-Allen v Easther*,<sup>118</sup> *Swanton v Resource Management and Planning Appeal Tribunal*,<sup>119</sup> *R v Macdessi; ex parte Walton*,<sup>120</sup> *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd*,<sup>121</sup> and *Pervan v Frawley*.<sup>122</sup> However, the decision in *Tasman Quest* does not leave the law in a settled or satisfactory state.

### ***The need for legislation establishing a firm legal basis for the prerogative writs***

3.2.19 Although the conclusion in *Tasman Quest* has been accepted in later cases, its reasoning is flawed and the issue is likely to be reopened in some later case.<sup>123</sup> Given that the reasoning in *Tasman Quest* is flawed, there is need for parliament to legislate to make it clear that the prerogative remedies are available in Tasmania and to define the scope of the Supreme Court's jurisdiction. If the *JRA* were repealed, the need would be much greater. Without clarifying legislation, doubts will remain about the legal basis of the Supreme Court's constitutional jurisdiction to give relief for jurisdictional error.

3.2.20 Given that the Constitution requires that State Supreme Courts have the power to review government actions for jurisdictional error and the importance of judicial review in ensuring the rule of law, the Supreme Court's jurisdiction to grant the prerogative remedies needs to be defined in an

<sup>114</sup> Sections 17 and 18(2).

<sup>115</sup> [2005] TASSC 8, [25].

<sup>116</sup> [2005] TASSC 134, [15] (Evans J).

<sup>117</sup> [2009] TASSC 57.

<sup>118</sup> [2016] TASSC 29, [129] (Blow CJ).

<sup>119</sup> [2015] TASSC 6, [13] (Pearce J).

<sup>120</sup> [2014] TASSC 64, [3], (Blow CJ).

<sup>121</sup> [2013] TASSC 3, [3] (Blow J).

<sup>122</sup> [2011] TASSC 27, n 8 (Porter J).

<sup>123</sup> In *Pervan v Frawley*, [2011] TASSC 27, counsel for the Attorney-General argued that the Supreme Court no longer has power to grant prerogative relief and that Part 27 of the *Supreme Court Rules* is invalid.

Act of parliament, rather than in *Supreme Court Rules* of doubtful validity. It may appear that the *Supreme Court Rules* are an appropriate place for regulations dealing with the writs because the *Rules* can only be changed by the judges of the Supreme Court with the approval of the Rule Committee which consists of the judges and four legal practitioners.<sup>124</sup> They may be more likely to be aware of the constitutional and legal significance of changes to fundamental features of the legal system such as the prerogative writs than is parliament. Parliament had little understanding of the implications of what it was doing when it attempted to abolish the prerogative remedies in the *Judicial Review Act*.

3.2.21 This argument ignores the fact that the rule making power of the judges is not a free-standing law making power, but a power which parliament has conferred on them and which parliament can take away.<sup>125</sup> As argued above, parliament may already have done that with respect to the power to make rules about the prerogative remedies. Hence there is nothing to be gained by having the *Supreme Court Rules* as the legal basis for the prerogative remedies.

3.2.22 Legislation is needed not only to provide a sound legal basis for the prerogative remedies but also to define their scope. The Court has held that under Part 26, the remedies are available not only for jurisdictional error but that certiorari is available for error of law on the face of the record.<sup>126</sup> Hence, it is available to do more than implement the Court's constitutional jurisdiction to review for jurisdictional error. This is appropriate in cases such as review of decisions of a judicial rather than of an administrative character, which fall outside the scope of the Act entirely. However, it may not be appropriate in cases involving review of legislation which falls within Schedules 1 and 2 of the Act. Parliament's intention was that decisions under this legislation were to be unreviewable or that review was to be limited in various ways and that intention should be respected to the extent that it is consistent with the constitutional limits on parliament's power to exclude review.

3.2.23 *Kirk* provides no justification for permitting review in cases where parliament intended to exclude review for non-jurisdictional errors of law. Under the *Kirk* doctrine, parliament has no power to exclude review for jurisdictional error. However, parliament does have the power to exclude review for other errors.<sup>127</sup> When it has expressed a clear and unambiguous intention to do so, the Court should respect that intention. *Kirk* recognised that the categories of jurisdictional error are not closed so that the scope of jurisdictional error has expanded and will continue to do so. As it does so, the scope of non-jurisdictional errors of law and of parliament's power to exclude review will contract. However, as noted above,<sup>128</sup> *Kirk* recognised the distinction between jurisdictional and non-jurisdictional errors and that that distinction marks the boundaries of parliament's jurisdiction to exclude judicial review.

3.2.24 Despite these considerations, there is nothing in Estcourt J's judgment in the *Tasmanian Industrial Commission Case*<sup>129</sup> to suggest that certiorari is not available for error of law on the face of the

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<sup>124</sup> *Supreme Court Civil Procedure Act 1932*, ss 197 and 202.

<sup>125</sup> This does not deny that the Supreme Court, as a superior court of record, has an inherent power to control its own procedure. Whether that power extends to a power to regulate the way in which its grant of supervisory jurisdiction under the *Australian Courts Act 1828* is to be exercised is a moot point. It need not be discussed here because when laying down Part 26 of the *Supreme Court Rules*, the Court did not claim to be exercising that power, but the rule making power conferred on it by the *Supreme Court Civil Procedure Act*.

<sup>126</sup> *Swanton v Resource Management and Planning Appeal Tribunal* [2015] TASSC 6, [14]; *R v Macdessi; ex parte Walton* [2014] TASSC 64, [5]; *Skilltech Consulting Services Pty Ltd v Bold Vision Pty Ltd* [2013] TASSC 3, [8].

<sup>127</sup> *Kirk* (2010) 239 CLR 531, 581, [100].

<sup>128</sup> *Ibid.*

<sup>129</sup> [2015] TASSC 54.

record in cases where review under the *JRA* is excluded under Schedules 1 and 2. There are good reasons for that. Once Part 26 of the *Supreme Court Rules* is interpreted as an alternative to the *JRA*, there is no reason why a section of the *JRA* which excludes or limits review under that Act should be interpreted as limiting review under other legislation, such as the *Supreme Court Rules*.

3.2.25 Allowing review for error of law on the face of the record defeats parliament's intention to exclude or limit review in these cases. There is no constitutional warrant for it under the *Kirk* doctrine. However, as noted above, it is difficult to reach any other conclusion once Part 26 of the *Supreme Court Rules* is interpreted as an alternative to the *JRA*. Hence legislation may be needed to implement parliament's intentions in these cases. That legislation could be included in any legislation putting the prerogative remedies on a proper legal foundation.

### **Summary**

3.2.26 Since 2010, the jurisdiction of State Supreme Courts to correct jurisdictional errors has been constitutionally entrenched. Therefore, if the prerogative remedies are abolished, it will be necessary to ensure that the *JRA* provides a remedy in every case in which the prerogative remedies may have been available. If this is not done, it will create constitutional difficulties, forcing the courts to find a way to provide a remedy where the Constitution requires it. This could lead to a case being taken to the High Court to determine whether relief remains available in cases where the *JRA* does not allow it.

3.2.27 There are two ways in which parliament could avoid such an outcome. The first is not to abolish the prerogative remedies but to keep them as a safety net for cases of jurisdictional error which fall outside the scope of the *JRA*. The second is to incorporate them into the *JRA* itself by means of a grant of jurisdiction under that Act in every case in which a prerogative remedy would have been available.

3.2.28 Of the two, the second is preferable because it involves greater simplification of the law. If the two causes of action, that under the *JRA* and that under the prerogative writs, are retained, they have to be separately pleaded. If the wrong one is pleaded, an action may fail without being considered on its merits. That adds to the complexity of the law and the expense of litigation.

3.2.29 If the prerogative remedies are incorporated into the *JRA* in the way suggested, they will not have to be separately pleaded, simplifying procedures and reducing the cost of challenges to government decisions and actions. This approach may also avoid the common practice at the federal level of proceeding in the *ADJR Act* or under the *Judiciary Act* and pleading the other in the alternative but keeping it in abeyance. That practice has the potential to add to the complexity and expense of litigation by requiring counsel to prepare an argument which may never be used or to ask for an adjournment if they find that they do need to use the argument.

3.2.30 Incorporating the prerogative remedies into the *JRA* also has the advantage that it reduces the opportunity for litigants to bring separate actions under the *JRA* and for a prerogative remedy in order to frustrate government action and to maximise their chances of success. Although the *JRA* allows the court to dismiss one or other of such actions,<sup>130</sup> that causes delay and adds to the expense of litigation.

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<sup>130</sup> *JRA* ss 11, 12.

A better solution is to reduce the possibility of bringing such multiple actions by incorporating the remedies into the *JRA*.

3.2.31 Because other jurisdictions which have adopted an Act regulating judicial review have chosen to retain the prerogative remedies as separate remedies rather than incorporate them into judicial review legislation, parliament may opt for uniformity and do likewise. If parliament chooses to retain the prerogative remedies as separate remedies rather than incorporate them into the *JRA*, it needs to place the remedies on a stronger constitutional footing.

***Feedback is invited with respect to the following questions.***

**Question 1**

- (a) Is it sensible and feasible to abolish the prerogative remedies? How could this best be done? Do the advantages of doing so outweigh the disadvantages?
- (b) Is it more sensible and feasible to retain the prerogative remedies? What are the advantages and disadvantages of doing so?
- (c) If so, how is this best done — by incorporation into the *JRA* or by being kept separate? What are the advantages and disadvantages of the two options?

**Question 2**

If it is decided to keep the prerogative remedies separate from the *JRA*, is it necessary to put them on a stronger legal footing by embodying them in legislation? Or is their current basis sufficient?

## Part 4

# Limitations on the Scope of Review under the *Judicial Review Act 2000 (Tas)*

## 4.1 Introduction

4.1.1 There are a number of limitations placed on the scope of review under the *JRA* including:

1. Only decisions, conduct related to the making of a decision and failure to make a decision are reviewable.<sup>131</sup>
2. To be reviewable, a decision, conduct relating to a decision and failure to make a decision must be of an administrative character;<sup>132</sup>
3. To be reviewable, a decision, conduct relating to a decision and failure to make a decision must be under an enactment.<sup>133</sup>

4.1.2 This part considers whether these limitations ought to be altered or removed entirely, and if so what limits should replace them.

### *The meaning of 'decision' in the JRA*

4.1.3 'Decision' is a key term in defining the scope of judicial review under the *JRA*, because its jurisdiction is limited to 'decisions', 'conduct relating to a decision' and 'failure to make a decision'.<sup>134</sup>

4.1.4 The centrality of the concept of 'decision' to *JRA* jurisdiction has given rise to areas of controversy:

1. Is there jurisdiction under the *JRA* where the Act in question does not require a decision? If not, should there be jurisdiction in these cases?
2. Do all decisions of an administrative character made under an enactment count as decisions for the purposes of the *JRA*? Or must they have some additional characteristics such as being 'final and operative'?

4.1.5 These controversies raise a number of issues which need to be considered in any reform proposals. The issues are considered in turn below.

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<sup>131</sup> *JRA* ss 17–19.

<sup>132</sup> *Ibid* s 4(1).

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid* ss 17–19.

## 4.2 Issue 3

*Is there jurisdiction under the JRA where the Act in question does not require a decision? If not, should there be jurisdiction in these cases?*

4.2.1 These two questions are, for reasons set out below, better formulated as:

*Issue 3(1) – Is there jurisdiction under the JRA where the provision in question operates to change the legal position of a person without any administrator having to make a decision?*

*Issue 3(2) – If not, should the definition of decision be broadened to include a decision that is necessary for the implementation of a statutory provision which operates to change the legal position of a person without any administrator having to make a decision?*

4.2.2 Aronson, Groves and Weeks argue that there is a long tradition in Administrative law of regarding some statutes as self-executing; that is as changing legal rights and obligations by the operation of law if certain facts occur without any administrator having to make a decision.<sup>135</sup> They are critical of the theory and point out that it has been used to exclude review under the *ADJR Act*, which like the *JRA* is limited to review of a decision, conduct relating to a decision and failure to make a decision. If a statutory provision is self-executing in the way described, review under the *ADJR Act* may be ruled out because there is no decision to review.<sup>136</sup>

4.2.3 The issue is yet to arise in Tasmania. However, as the wording of the *JRA* with respect to the need for a decision follows that of the *ADJR Act*, it is also likely to be interpreted as not authorising review where the statutory provision in question operates to change the legal position of a person without any official having to make a decision.

4.2.4 It would simplify the law and remove an unjustifiable gap in the jurisdiction which the *JRA* confers if the definition of decision were extended to allow review in cases in which a statutory provision operates to change the legal position of a person without any administrator having to make a decision. The cases on this point under the *ADJR Act* are complex and contradictory, drawing many fine distinctions. They suffer from a failure to analyse the issue correctly. That failure tends to hide what is at stake and why legislation is needed to plug the jurisdictional gap.

4.2.5 A possible distinction between a statute which is self-executing and one which is not is that there is no discretion under the former and there is a discretion under the latter.<sup>137</sup> As the *ADJR Act* lays down that ‘decision’ extends to situations in which the statutory provision in question does not confer a discretion,<sup>138</sup> it covers both type of provisions which this distinction identifies. Therefore, if self-executing statutes are identified as ones which do not confer a discretion, they may still require decisions which are reviewable under the *ADJR Act*.

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<sup>135</sup> Aronson, Groves and Weeks, above n 13, 83–5.

<sup>136</sup> Ibid.

<sup>137</sup> *Doan v Health Insurance Commission* (2002) 124 FCR 125; [2002] FCA 1160 (18 September 2002) [99]–[100] (Marshall J)

<sup>138</sup> *ADJR Act* s 3(1) – the definition of ‘decision to which this Act applies’ extends to decisions whether made in the exercise of a discretion or not.

4.2.6 Some of the cases and some commentators have analysed the problem in terms of statutes which are ‘self-executing’ in that they operate to change the legal relationship of a person to the state if certain circumstances exist without any administrator’s having to make a decision or take any action.<sup>139</sup> As the Court said in *Australian Postal Corporation v Forgie* when comparing s 14 of the *Safety, Rehabilitation and Compensation Act* (Cth) with s 37(1) of that Act:

Indeed, all three have about them much the same self-executing element as s 37(7): Comcare **is** liable if certain circumstances exist, Comcare **is not** liable if certain other circumstances exist, just as rights **are** suspended under s 37(7) if certain circumstances exist.<sup>140</sup>

4.2.7 The forfeiture provisions of the *Customs Act 1901* (Cth) appear to be self-executing in this sense. A series of cases has held that as no ‘decision’ need be made for forfeiture to occur, the validity of forfeiture cannot be challenged under the *ADJR Act*.<sup>141</sup> As Spender J pointed out in *Re Whim Creek Consolidated NL v Colgan*,<sup>142</sup> (*Whim*) goods are forfeited under s 229 of that Act on the occurrence of particular acts without any official action needing to be taken. Section 229 of the *Customs Act 1901* did not authorise or identify any official who had the power or the duty to declare that goods were forfeited. Where goods were forfeited or a customs officer reasonably believed that they had been forfeited, the officer had the power to take further action to seize the goods but need not have done so.<sup>143</sup> In some cases it may have been reasonable not to seize the goods. However, the goods remained forfeited so that the person who retained possession of them could not sell them because he or she was not the owner and could not pass a good title to them to the intending purchaser.<sup>144</sup>

4.2.8 The Court in *Whim* held that as forfeiture under the *Customs Act 1901* occurred by operation of law without any official making a decision, there was no decision which could be challenged under the *ADJR Act*.<sup>145</sup> *Whim* held that the seizure of goods which were forfeited under the *Customs Act* was different in that it did not happen by operation of law but only occurred if an authorised officer made a decision to seize the goods in question.<sup>146</sup> That decision was one which was reviewable under the *ADJR Act*.<sup>147</sup> In reviewing that decision, the Court may need to determine whether the goods were in fact forfeited, permitting incidental review of that decision. But the forfeiture decision itself is not reviewable under the Act.

4.2.9 As noted above,<sup>148</sup> Spender J in *Whim* analysed the problem as one in which the existence of specified circumstances or the occurrence of certain events triggers the operation of the law. This analysis suggests that the law can operate without any human intervention. Such an analysis suggests

<sup>139</sup> *Australian Postal Corporation v Forgie* (2003) 130 FCR 279; [2003] FCAFC 223.

<sup>140</sup> *Ibid* [39].

<sup>141</sup> *Re Tetron International Pty Ltd v AB Luckman* [1985] FCA 293 (7 August 1985) [11]; *Re Whim Creek Consolidated NL v Colgan* (1991) 31 FCR 469, [1991] FCA 467 (7 October 1991) [20].

<sup>142</sup> (1991) 31 FCR 469, [1991] FCA 467 (7 October 1991) [29].

<sup>143</sup> *Customs Act 1901* (Cth) s 203(2).

<sup>144</sup> *Re Whim Creek Consolidated NL v Colgan* (1991) 31 FCR 469, [1991] FCA 467 (7 October 1991) [29].

<sup>145</sup> *Ibid* [20].

<sup>146</sup> Section 203(2) of the *Customs Act 1901* at that time read: ‘An authorised person may seize any forfeited goods or any goods that he believes on reasonable grounds are forfeited goods.’ This section has since been repealed.

<sup>147</sup> *Ibid* [21].

<sup>148</sup> See [4.2.8].

an analogy with what Aronson, Groves and Weeks call the long-discredited mechanical or purely declaratory theories of adjudication.<sup>149</sup>

4.2.10 The analogy with declaratory theories of adjudication suggests that an improved analysis which takes into account that in most cases of so-called ‘self-executing’ statutes the law is not self-executing but involves official choice and action to implement it will reveal that there are decisions which are reviewable under the *ADJR Act*. That is not always the case, in that some so called ‘self-executing statutes’ are not ones which operate by means of official intervention which is necessary for their implementation but which the statute does not specify. Instead, they are provisions under which persons, through their own actions and without any official intervention, can change their legal position with respect to the state or to one of its agencies.

4.2.11 In private law, situations in which persons can change their legal position with respect to other persons without any administrative intervention are common. Some, such as contract law, involve the deliberate use of legal powers to make intentional changes. But this is not always the case. The law of negligence assumes that people, by their actions, can unintentionally change their legal relations with others, usually to their own detriment.

4.2.12 Many of the provisions which are misleadingly analysed as self-executing are ones under which persons can unintentionally change their legal relations with the state or with an agency of the state, often to their detriment. An example is s 229(1)(a) of the *Customs Act 1901* (Cth), referred to above, which provided for the forfeiture of imported goods when an attempt had been made to smuggle them into Australia or to avoid duty by under-declaring their value.

4.2.13 It is easy to understand why these cases fall outside the scope of the *ADJR Act* and the *JRA*. These Acts focus on official action, providing for review of official action which involves a decision, conduct relating to a decision and failure to make a decision. Where there is no official action, but it is the actions of the person which operate to change his or her legal position, there can be no review under either Act. Any attempt to interpret the *ADJR Act* or the Act under which review is sought so as to allow for review is likely to distort one or other provision. Amending the *JRA* so as to provide for review in these cases would require radical change, extending its scope to cases in which there was no official decision or action. It is not clear how this should be done.

4.2.14 However, it is necessary to ensure that there are adequate remedies available to allow persons to obtain an authoritative ruling as to whether their actions have changed their legal position in relation to the state. Consider s 229(1)(a) of the *Customs Act 1901* (Cth). Under that section, a person’s goods were forfeit to the Crown if the person attempted to smuggle them into Australia or understated their value in an attempt to avoid duty. No official had the power or the duty to declare the goods forfeit. Official acts such as seizure may but need not have followed forfeiture.<sup>150</sup> Hence, it was possible for forfeiture to occur without any person being aware of the fact. A third party such as an intending purchaser who was concerned that the seller may not have been able to pass on a good title might have been the first to raise the issue. In this situation, it is only fair that individuals who have an interest in the goods have a remedy which enables them to ask the court who is the owner of the goods, the Crown or another person.

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<sup>149</sup> Aronson, Groves and Weeks, above n 13, 83–4.

<sup>150</sup> *Ibid.*

4.2.15 There is no reason why that remedy has to be a public law remedy, let alone one under the *ADJR Act* or the *JRA*. The most appropriate remedies are private law remedies for determining title to goods, such as detinue, conversion, or where the Crown has not seized the goods, a declaration.

4.2.16 Not all provisions which have been analysed as self-executing are ones in which the actions of a person change their legal relations with government without any official intervention. Some of these provisions involve situations in which although a person's actions change his or her legal position with respect to the state, official action is needed make the change effective. As official action is necessary to implement the provision, whether the provision expressly stipulates the action to be taken or not, review under the *ADJR Act* or the *JRA* should be available.

4.2.17 Examples of this type of provision were ss 37(1) and 57(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). These sections suspended an injured employee's right to worker's compensation if he or she failed to take part in a rehabilitation programme or to undergo a medical examination without reasonable excuse. Although the employee's action in not taking part in a rehabilitation programme or in not undergoing a medical examination triggered the suspension of compensation, official action was needed to implement the suspension and to cut off payments. A number of cases had held that as these provisions were self-executing and did not require the making of a decision, review under the *ADJR Act* was not available.<sup>151</sup>

4.2.18 These cases were considered in *Australian Postal Corporation v Forgie*,<sup>152</sup> which held that *ADJR Act* review was available with respect to ss 37(1) and 57(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) because they impliedly required that a decision be made as to whether compensation payments to the person in question were suspended and that decision was a reviewable decision. In coming to this conclusion, the Full Court of the Federal Court placed considerable weight on the fact that if a person had a reasonable excuse for not attending a rehabilitation programme or a medical examination, the payment of compensation was not suspended. The Court held that determining whether an excuse was reasonable or not required that someone exercise judgment and that that exercise of judgment entailed a reviewable decision:

The way in which s 37(7) must operate also suggests that a 'determination' is required. The inclusion of the words 'without reasonable excuse' introduces a distinctive requirement for some deliberative human action. An assessment needs to be made at some point — by a person — as to a refusal or failure to undertake a rehabilitation program, and to the reasonableness or unreasonableness of that refusal or failure. Such a process requires that the person at least consider the circumstances surrounding the employee's failure or refusal to undertake a rehabilitation program and to evaluate what is reasonable in the circumstances. This intellectual process involves matters of judgment and degree. The suspension of rights under s 37(7) can only occur by force of law once some such assessment has been made. The process cannot be conducted in a manner analogous to the mechanistic operations of a sorting machine. The process that is required would seem unequivocally to fall, at least, within the s 3(3)(g) AAT Act definition of 'decision' as 'doing

<sup>151</sup> *Buck v Comcare* (1996) 66FCR 359; [1996] FCA 1485; *Trajkovski v Telstra Corporation Ltd* (1998) 81 FCR 459, 464 ('*Trajkovski*'); *Chowdhary v Bayne* [1999] FCA 41; (1999) 29 AAR 100, 102–103 ('*Chowdhary*'), *Telstra Corporation Ltd v Administrative Appeals Tribunal* [2003] FCA 102; (2003) 37 AAR 40 ('*Telstra*'); and *Australian Postal Corporation v Pascoe* [2003] FCA 390.

<sup>152</sup> (2003) 130 FCR 279; [2003] FCAFC 223.

or refusing to do any other act or thing’ and hence within the definition of ‘determination’ under the SRC Act.<sup>153</sup>

4.2.19 Although the Court stressed the element of deliberation and judgment involved in determining whether an excuse was reasonable, there are good reasons for assuming that a suspension or refusal of compensation or of a benefit should be reviewable even if no deliberation or judgment is required. Refusal or suspension can only be implemented by a decision to refuse or suspend and there is no reason why that decision should not in principle be reviewable, even though the refusal or suspension flows automatically from the operation of the provision on the actions of the person who receives the compensation or benefit. The fact that no element of judgment may be required is not a reason for regarding such a decision as unreviewable, given that the *ADJR Act* and the *JRA* extend to decisions which are not discretionary as well as ones which are.<sup>154</sup>

4.2.20 There is nothing in *Bond*<sup>155</sup> which requires a different conclusion. Although that case limits decisions which are reviewable under the *ADJR Act* and hence the *JRA* to ‘final and operative’ decisions, that is decisions which are determinative of the issue, the court stressed that this only need be in a practical sense:

That answer is that 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 a 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.<sup>156</sup>

4.2.21 The implementation of a refusal or suspension of compensation or of a benefit may not be legally operative to determine the rights and duties of the parties where the refusal or suspension flows automatically from the operation of the relevant provision on the actions of the recipient of the compensation or benefit. However, it is operative in a practical sense, in that, until an official implements the refusal or suspension, the compensation or benefit will continue to be paid. Hence it meets the criteria for a decision which *Bond* laid down.

4.2.22 Despite the decision in *Australian Postal Corporation v Forgie*,<sup>157</sup> the matter should be put beyond all doubt by amending the *JRA* to make it clear that decisions and action needed to implement a change in the legal relationship between a person and the state brought about by the person’s actions are reviewable. That could be done by amending the definition of ‘decision’ to include that a decision or action which is necessary for the implementation of a statutory provision which operates on the actions of a person to change the legal position of that person.

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<sup>153</sup> Ibid [40].

<sup>154</sup> *ADJR Act* s 3; *JRA* s 4(1).

<sup>155</sup> (1990) 170 CLR 321; [1990] HCA 33.

<sup>156</sup> Ibid, [32] (Mason CJ, Brennan and Deane JJ agreeing on this point), [25]–[9] (Toohey and Gaudron JJ).

<sup>157</sup> (2003) 130 FCR 279; [2003] FCAFC 223.

## 4.3 Issue 4

***Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the JRA? Or should they have some additional characteristics such as being ‘final and operative’?***

### Why the issue is important

4.3.1 The broader the definition of decision, the greater the scope for persons to challenge government decisions in which they have an interest. Given that the aim of the *ADJR Act* and the *JRA* is to make it easier for persons to challenge government actions in the courts, there are good reasons for adopting a broad definition of decision. However, there has been concern that a very broad definition will permit litigation designed to obstruct the decision-making process rather than to challenge the legality of the government action in question.

4.3.2 Much government action is the result of a long decision-making process. That process often results in a decision which is final and operative in the sense that it affects the legal position of the parties. Other decisions, especially of fact, may be made in the process of arriving at that final decision. A broad definition of decision is likely to permit challenges to those decisions. Allowing those challenges may enable a litigant who is determined to frustrate the process to challenge every decision up to and including the final decision. It is not in the public interest to allow government administration to be frustrated by such a string of challenges.

4.3.3 Hence the courts, the ARC and State legislatures which have adopted measures such as the *JRA* have come to the conclusion that the courts need a screening device to rule out premature challenges and to prevent the misuse of the Act to frustrate the administrative process. The High Court has adopted a narrow definition of decision to rule out challenges to decisions made in the course of a process of decision-making and restrict challenges to decisions which are final and operative.<sup>158</sup> The Tasmanian parliament copied s 14 of the *Judicial Review Act* (Qld) in s 13 of the *JRA*, which gives the Court the power to dismiss challenges to decisions made in the process of arriving at a final and operative decision where, in the circumstances it is in the interests of justice to do so. Most radical of all, the ARC considered but did not recommend a proposal to require all applications under the *ADJR Act* to have the leave of the court.<sup>159</sup>

4.3.4 This part of the paper considers the effectiveness of these measures, whether all are needed, and whether they go too far in complicating the operation of the *JRA*.

### ***The current position – Australian Broadcasting Tribunal v Bond***

4.3.5 In the early case of *Lamb v Moss*,<sup>160</sup> the Full Court of the Federal Court held that reviewable decisions under the *ADJR Act* and, by implication, the *JRA*, were not limited to decisions which finally determine rights and obligations or which are in some sense ultimate and operative:

<sup>158</sup> *Bond* (1990) 170 CLR 321; [1990] HCA 33.

<sup>159</sup> The Administrative Review Council, *Review of the Administrative Decisions Judicial Review Act – Stage 1*, Report 26 (Commonwealth of Australia, 1986).

<sup>160</sup> (1983) 49 ALR 533; [1983] FCA 254.

In our opinion, there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect. Such a conclusion is, in our opinion, in accordance with the plain legislative intention revealed by the words of the Act.<sup>161</sup>

4.3.6 The Court recognised that the broad interpretation which they had adopted opened up the possibility that litigants would raise numerous challenges to an administrative process, not with any hope of success but in order to slow down the process or bring it to a halt. It also recognised that the broad interpretation which they were proposing could lead to so many challenges that it slowed down the Court's hearing of such cases:

We acknowledge that to some the giving of a wide meaning to 'decision' in the Act may be disturbing. There will be concern that the proper administration of government will be unduly delayed, and in some cases stultified, by a proliferation of applications to the Court, some perhaps made without any real prospect of success, but in the hope that the very making of them may tend to achieve an applicant's purpose. There will be concern also that the Court's list will become unduly congested making it less able to provide the expeditious service which is so clearly desirable in this field. And there will finally be anxiety that the limited funds of legal aid agencies may be unnecessarily depleted by premature, and even baseless, applications.<sup>162</sup>

4.3.7 However, the Court held that these considerations did not outweigh the clear and unambiguous words of the Act, which showed that decision was to be interpreted broadly. The Court had no power to limit the scope of the Act for fear of opening the floodgates. Besides, administrative law required a balance between ensuring that government policies were implemented efficiently and effectively and protecting the interests of individuals whom those policies affected by ensuring that the administration was acting within its legal powers.<sup>163</sup> By implication, the Court was of the view that the balance required a broad interpretation of decision.

4.3.8 The Court was fortified in its opinion by its decision that it had a broad discretion to refuse relief if an application for review was premature or had the potential to lead to a stream of similar applications. It held that the power to refuse relief was the appropriate way to control premature actions and suggested that it might not have adopted such a broad interpretation of the term decision if it had only had a limited discretion to refuse relief:

To those who have the concerns which we have mentioned we would say that it should not be overlooked that we have earlier concluded that this Court has conferred upon it a wide discretion to grant or refuse relief in a particular case. It is in the exercise of that discretion that the Court will exercise control over the circumstances in which and the stage at which judicial review will be embarked upon. Furthermore, it should be understood that the Court's discretion is not limited to what is to occur when it comes to the question of whether to grant or refuse final relief. By s.15 of the Act there is no automatic stay of the operation of a decision upon the making of an application to the Court. It will always be

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<sup>161</sup> *Lamb v Moss* (1983) 49 ALR 533, 556.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

for the Court carefully to consider whether a stay should be granted. One of the matters that will be taken into account is whether the application has been made prematurely. Whilst an opportunity to apply for a stay would always be permitted, except perhaps in the most exceptional circumstances, if the opportunity is not availed of there may be no reason why ongoing proceedings, such as committal proceedings, should not be continued.<sup>164</sup>

4.3.9 *Lamb v Moss* assumed that the discretion which the *ADJR Act* conferred to refuse a remedy was a sufficient screening device.<sup>165</sup> There is no doubt that the discretion to refuse a remedy which the *ADJR Act* and the *JRA* confer on the courts is sufficiently broad to enable the courts to dismiss premature and unmeritorious claims. The Federal Court in *Lamb v Moss* and the High Court in *Bond* were agreed on that.<sup>166</sup>

4.3.10 The broad interpretation of decision adopted in *Lamb v Moss* was rejected by the High Court in *Bond*.<sup>167</sup> In that case, the High Court held that the term ‘decision’ for the purposes of the *ADJR Act* had to be at least in a practical sense, final and operative, that is determinative of the issue at hand and that it had to be a decision with respect to substantive rather than procedural matters.

4.3.11 Unlike the Federal Court in *Lamb v Moss*, which held that the words of the *ADJR Act* required a broad interpretation of the term decision, the High Court held that the words, especially the fact that the decision was to be under an enactment clearly indicated a narrow interpretation. To qualify as a decision under an enactment, a decision had to be one for which provision is made under or by a statute. Usually that will be a final and operative decision which determines at least in a practical sense, the issue at hand:

The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations. That answer is that 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 a 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.<sup>168</sup>

4.3.12 In Mason CJ’s opinion, the policy arguments he identified, which were similar to those which the Federal Court considered in *Lamb v Moss*, were evenly balanced and were not sufficiently strong to justify a departure from the clear meaning of the words:

The relevant policy considerations are competing. On the one hand, the purposes of the *ADJR Act* are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of ‘decision’ is extended, there is a greater risk that the efficient administration of government will be impaired. Although

<sup>164</sup> *Ibid* 557.

<sup>165</sup> (1983) 49 ALR 533; [1983] FCA 254.

<sup>166</sup> *Bond* (1990) 170 CLR 321; [1990] HCA 33, [37] (Mason CJ, Brennan J agreeing); *Lamb v Moss* (1983) 49 ALR 533; [1983] FCA 254.

<sup>167</sup> (1990) 170 CLR 321; [1990] HCA 33.

<sup>168</sup> *Ibid* [32] (Mason CJ, Brennan J agreeing). See also [25] (Toohey and Gaudron JJ).

Bowen C.J. and Lockhart J. appeared to emphasize the first of these considerations in *Australian National University v Burns* [1982] FCA 191; (1982) 64 FLR 166, at p 172; [1982] FCA 191; 43 ALR 25, at p 30, there comes a point when the second must prevail, as their Honours implicitly acknowledged. To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations.<sup>169</sup>

4.3.13 The High Court in *Bond*, to the extent that that case was determined on policy grounds rather than the words of the *ADJR Act*,<sup>170</sup> was less sanguine about the adequacy of the discretion to refuse a remedy as a screening device. As a result, it adopted a narrower interpretation of two key terms in the *ADJR Act* defining the court's jurisdiction, decision and conduct to limit the range of applications which could be brought before the final decision was made.

4.3.14 The holding that decisions had to be final and operative led the Court to hold that decisions made in the process of arriving at a final decision were not normally reviewable, at least as decisions:

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 a 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.<sup>171</sup>

4.3.15 These arguments left open the possibility that decisions made in the process of arriving at a final decision could be reviewed as conduct relating to the making of a decision. In *Bond*, the Court drew a distinction between challenges to the substantive decision and challenges to the procedures used in arriving at that decision. Challenges to substantive decisions were to be brought under s 5 dealing with decisions while challenges to the procedures used in arriving at a decision, including decisions with respect to procedures, were to be brought under s 6 dealing with conduct relating to a decision:

If 'decision' were to embrace procedural determinations, then there would be little scope for review of 'conduct', a concept which appears to be essentially procedural in character. To take an example, the refusal by a decision maker of an application for an adjournment in the course of an administrative hearing would not constitute a reviewable decision, being a procedural matter not resolving a substantive issue and lacking the quality of finality. Then it is the 'conduct' of the hearing in refusing an adjournment that is the subject of review.

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<sup>169</sup> Ibid [31].

<sup>170</sup> In *Bond* itself, the High Court argued that the words of the *ADJR Act* were clear in requiring that 'decision' be limited to 'final and operative decision' and that there were no policy reasons which were sufficiently strong to justify disregarding the clear meaning of the words: (1990) 170 CR 321; [1990] HCA 33, [31]–[32] (Mason CJ); [25]–[29] (Toohey and Gaudron JJ). Policy arguments with respect to the need for additional screening devices to rule out premature actions may have played a smaller role in the decision than is commonly assumed.

<sup>171</sup> Ibid [32] (Mason CJ, with whom Brennan and Deane JJ agreed). Toohey and Gaudron JJ reached a similar conclusion, [25]–[29].

To treat the refusal of the adjournment in this way is more consistent with the concept of ‘conduct’ than with the notion of ‘decision under an enactment’.<sup>172</sup>

4.3.16 As s 6 permitting review of conduct is limited to authorising the review of the procedures used in arriving at a decision, it normally does not allow the review of substantive decisions and findings of fact which are part of the chain of reasoning leading to the making of the final decision. These decisions and findings of fact are therefore unreviewable at the time they were made either as a decision or as conduct relating to the making of a decision.<sup>173</sup> Hence, in *Bond*, Mason CJ, with whom Brennan and Deane JJ agreed, held that the findings of fact that Bond was not a fit and proper person to hold a broadcasting licence and that Bond controlled Bond Corporation, which were a part of the chain of reasoning leading to the final and operative conclusion that Bond Corp was not a fit and proper person to hold a broadcasting licence, were not reviewable decisions or conduct under the *ADJR Act*.<sup>174</sup> Toohey and Gaudron JJ agreed with this conclusion.<sup>175</sup>

4.3.17 The fact that substantive decisions and findings of fact which are part of the chain of reasoning leading to the making of the final decision are not reviewable in themselves as decisions or conduct does not completely prevent their review under the *ADJR Act* and the *JRA*. Instead, it delays their review until the final decision has been made.<sup>176</sup> They may be, and often are, reviewed in order to show that they are based on legal errors and that those errors infect the final decision.

4.3.18 *Bond* appears to draw a clear distinction between substantive and procedural issues, substantive issues being reviewable under s 5 of the *ADJR Act* as decisions if they are operative and required by the legislation and procedural issues being reviewable under s 6 of the Act as conduct. The distinction is not as clear as first appears because many decisions and actions arising in the course of a process leading to a final outcome have substantive and procedural elements and because the grounds of review are the same whether a matter is reviewed under s 5 or 6. As a result, in many cases it does not matter much whether an issue is characterised as substantive or procedural because the result is the same.<sup>177</sup>

4.3.19 The real importance of the distinction between substantive and procedural issues is that it excludes some matters from review, including substantive decisions which are not final and operative or required by the legislation but are steps in the reasoning or process leading to the final outcome. They are not reviewable under s 5 because they are not final and operative or required by the legislation and they are not reviewable under s 6 because they are not procedural and hence are not conduct. Hence the key issue is not whether an issue is substantive or procedural because it may well be both but whether it is not procedural and not a final, operative substantive decision, because if that is the case, it is unreviewable.

4.3.20 Given that the key issue is not whether a matter is substantive or procedural, it is not surprising that situations with substantive and procedural elements, especially decisions with respect to the scope of an enquiry and the procedures to be followed, which can have substantive consequences for the

<sup>172</sup> Ibid [34] (Mason CJ, with whom Brennan and Deane JJ agreed).

<sup>173</sup> Ibid [86] (Mason CJ, with whom Brennan and Deane JJ agreed).

<sup>174</sup> Ibid [39] (Mason CJ, with whom Brennan and Deane JJ agreed).

<sup>175</sup> Ibid [25]–[29].

<sup>176</sup> Aronson, Groves and Weeks, above n 13, 75.

<sup>177</sup> This assumes that procedural decisions are reviewable as conduct. Some statements in *Bond* cast doubt on this. They are considered below in *Bond and the review of procedural decisions as conduct*.

rights of the parties, have been characterised as substantive in some cases and procedural in others. *Clark v Wood*<sup>178</sup> and *McKibben v Linkenbach*<sup>179</sup> provide examples. In *Clark v Wood*, Finkelstein J held that a ruling under s 81(10) of the *Bankruptcy Act 1966* (Cth) was reviewable as a substantive decision under s 5 of the *ADJR Act*. Section 81 of the *Bankruptcy Act* permits the examination of a bankrupt in court or before a magistrate or the registrar. Section 81(10) authorises the court, magistrate or registrar to put questions or allow questions to be put to the person being examined. The applicant sought review of a ruling under s 81(10) that certain questions were allowable.

4.3.21 Decisions with respect to the questions which may be put in proceedings have strong procedural overtones and relate to the way in which proceedings are conducted. Therefore, they could easily be classified as conduct for the purposes of the *ADJR Act*, so that they would be reviewable under s 6. Despite these considerations, Finkelstein J held that they were substantive and reviewable under s 5 as decisions because of their potentially oppressive nature and because of the potential impact which they had on the rights of the bankrupt:

For the reason that mischief or hardship might result from a misuse of the power to compel and conduct an examination the courts have been at pains to point out that care should be exercised before ordering an examination and that vigilance must be observed by those overseeing an examination to ensure that no injustice occurs ... Not only must injustice be guarded against, but ‘irrelevant or fishing questions or (those that) have an indirect purpose not connected with the bankruptcy must not be allowed’: see *Re Hodder; Ex parte Cogle* (1965) 7 FLR 436 at 437 and the cases cited at 438. ...

It must be remembered that if an examinee fails to answer a question that is put and required to be answered an offence is committed and the examinee is liable to a penalty of \$1000 or imprisonment for six months or both: see s 81(11) and 264C. In addition, the fact that an answer may be incriminating is not an excuse not to answer the question unless the person before whom the examination takes place otherwise directs: see s 81(11AA). So, it is obvious that if an examination is not strictly controlled real harm may be suffered by an examinee and by other persons as well. Private, sensitive or confidential information might be disclosed when it should not have been. Incriminating answers may be given when the questions that led to them should not have been asked. Some unfair advantage might be obtained for other litigation.

The possibility that an examination may be oppressive or unfair suggests to me that the quality of a ruling to allow a question to be put is something more than a procedural matter ‘at least in a practical sense’ to borrow from the language of Mason CJ in *Bond*. A ruling may not resolve any dispute of fact, but that is not a strict requirement of a ‘decision’. A ruling does of course resolve an issue that is raised namely whether a particular question should be allowed. Having regard to these considerations and the potentially serious consequences that may result from a ruling under s 81(10) to allow a question to be put, it seems to me that such a ruling is a ‘decision’ that is capable of review under the *ADJR Act*.<sup>180</sup>

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<sup>178</sup> (1997) 78 FCR 356; 149 ALR 38.

<sup>179</sup> [1996] 41 ALD 219.

<sup>180</sup> (1997) 78 FCR 356, 358–9; 149 ALR 38, 40–1.

4.3.22 In *McGibbon v Linkenbagh*<sup>181</sup> on the other hand, Kiefel J held that a decision not to grant an adjournment in a disciplinary hearing to enable the applicant to gain legal representation was a procedural decision reviewable under s 6 rather than a substantive decision reviewable under s 5. She conceded that the decision had substantive elements and was based on findings adverse to the applicant in that the Disciplinary committee refused the adjournment because they did not believe the applicant's evidence that he did not have sufficient notice of the hearing date to arrange representation. Despite these considerations, she held that the decision was reviewable under s 6 as conduct rather than under s 5 as a substantive decision:

It was not suggested by the second respondents that the matters raised could not be grounds for review under the *ADJR Act* and it was accepted by their submissions that the Committee was under an obligation to ensure fairness in the procedures it adopted. Since *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 it would not however be correct to approach the matter as one reviewing the decision not to grant the adjournment. It is not a 'decision' of which s3(1) and s5(1) *ADJR Act* speaks, since it is neither final nor determinative of a substantive matter. Although one is tempted to conclude that in a sense it has some operative effect and carries with it findings adverse to Mr McGibbon, it is to be seen as merely procedural and intermediate and as such is to be viewed as conduct engaged in as a step towards and for the purpose of the later 'decision'.<sup>182</sup>

4.3.23 Similar problems have arisen under the *JRA*. The Tasmanian Courts have tended to hold that decisions with respect to procedural issues are not reviewable in themselves as decisions under s 17 of the *JRA* (s 5 of the *ADJR Act*) or as conduct under s 18 (s 6 of the *ADJR Act*). However, the Courts have held that the act of continuing the proceeding on the basis of the procedural decision is reviewable conduct.<sup>183</sup> In coming to this conclusion, they have followed the statements of Mason CJ in *Bond* to the effect that procedural decisions themselves were not conduct for the purposes of s 6 of the *ADJR Act* (s 18 of the *JRA*), but preceded reviewable conduct, the continuing of the proceeding on the basis of the decision in question.<sup>184</sup>

4.3.24 In *State of Tasmania v Anti-Discrimination Tribunal and Others*,<sup>185</sup> the applicant challenged a decision of the Anti-Discrimination Tribunal to admit fresh evidence in a review of the decision of the Commissioner. The applicant had applied to the Tribunal to review a decision of the Commissioner to dismiss his complaint of victimisation. The Tribunal had decided that it was entitled in the course of the review to admit fresh documentary evidence. The applicant sought to challenge the ruling and/or the Tribunal's conducting of the review on the basis of that ruling under the *JRA*.

4.3.25 Porter J conceded that it was arguable that the decision to admit further evidence was a reviewable decision under s 17 in that it determined an issue of substance, the scope of the review, and was final and operative in a practical sense.<sup>186</sup> However, he came to the conclusion that the Tribunal's actions were more properly to be reviewed as conduct under s 18: 'the conduct which is properly the

<sup>181</sup> [1996] 41 ALD 219.

<sup>182</sup> *Ibid* [13].

<sup>183</sup> *State of Tasmania v Anti-Discrimination Tribunal and Others* [2009] TASSC 48; *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC 97 [32] (Crawford J).

<sup>184</sup> (1990) 170 CLR 321, [46]–[47], quoted below n 215.

<sup>185</sup> [2009] TASSC 48.

<sup>186</sup> *Ibid* [24].

subject of the scrutiny is that of continuing the review on the basis of the ruling which has been made.<sup>187</sup>

4.3.26 Similarly, in *Port of Devonport Corporation Pty Ltd v Abey*,<sup>188</sup> Crawford J was of the opinion that a decision of an Industrial Commissioner that he had jurisdiction to determine a case of unfair dismissal was not in itself a reviewable decision under s 17 of the *JRA* because it lacked finality. However, he held that the holding of a hearing on the merits of the case on the basis of the decision in question was reviewable conduct for the purposes of s 18 of the *JRA*.<sup>189</sup>

4.3.27 Some of the language in these and similar cases suggests that the action being challenged must be classified as a substantive decision under s 5 or as conduct under s 6. For reasons set out above, that is not the case. *Bond* did not establish that administrative action had to be classified as either a decision or conduct as a step in determining whether it was reviewable. After *Bond*, it remains possible that administrative action with mixed substantive and procedural elements could be reviewed either as conduct or as a decision. What *Bond* established is that administrative decisions which only have substantive effects are reviewable as decisions under s 5 or not at all, while administrative actions which only have procedural effects are reviewable under s 6 or not at all. Hence substantive decisions which cannot be reviewed under s 5 are not reviewable under s 6 and procedural actions which are not reviewable under s 6 cannot be reviewed under s 5. The effect was to exclude review of substantive decisions which are not operative or required by the statute but are merely steps in the chain of reasoning leading to a final decision.

### ***The current position – s 13 of the JRA***

4.3.28 The *JRA* s 13, following the *Judicial Review Act* (Qld) s 14, adopted a provision giving the Court the power to dismiss any application for review which it considers in all the circumstances to be premature or disruptive of the administrative process.

4.3.29 Section 13 of the *JRA* imposes a duty in some cases on the Court to dismiss an application for review of a matter which arises during the course of a proceeding where the applicant is entitled to seek review of any decision made at the end of those proceedings. Section 3 defines reviewable matter as a decision, conduct including conduct relating to the making of a decision and failure to make a decision or perform a legal duty. When s 13 is read in the light of this definition, it requires the court to dismiss some applications for review of decisions, conduct relating to the making of a decision and failure to make a decision or perform a legal duty arising in the course of a proceeding. The duty arises where the Court considers that it is desirable to dismiss the application in order to ensure the orderly conduct of the proceedings because the balance of convenience so requires and the Court is satisfied having regard to the interests of justice that it should dismiss the application. In considering the balance of convenience, the Court is required to consider but is not limited to considering the interests of the applicant, those of another person or party, the public interest and the consequences of any delay in the proceeding while the application is considered.

4.3.30 Section 13 requires the Court to consider a broad range of relevant matters. After considering those matters, it must dismiss the application if it decides that it is in the interests of justice so to do.

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<sup>187</sup> *Ibid* [20].

<sup>188</sup> [2005] TASSC 97.

<sup>189</sup> *Ibid* [32].

Section 14 permits the Court to exercise the power under s 13 at any time after the application for review has been lodged but requires that the power be exercised at the earliest possible time. It permits the Court to act of its own motion or on the application of one of the parties. The Court’s decision to dismiss an application is only appealable with the leave of the Court.

4.3.31 The Court has held that it should use s 13 to dismiss most applications which are premature in the sense that they will interrupt a pending investigation or process. It is of the view that the delays inherent in allowing such applications are so disadvantageous that they should be dismissed unless allowing the application produces a clearly discernible benefit:

However, should additional evidence provide a basis for the applicant to invoke the Court’s jurisdiction under the *JRA*, it is highly unlikely that the applicant would be allowed to avail himself of that jurisdiction as his originating application is premature insofar as it will interrupt a pending investigation. As to such an application, I repeat what I said in *Port of Devonport Corporation Pty Ltd v Abey* (supra) at pars 48 and 49:

‘... It is only in exceptional circumstances that it is appropriate to grant relief under the *Judicial Review Act 2000* in respect of a decision given in the course of ongoing proceedings. The delays consequent upon the fragmentation of proceedings are so disadvantageous that they should be avoided unless the grant of relief by way of judicial review can clearly be seen to produce a discernable benefit. Observations to this effect have been made in relation to committal proceedings in *Lamb v Moss* [1983] FCA 254; (1983) 49 ALR 533 at 564, *Yates v Wilson* [1989] HCA 68; (1989) 168 CLR 338 at 339 and *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 338 - 339. In my view these observations are generally applicable in relation to ongoing proceedings that are open to judicial review.’<sup>190</sup>

4.3.32 Despite the strength of these comments, the Court has allowed some applications brought within the course of proceedings. In some cases, it is clearly in the public interest as well as in the interests of all parties, including the administrator, to know of the scope of the administrator’s powers at the beginning of a proceeding rather than to have a long and expensive proceeding set aside because of a legal error about the scope of the powers in question. *State of Tasmania v Anti-Discrimination Tribunal*<sup>191</sup> is a case on point. That case involved an application to review a decision of the Anti-Discrimination Tribunal. The Tribunal decided, in a review of a decision of the Commissioner, to admit evidence which was not available to the Commissioner. Although the challenge was brought in the course of the proceedings, it was brought by the State of Tasmania in order to gain a ruling as to the scope of the Tribunal’s powers. The Tribunal adjourned the hearing to await the ruling before proceeding.<sup>192</sup> Although the application was in the course of proceedings and caused a delay, the Court did not consider dismissing it. Clearly it was in the interests of justice and in the public interest to allow it to proceed.

4.3.33 Although no doubt based on s 14 of the *Judicial Review Act 1991* (Qld), which it closely resembles, s 13 is broader in some respects than its Queensland counterpart and narrower in other

<sup>190</sup> *Von Stalheim v Anti-Discrimination Commissioner & Anor* [2005] TASSC 134, [9]. See also *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC 97, [35] (Crawford J); *Houghton Pty Ltd v Resource Development and Planning Commission* [2005] TASSC 58.

<sup>191</sup> (2009) 19 Tas R 54.

<sup>192</sup> *Ibid.*

ways. It is broader in that it empowers the Court to dismiss premature or disruptive applications for review of conduct related to the making of a decision as well as empowering the Court to dismiss premature and disruptive applications for review of decisions and failure to make decisions. Section 14 of the Queensland Act, on the other hand, only empowers the Court to dismiss premature and disruptive applications for review of decisions and failure to make decisions, not for review of conduct. However, in one important respect s 13 is narrower in that, unlike s 14, it does not apply to the prerogative remedies.

4.3.34 This Issues Paper argues below that s 13 should extend to the prerogative remedies as there is no reason why it should be possible to bring premature or disruptive actions under them but not under the *JRA*.<sup>193</sup> However, there is no good reason for excluding applications for review of conduct from the scope of s 13 as the Queensland Act does. They can be as premature and disruptive as premature applications to review decisions are, as attempts to review directions given at directions hearings show.<sup>194</sup> Therefore, s 13 should continue to require the Court to dismiss premature applications to review conduct.

### ***The impact of Bond on s 13 of the JRA***

4.3.35 The Supreme Court has applied the narrow *Bond* interpretation of decision to the *JRA*.<sup>195</sup> This section considers the implications of that interpretation for s 13, suggesting that s 13 assumes a broader interpretation of decision and that the *Bond* interpretation deprives the section of much of its effect.

4.3.36 Section 13, in authorising the Court to dismiss premature actions, addresses the issue which led in part to the decision in *Bond* to adopt a narrow interpretation of the word decision and to draw a distinction between review of decisions under s 5 and of conduct under s 6 of the *ADJR Act* (ss 17 and 18 of the *JRA*), so as to prevent review of fact finding and other decisions leading to a final decision. Yet the decision in *Bond* limits the scope of s 13. If the decision in *Lamb v Moss* that decision should be interpreted broadly had remained good law, s 13 would have been available to dismiss challenges to decisions, to conduct related to the making of a decision and to failure to make a decision where the decisions, the conduct and the failure to make a decision occurred in the process of making a final decision.

4.3.37 *Bond* greatly limits the scope of s 13. Section 13 requires the Court to dismiss some applications for review of reviewable matters arising in the course of a proceeding. As noted above, s 3 defines reviewable matter as a decision, conduct including conduct relating to the making of a decision and failure to make a decision or perform a legal duty. When s 13 is read in the light of this definition, it requires the court to dismiss some applications for review of decisions, conduct relating to the making of a decision and failure to make a decision or perform a legal duty arising in the course of a proceeding.

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<sup>193</sup> [4.3.79]–[4.3.82] below.

<sup>194</sup> See *Commissioner of Taxation v Beddoe* (1996) 68 FCR 446; [1996] FCA 78; [1996] FCA 1661; (1997) 148 ALR 383; *Geographical Indications Committee v O'Connor* [2000] FCA 1877, [20], [28]. See also *Somnored Ltd v Commissioner of Patents* [2006] FCA 765.

<sup>195</sup> *King v Director of Housing* [2013] TASFC 9; *State of Tasmania v Anti-Discrimination Tribunal* (2009) 19 Tas R 54, [21]–[24]; *Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995* [2016] TASSC 11, [27]–[30]; *G F Noye Pty Ltd v Resource Management and Planning Appeal Tribunal* [2007] TASSC 109 (19 December 2007); *Von Stalheim v Anti-Discrimination Commissioner & Anor* [2005] TASSC 134; *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC 97, [26]–[32]; *Houghton Pty Ltd v Resource Development and Planning Commission* [2005] TASSC 58, [8]–[9].

The decision in *Bond* effectively excludes many decisions made in the course of a proceeding, some but not all conduct relating to the making of a decision and failure to make decisions from the scope of s 13. As a result, s 13 is left with little work to do as the only reviewable matters arising in the course of a proceeding to which it could apply are the occasional operative decision made in the course of a proceeding, some conduct relating to decisions, especially where that involves procedural issues, and failures to perform a legal duty which are not failures to make a decision.

4.3.38 *Bond* held that decision for the purposes of the *ADJR Act* and by implication the *JRA* means operative decision required by the legislation in question. Hence, it rules out review of decisions made in the course of a proceeding unless they are in some sense final and operative or are required by the legislation in question.<sup>196</sup> As decisions made in the course of a proceeding leading to a final and operative decision are rarely themselves final and operative or required by the legislation, most fall outside the *Bond* interpretation of decision. As, according to *Bond*, they are not decisions for the purposes of the Act, they fall outside the scope of reviewable matter and s 13 does not apply to them. As they are not reviewable, no application for review may be brought with respect to them. As no application for review may be brought, no power to dismiss such an application where it is premature is needed.

4.3.39 Applying *Bond*, s 13 rarely applies to failures to make a decision in the course of a proceeding for similar reasons. Section 7 of the *ADJR Act* (s 19 of the *JRA*) permits review of failures to make decisions and failures to perform legal duties. There is little doubt that the meaning of decision in s 19 is the same as in s 17 which permits review of decisions. As *Bond* held that decision for the purposes of s 17 means final and operative decision, it is reasonable to assume that decision has a similar meaning in s 19, so that that section only permits the review of failure to make a final and operative decision. As decisions made in the course of a proceeding are rarely final and operative, failure to make such a decision is not a failure which is reviewable under the *JRA* and hence is not a reviewable matter for the purposes of s 13.

4.3.40 Applying *Bond*, the relationship between conduct relating to the making of a decision and s 13 is more complex. If decisions made in the course of a proceeding are rarely final and operative and hence are rarely decisions for the purposes of the *JRA*, conduct for the purposes of making those decisions is prima facie not conduct for the purposes of making a decision for the purposes of the *JRA*. Hence such conduct is not a reviewable matter and does not fall within the scope of the power which s 13 confers. However, if the conduct occurs within the course of a proceeding which leads to an operative, reviewable decision, and if the decision to which it relates is an essential step in the reasoning or process which leads to the reviewable decision, it may be conduct for the purpose of making a reviewable decision and reviewable on that basis. Hence it could be a reviewable matter for the purposes of s 13. Where the conduct which occurs in the course of a proceeding only relates to a decision which is not an essential step in the reasoning or process which leads to the final decision, it is unlikely to be conduct for the purposes of the *JRA* and is unlikely to be a reviewable matter for the purposes of s 13.

4.3.41 Besides, *Bond* drew a distinction between substance and procedure, holding that procedural decisions are conduct rather than decisions for the purposes of the *ADJR Act*. If that reasoning is

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<sup>196</sup> [1990] HCA 33; (1990) 170 CLR 321, [32]–[33] (Mason CJ with whom Brennan and Deane JJ agreed), [25]–[29] (Toohey and Gaudron JJ).

applied to the *JRA*, review of such decisions is review of conduct under s 18 rather than review of a decision under s 17. Reviewable conduct may and indeed is likely to arise in the course of a proceeding. As procedural decisions are conduct, they can be reviewed whether or not they are in any sense final and operative as long as the procedure relates to a final and operative decision.<sup>197</sup>

4.3.42 To sum up, adopting the interpretation of decision which was upheld in *Bond* deprives s 13 of much of its effect. *Bond's* interpretation of decision takes from the Court the power to consider many types of application to review matters arising in the course of a proceeding, greatly reducing the importance of the power which s 13 grants to dismiss such applications. There will be relatively few cases, mostly dealing with procedural issues, to which the power it confers to dismiss a premature action will apply. That is inconsistent with the drafting of s 13. The section assumes the correctness of a broader interpretation of decision in which decision extends to decisions made in the course of a proceeding as well as the final, operative decision which results from the proceeding.

4.3.43 The fact that s 13 is based on a broader interpretation of decision than the one which *Bond* adopted suggests that the drafters of the *JRA* rejected the narrow interpretation of decision adopted in *Bond*. However, as noted above, the Supreme Court has applied that narrow interpretation to the *JRA*.<sup>198</sup>

4.3.44 More importantly, if *Bond* is accepted, there may be little point in retaining s 13 in its current form. As shown above, if decision is interpreted as final and operative decision, the scope of *JRA* review in the course of a process is for the most part limited to review of conduct, that is of procedural issues. Therefore, the Court has little need for a power to dismiss applications for review of decisions and failure to make decisions on the grounds that they are premature. This raises the issue of whether s 13 should be amended to reflect the interpretation of decision adopted in *Bond* or whether the definition of decision should be amended to make it clear that the narrow interpretation of decision adopted in *Bond* does not apply in Tasmania.

### ***Handling premature applications for review – the Bond rule or the s 13 discretion***

4.3.45 Whether we should amend s 13 to reflect the *Bond* interpretation of decision or whether we should amend the definition of decision to reject the *Bond* interpretation and retain s 13 in its present form depends on which is the better approach to dealing with premature applications for review. The *Bond* approach is a rule-based approach in that it adopts the rule that reviewable decisions be final and operative or required by the legislation so as to rule out challenges to decisions made in the process of arriving at a final and operative decision, especially decisions on questions of fact. By limiting reviewable decisions to decisions which are operative in that they alter a person's legal position, the *Bond* interpretation seeks to rule out the possibility of multiple challenges to a process leading to an operative decision. In this way, it seeks to rule out premature challenges and challenges designed to frustrate and slow down government decision making.

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<sup>197</sup> *JRA* s 18.

<sup>198</sup> *King v Director of Housing* [2013] TASFC 9; *State of Tasmania v Anti-Discrimination Tribunal* (2009) 19 Tas R 54, [21]–[24]; *Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995* [2016] TASSC 11, [27]–[30]; *G F Noye Pty Ltd v Resource Management and Planning Appeal Tribunal* [2007] TASSC 109 (19 December 2007); *Von Stalheim v Anti-Discrimination Commissioner & Anor* [2005] TASSC 134; *Port of Devonport Corporation Pty Ltd v Abey* [2005] TASSC 97, [26]–[32]; *Houghton Pty Ltd v Resource Development and Planning Commission* [2005] TASSC 58, [8]–[9].

4.3.46 Section 13, rather than adopting a general rule, requires the judges to consider each application for review during the process on its merits. In determining whether an application must be dismissed, the Court must take into account some very broad considerations such as the orderly conduct of the administrative process in question, the balance of convenience and the interests of justice. These matters require the exercise of judgment, so that reasonable judges will often disagree about the result.

4.3.47 There are a number of good reasons for preferring s 13 to *Bond* as a means of preventing premature applications for review. Firstly, experience in applying *Bond* to the *ADJR Act* suggests that it has not solved the problem of premature actions or simplified the law. The Federal Court has often been reluctant to interpret *Bond* as a rule-based approach in which:

- substantive decisions which are final and operative or required by the statute are reviewable and those which are not final and operative or required by the legislation are unreviewable; and
- procedures are reviewable if they relate to the making of a final and operative decision.

4.3.48 Instead, the Court has tended to weigh general considerations such as the impact or lack of impact of a decision on the applicant and the likely impact of review on the administrative process in determining whether decisions or procedures are reviewable.

### ***Bond and determining which substantive decisions are reviewable***

4.3.49 According to *Bond*, not all substantive decisions are reviewable. *Bond* held that reviewable decisions are decisions for which provision is made by or under legislation. Usually such decisions are final and operative in the sense that they involve a final determination of the issue of fact to be determined:

That answer is that 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 a 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.<sup>199</sup>

4.3.50 The passage appears to adopt a simple definition of a reviewable decision in that a decision is reviewable if it is authorised or required by statute, or to use the words of Mason CJ, quoted above, is ‘one for which provision is made by or under a statute’. Such decisions are determinative in that they determine an issue which a statutory provision gives an official the power to determine, sometimes as a step in a process to a final decision. They are operative in the sense that they have some legal consequences, although they do not necessarily have any legal consequences for the aggrieved person challenging them.

4.3.51 Complex legal processes may contain many such provisions and hence, on this interpretation, may give a litigant a number of opportunities to bring challenges to what is essentially the one administrative process. Taken literally, the passage does not appear to rule out such multiple challenges.

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<sup>199</sup> (1990) 170 CLR 321, [32] (Mason CJ with whom Brennan and Deane JJ agreed). See also [26]–[29] (Toohey and Gaudron JJ).

It points out that most decisions for which provision is made under a statute will be final and operative or determinative of the issue falling for consideration. But if the statute provides for the making of a finding or ruling on a point which is merely a step leading to the ultimate decision, that finding is a decision under an enactment and reviewable. The decision that Bond Corp, the licensees in the *Bond* case, were no longer fit and proper persons to hold a broadcasting licence was a decision which the statute required as a step in the process to a final decision. Because the statute required it, it was reviewable.<sup>200</sup>

4.3.52 To the extent that *Bond* sought to limit the possibility of challenges during the process rather than at its end, permitting review of all decisions which the legislation requires as steps in the process of making the final decision may operate inconsistently with the spirit even if not inconsistent with the letter of the decision.

4.3.53 Courts applying *Bond* have not always applied the simple understanding of reviewable decision set out above where it leaves litigants free to bring multiple actions challenging the different steps in a complex statutory procedure. *Edelsten v Health Insurance Commission*<sup>201</sup> is a good example. That case involved challenges to the Health Insurance Commission's review of Dr Edelsten's medical practice for over-servicing. The legislation, the *Health Insurance Act 1973* (Cth) set out a complicated procedure for investigating allegations of over-servicing. The applicant challenged two decisions which were made as part of that process. The first was a decision to refer the matter to the Minister or the Minister's delegate under reg 3(2)(b) of the *Health Insurance Commission Regulations*. The power to refer to the Minister or the Minister's delegate arose under reg 3(2)(b) if an investigation showed that there was sufficient evidence to warrant referral of the case to a disciplinary committee established under the *Health Insurance Act*. The second was a decision of the delegate, who after receiving the referral, decided that the matter should be referred to a disciplinary committee. He had an implied power to refer matters to a committee under s 82 of the *Health Insurance Act 1973* (Cth) which required a committee to consider matters which the Minister (or the Minister's delegate) referred to it.

4.3.54 Both the decisions which the applicant sought to have reviewed were made under statutory powers, the one express and the other implied. Both decisions were legally operative in that they were legally required steps in the process of determining whether a medical practitioner was over-servicing. They were also steps 'along the way in a course of reasoning leading to an ultimate decision'.<sup>202</sup> But that fact does not rule out review where, according to Mason CJ, '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'.<sup>203</sup> Hence, if it had simply applied the passage from Mason CJ's judgment quoted above, the Full Court of the Federal Court could have come to the conclusion that both decisions were final and operative in the relevant sense and reviewable. Steps along the way in the making of these decisions were the decision to compare a computer analysis of the applicant's use of certain procedures with those of other doctors to determine whether the applicant may have over serviced and similar decisions about what constituted evidence of over servicing. Decisions such as these would not have been reviewable under Mason CJ's reasoning.

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<sup>200</sup> Ibid [38].

<sup>201</sup> (1990) 27 FCR 26.

<sup>202</sup> *Bond* (1990) 170 CLR 321, [32] (Mason CJ).

<sup>203</sup> Ibid.

4.3.55 However, the Full Court of the Federal Court decided that neither decision was reviewable because neither had any legal effect on the applicant Edelsten, implying that a decision was final and operative only if it had a legal effect on the applicant's rights or legitimate expectations:

No rights of Dr Edelsten are affected by Dr Nearhos's decision (the decision to refer the matter to the Minister or the Minister's delegate under regulation 3(2)(b) of the Health Insurance Commission Regulations), nor does any 'legitimate expectation' arise from it. During the course of the investigations being made by Dr Nearhos, Dr Edelsten spent much time and energy in supplying information to Dr Nearhos and other officers of the Commission. This action by Dr Edelsten can be understood, but that action does not 'constitute rights of Dr Edelsten' in any relevant sense. Dr Edelsten was not required by law to take that action or to give any information or explanation. The legal 'rights' of Dr Edelsten were not affected by what the officers did. Dr Edelsten could have refused to cooperate and in so doing would not have committed any offence. For similar reasons, neither did the subsequent decision of Dr Dash to refer, as delegate of the Minister, the matter to the Committee pursuant to s. 82 affect any rights of Dr Edelsten or give rise to any legitimate expectation. Indeed, even when the Minister or his delegate refers a matter to the Committee pursuant to s. 82, the Committee, though bound by s. 94 to consider the matter, may decide no more than that Dr Edelsten may have rendered excessive services (s. 94(c)). But the Committee is not empowered to decide at that preliminary stage whether Dr Edelsten has or has not rendered excessive services, simply whether he may have rendered excessive services. It is only when the Committee reaches an affirmative view on that question that it is required to conduct a hearing into the matter (s. 94(j) and (k)). The machinery of the *Health Insurance Act* then comes into operation, requiring the Committee to give notice of the hearing to Dr Edelsten and particulars of the matter to which the hearing relates (s. 95); empowering it to issue summonses to Dr Edelsten and others for the production of documents and the giving of evidence at the hearing; and giving Dr Edelsten the right to legal representation at the hearing which must be conducted in private.<sup>204</sup>

4.3.56 The Federal Court justified this interpretation of *Bond* by pointing to its underlying rationale rather than to any particular words in the judgment:

The rationale underlying *Bond* is that Parliament could not have intended the *Judicial Review Act* to be a vehicle for judicial review of every decision of a decision-maker under a Commonwealth enactment. Some decisions will have real impact upon a person's rights, privileges or obligations; some will have no such impact, whilst others are mere stepping stones which may lead ultimately to the making of a decision which does affect the person's position.<sup>205</sup>

4.3.57 This interpretation reads the judgments in *Bond* in the light of the facts of the case, as well as its assumed rationale, in that the decisions found to be final and operative in that case were decisions which altered Bond Corporation's legal position, while those that were unreviewable did not. The finding that Bond Corporation was not a fit and proper person to hold a broadcasting licence enlivened the power of the Australian Broadcasting Tribunal to cancel its licence or to impose conditions on it. Hence it was reviewable. However, the decision that Bond was not a fit and proper person to hold a

<sup>204</sup> *Edelsten v Health Insurance Commission* (1990) 27 FCR 26, [47].

<sup>205</sup> *Ibid* [43].

broadcasting licence had no effect on anyone's legal position. It was only a step on the way to making the decision that Bond Corporation was not a fit and proper person to hold such a licence. As a result, it was not reviewable.

4.3.58 The Federal Court has not consistently taken into account the impact of the decision on the legal position of the parties, sometimes accepting that it is sufficient that the decision, although not finally determining the rights of the parties, is empowered by the relevant statute and hence falls within the *Bond* conclusion that 'the statute provided for the making of a finding or ruling on [the] point so that the decision, though an intermediate decision, might be described as a decision under an enactment'.<sup>206</sup> *Otter Gold Mines Ltd v Dep President B M Forrest of the Administrative Appeals Tribunal & Ors*<sup>207</sup> is a case in point. In that case, the applicant sought review of a decision of the AAT staying a decision of the ASC with respect to the purchasing of shares in a takeover battle until it had reviewed that decision on the merits. The Federal Court held that it had jurisdiction to review the staying order although that order did not finally determine the issue between the parties but stayed the decision of the ASC until the final decision was made.

4.3.59 Unlike Edelman, the court in *Otter* did not openly take into account the impact of the decision on the parties, simply applying the words of Mason CJ's judgment which suggest that intermediate decisions are reviewable if the statute in question provides for them. However, stay orders can have a substantial impact on the legal position of the parties. A refusal to grant a stay order in a case such as *Otter*, in which the challenged decision of the ASC was a decision to permit *Otter* to buy more shares in a company the subject of a takeover bid, may effectively decide the case because *Otter* may have acted on the permit before the challenge to the permit was decided. In those circumstances, it is not surprising that the Court decided that the stay order was reviewable.

4.3.60 Similarly, the Queensland Supreme Court in *Vega Vega v Hoyle & Ors*<sup>208</sup> held that two enquiries under the *Hospital and Health Boards Act 2011* (Qld) into the practice of Dr Vega Vega as a specialist urologist at the Rockhampton Hospital were reviewable decisions under the *Judicial Review Act 1991* (Qld). Applying *Bond*, the two reports were reviewable because they were determinative of the factual issues involved and were necessary preconditions to the making of a direction under s 199(5) of the *Hospital and Health Boards Act 2011* (Qld) with respect to the delivery of medical services at the hospital in question. Although there was no obligation to issue a direction on the basis of the reports, no direction could be made without taking them into account. As they were required under the legislation rather than mere administrative steps along the way to the making of a reviewable decision, they were reviewable.<sup>209</sup>

4.3.61 As in *Otter*, the court arrived at this decision without considering the impact of the reports on the rights of the applicant. However, it is clear from other parts of the judgment that the Court considered that the making of the reports did have an impact on the rights of the applicant, especially his right to practice.<sup>210</sup>

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<sup>206</sup> *Bond* (1990) 170 CLR 321, [32] (Mason CJ).

<sup>207</sup> [1997] FCA 85 (20 February 1997).

<sup>208</sup> [2015] QSC 111.

<sup>209</sup> *Ibid* [116]–[119].

<sup>210</sup> *Ibid* [120]–[128].

4.3.62 In other cases, the fact that a decision had a substantial impact on the rights of the applicant was held to be sufficient reason to hold that the decision was reviewable, even though the decision was made in the context of an on-going procedure. In *Clark v Wood*,<sup>211</sup> the Court held that a decision made in the examination of a bankrupt that the bankrupt had to answer a particular question was a reviewable decision because of the potential such decisions had to infringe the bankrupt's rights. Allowing the question to be put was a decision made under an enactment because the *Bankruptcy Act 1966* (Cth) regulated the examination of a bankrupt and compelled the bankrupt to answer questions. The Court held that the decision was substantive and hence reviewable because the questions might require the disclosure of confidential information or require the bankrupt to incriminate himself or herself or have some other negative impact on the bankrupt's legal position.<sup>212</sup>

### ***Bond and the review of procedural decisions as conduct***

4.3.63 *Bond* held that s 6 of the *ADJR Act* providing for the review of conduct permitted the review of procedures rather than of substantive decisions. However, it did not impose any obvious limits on the review of procedures to rule out the possibility of a number of reviews of different steps in the same procedure. In particular it did not adopt a rule similar to that adopted with respect to substantive decisions, limiting review to a final review after the procedure is completed except where the statute clearly contemplated other possibilities for review.

4.3.64 An ambiguity in *Bond* with respect to the review of procedures, especially procedural decisions, has opened up some scope for limiting procedural reviews. The key judgment is that of Mason CJ as he drew the now generally accepted distinction between review of substantive decisions under s 5 and the review of procedural questions as conduct under s 6. In his argument for limiting s 5 to the review of substantive decisions he argued that if procedural decisions were reviewable as decisions under s 5, it would leave little to be reviewed under s 6 as conduct.<sup>213</sup> This strongly implies that procedural decisions are to be reviewed under s 6 as conduct and that procedural decisions are likely to form the bulk of the matters to be reviewed under s 6. In support of this view, he gives an example of a procedural decision reviewable as conduct, the decision to grant an adjournment.<sup>214</sup>

4.3.65 However, later in his judgment, Mason CJ strongly suggests that procedural decisions are not reviewable per se as conduct under s 6. He argues that s 6 allows for review of actions taken in the conduct of proceedings and that it allows for the review of procedural decisions only incidentally, as something which precedes conduct. To support the argument, he gives the continuation of proceedings in a way which denies natural justice as an example of actions with respect to procedures which are reviewable as conduct under s 6:

The distinction between reviewable decisions and conduct engaged in for the purpose of making such a decision is somewhat elusive. However, once it is accepted that 'decision' connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative, the place of 'conduct' in the statutory scheme of things becomes reasonably clear. In its setting in s.6 the word 'conduct' points to action taken, rather than a decision made, for the purpose of making a reviewable decision. In

<sup>211</sup> (1997) 78 FCR 356; 149 ALR 38.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Bond* (1990) 170 CLR 321, [34], quoted above n 172.

<sup>214</sup> *Ibid.*

other words, the concept of conduct looks to the way in which the proceedings have been conducted, the conduct of the proceedings, rather than decisions made along the way with a view to the making of a final determination. Thus, conduct is essentially procedural and not substantive in character. Accordingly, s.3(5) refers to two examples of conduct which are clearly of that class, namely, ‘the taking of evidence or the holding of an inquiry or investigation’. It would be strange indeed if ‘conduct’ were to extend generally to unreviewable decisions which are in themselves no more than steps in the deliberative or reasoning process.

Accordingly, there is a clear distinction between a ‘decision’ and ‘conduct’ engaged in for the purpose of making a decision. A challenge to conduct is an attack upon the proceedings engaged in before the making of the decision. It is not a challenge to decisions made as part of the decision-making process except in the sense that if the decisions are procedural in character they will precede the conduct which is under challenge. In relation to conduct, the complaint is that the process of decision-making was flawed; in relation to a decision, the complaint is that the actual decision was erroneous. To give an example, the continuation of proceedings in such a way as to involve a denial of natural justice would amount to ‘conduct’. That is not to deny that the final determination of the proceedings would constitute a decision reviewable for denial of natural justice.<sup>215</sup>

4.3.66 Some decisions in the Federal Court have relied on the passages in *Bond* suggesting that what is reviewable under s 6 as conduct consists of actions rather than decisions to deny review to procedural decisions under the *ADJR Act*. For example, the Court in *Commissioner of Taxation v Beddoe* (*Beddoe*),<sup>216</sup> quoting the above passage, held that directions given by the AAT to the Commissioner of Taxation were not reviewable as decisions under s 5 because they were not substantive nor as conduct under s 6 because they were simply steps in the decision-making process.<sup>217</sup>

4.3.67 The decision was motivated by a concern that if review of directions given at directions hearings were permitted, it would fragment and delay the decision-making process unreasonably:

It is in my opinion wholly undesirable that the process contemplated by the *AAT Act* should be fragmented by applications seeking to challenge intermediate directions or determinations made along the way to reaching an ultimate determination of the issue before the Tribunal, in the same way that this Court should be reluctant to fragment the criminal process by entertaining applications under the *ADJR Act* in relation to committal proceedings and, in particular, intermediate rulings or determinations made in the course of committal proceedings rather than the ultimate decision to commit.<sup>218</sup>

4.3.68 In *Geographical Indications Committee v O’Connor*, the Full Court of the Federal Court followed the decision in *Beddoe* to hold that directions given in directions hearings are not reviewable either as decision or conduct. It endorsed the comments made in *Beddoe* about the undesirability of fragmenting administrative procedures by permitting challenges to intermediate directions or decisions made in the process of arriving at a final decision.<sup>219</sup> The case was one in which the decision-maker itself sought to

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<sup>215</sup> Ibid [46]–[47].

<sup>216</sup> (1996) 68 FCR 446; [1996] FCA 78; [1996] FCA 1661; (1997) 148 ALR 383.

<sup>217</sup> (1996) 68 FCR 446, 452–3.

<sup>218</sup> Ibid 453.

<sup>219</sup> *Geographical Indications Committee v O’Connor* [2000] FCA 1877, [20], [28]. See also *Somnored Ltd v Commissioner of Patents* [2006] FCA 765.

be joined as a party to the proceedings to ensure that the public interest was represented. Hence, the decision had no impact on private rights to be weighed against the undesirability of fragmenting administrative procedures which could follow from review of the direction.

4.3.69 Where a procedural decision or direction leads to a flawed process, the passage from *Bond* quoted above makes it clear that the flawed process may be challenged as conduct. But that does not entail that the decision or direction which leads to the flawed process may be challenged as conduct because it is not conduct in itself but according to the quoted passage, precedes that conduct. This line of argument is designed to rule out premature challenges and requires the courts to wait and see whether a direction or procedural decision in fact leads to a flawed process rather than intervene to review the direction itself on the grounds that it has the potential to lead to such a process. In *Geographical Indications Committee v O'Connor*, the Full Court of the Federal Court followed this approach in holding that a direction could not be challenged on the grounds that it denied natural justice.<sup>220</sup>

4.3.70 In other cases, the Court has permitted review of procedural decisions as conduct where those decisions have had a substantial impact on the legal position of the parties. For example, in *McGibbon v Linkenbach*,<sup>221</sup> the Court held that a decision not to grant an adjournment in a disciplinary hearing was reviewable as conduct under s 6 of the *ADJR Act*, even though it was a decision. In arriving at this decision, Kiefel J was influenced by the seriousness of the proceedings, which could have led to a decision to sack the applicant and by the serious consequences for him of not having legal representation.

### **Conclusion**

4.3.71 For reasons of length, the Issues Paper has only considered a small sample of cases. The sample is sufficient to show that the Federal Court, in applying *Bond*, has often applied the *Bond* interpretation of concepts such as decision and conduct in the light of broad concerns such as whether denying review would have a serious impact on the rights of the applicant and whether allowing it would unreasonably fragment the administrative process. However, it has not adopted this approach consistently. In other cases, the Court has interpreted *Bond* as laying down more clear-cut rules, allowing review of substantive decisions which are final and operative or are required by the legislation, regardless of the impact on administration or on the rights of the applicant.

4.3.72 The lack of consistency in approach suggests that *Bond* does not work well as a device for filtering out premature and disruptive challenges. Interpreted as a rule, it permits an applicant to challenge every step in a process where that step is required by the legislation regardless of the impact of each step on the applicant. It also may permit challenges to procedural steps and decisions as conduct, regardless of the stage in the procedure at which they are brought. If *Bond* were interpreted consistently in this way, it would not be an effective remedy for premature and disruptive applications and would need to be supplemented by another procedure for ruling out premature and disruptive applications which the *Bond* rules permitted, such as s 13. If another procedure were needed, there would be little point in retaining *Bond* rather than relying on that procedure alone.

4.3.73 On the other hand, if broad considerations such as the impact on the rights of the applicant and the possible disruption and delay of administrative processes are taken into account in a case by

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<sup>220</sup> [2000] FCA 1877.

<sup>221</sup> [1996] 41 ALD 219.

case assessment of whether a substantive decision was final and operative or merely a step along the way to such a decision and whether a procedural decision is reviewable or not, there is little point in retaining the *Bond* limits on the meaning of decision and conduct. It would probably lead to greater clarity and consistency if the courts were given a power to dismiss premature and disruptive applications for review and were directed to take these and other relevant considerations into account in deciding whether an application was premature or disruptive. Section 13 was intended to be such a power. Hence the best solution to the problem of preventing premature and disruptive applications is to reverse the decision in *Bond* and to retain s 13 in its current form.

4.3.74 Two other considerations support this conclusion. Firstly, the requirement that only final and operative decisions are reviewable does not rule out premature challenges or prevent litigants using the law to slow down and frustrate administrative procedures. Because the *ADJR Act* and the *JRA* do not replace but supplement the prerogative remedies, those remedies remain available to challenge decisions made in the course of an administrative process although they are not final and operative. Hence one result of *Bond* may be to increase the number of challenges based on the prerogative remedies rather than the *ADJR Act* and the *JRA*. That defeats one of the main aims of those Acts, which was to reduce reliance on the prerogative remedies and to provide a simpler and more effective remedy.

4.3.75 Secondly, in some cases it is advantageous to be able to challenge decisions which are made in the course of an administrative process whether or not those decisions are final and operative. If it is clear that any legal error in the making of a decision which is not final and operative will taint the final decision, it may be quicker and easier to permit a challenge to that decision when it was made rather than force the parties to wait until the final decision has been made. Forcing the parties to wait until the final decision has been made may result in the overturning of a long and complex administrative process which then has to be repeated. *Bond* does not provide a means of distinguishing this type of case from the case in which applications for review are being used to delay and frustrate the administration.

### ***Legislation to reverse the decision in Bond***

4.3.76 Because *Bond* is inconsistent with s 13 of the *JRA* and because it is difficult to apply, it is advisable to legislate to reverse it. The best way to legislate to reverse the decision in *Bond* may be to amend the definition of decision in the *JRA*, adding a provision such as the following:

Decision under an enactment includes a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment.<sup>222</sup>

4.3.77 The suggested amendment is deliberately broad enough to include all decisions which may arise in the course of a review. Section 13 may then be used to filter out any applications seeking review of a decision which are premature and disruptive. The TLRI takes the view that adopting a definition of decision which is broad enough to include all decisions which may be made in the course of an administrative process is most likely to simplify and clarify the law. Experience derived from *Bond* suggests that any attempt to exclude a class of decision from review is likely to complicate the law

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<sup>222</sup> The amendment should be to the definition of decision under an enactment, not simply to the definition of decision, for reasons explained in [5.5.4] below.

without working effectively as a filter. Hence the best way forward is to legislate to adopt a definition of decision which is sufficiently broad to include all decisions made in the course of an administrative proceeding and to give the courts a broad discretion to rule out any applications which are premature or disruptive.

4.3.78 Aronson has suggested a similar change to the *ADJR Act*.<sup>223</sup> He suggests that if such a change were adopted, it should be coupled with amendments to the right to reasons,<sup>224</sup> so as to ensure that applicants do not have a right to reasons with respect to every decision made in the course of an administrative process. This suggestion needs to be considered because of the possibility that giving a right to reasons for all decisions made in the course of an administrative process may impose too great a burden on the administration.

### ***Extending s 13 to the prerogative remedies***

4.3.79 Adopting a provision such as s 13 which gives the Court a broad power to dismiss premature and disruptive applications may have the unintended consequence of encouraging litigants to use the prerogative remedies rather than the *JRA* to challenge decisions made in the course of a government process. There are two reasons for not encouraging this result.

4.3.80 Firstly, there is no justification for it being easier to bring premature and disruptive actions under the prerogative remedies than under the *JRA*. Premature and disruptive applications should not be permitted whether under the *JRA* or the prerogative remedies if it is possible to prevent them. Secondly, as one of the aims of the *JRA* is to provide litigants with a simple alternative to the prerogative remedies, we should avoid as far as possible creating incentives to use the prerogative remedies rather than the *JRA*. That can be done by extending s 13 or a similar provision to the prerogative remedies.<sup>225</sup>

4.3.81 If, as suggested in Part 3, the prerogative remedies are incorporated in the *JRA*, s 13 will extend to them as a matter of course. It may be advisable to extend the operation of s 13 to the incorporated prerogative remedies and to extend the definition of reviewable matter under s 3 to include any matter reviewable under a prerogative remedy to cover matters other than those related to decisions which are reviewable under those remedies. No other changes would be needed.

4.3.82 If the prerogative remedies are not incorporated into the *JRA*, this Issues Paper has argued that they should be embodied in legislation re-establishing them on a firm legal footing.<sup>226</sup> A provision giving the Court a power similar to that in s 13 to dismiss premature and disruptive applications should be inserted in that legislation to prevent the remedies being used to bring premature actions and to disrupt government processes.

<sup>223</sup> Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law' (2005) 12 *Australian Journal of Administrative Law* 79, 84.

<sup>224</sup> *ADJR Act* s 13 and Schedule 2, which lists exceptions to the right. *JRA* s 29 and Schedule 3 which lists exceptions.

<sup>225</sup> The *Judicial Review Act 1991* (Qld) s 14, which is similar to s 13, extends to the prerogative remedies; s 14(a).

<sup>226</sup> Part 3 – the *JRA* and the Prerogative Remedies.

### ***Bond and uniformity***

4.3.83 *Bond* was a decision with respect to the scope of the *ADJR Act*. The Commonwealth legislature has accepted the interpretation of the Act adopted in *Bond* and has made no attempt to reverse it.

4.3.84 Other jurisdictions which have adopted legislation similar to the *JRA* have accepted the decision in *Bond*. Section 14 of the Queensland *Judicial Review Act 1991* provides the court with a power to dismiss premature and disruptive applications similar to that which s 13 of the *JRA* confers on the Tasmanian Court. The Issues Paper argues that s 13 assumes a broader interpretation of decision than that adopted in *Bond*.<sup>227</sup> As the Queensland section is similar in every relevant respect, the arguments presented above lead to the conclusion that it too is based on a broader interpretation of decision. However, the Supreme Court of Queensland has applied *Bond* to the Queensland Act.<sup>228</sup> Importantly, the plurality judgment of the High Court in *Tang*<sup>229</sup> applied *Bond* to that Act.

4.3.85 The ACT *Administrative Decisions (Judicial Review) Act 1989* does not contain a provision similar to s 13 of the *JRA* or s 14 of the *Judicial Review Act 1991* (Qld). In this respect it is more similar to the *ADJR Act* than to the *JRA* or the Queensland Act. Hence it is not surprising that the ACT Supreme Court has followed *Bond* in the interpretation of decision.<sup>230</sup>

4.3.86 If Tasmania adopted the amendment suggested above to extend decision to cover decisions in the course of a proceeding under an enactment whether or not the decision was final and operative or required by the enactment, the meaning of the term decision in the *JRA* would differ substantially from the meaning given to that term in similar Commonwealth, Queensland and ACT legislation. There are advantages in a small jurisdiction such as Tasmania adopting the interpretation which has been adopted in other larger jurisdictions. Relatively few cases arise in Tasmania so it assists the Tasmanian courts if they are able to consider cases interpreting similar legislation from other jurisdictions. The courts may face a more difficult task if Tasmania deliberately rejects the interpretation of a term adopted elsewhere.

4.3.87 Despite the advantages of a uniform approach to the interpretation of terms in similar legislation in different jurisdictions, there are good reasons for rejecting the interpretation of decision adopted in *Bond* which has been followed in other jurisdictions. As argued above, the courts have not been able to apply *Bond* with any degree of consistency and adopting a broad interpretation of decision and relying on s 13 to dismiss premature and disruptive applications is likely to lead to greater simplicity and consistency. These advantages outweigh any disadvantages resulting from Tasmania's going it alone.

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<sup>227</sup> See above [4.3.35]–[4.3.44].

<sup>228</sup> *Nona v Barnes* [2012] QCA 346; *Wilson v Coordinator-General Department of State Development* [2001] QCA 159; *Palmer v Chief Executive, QLD Corrective Services* [2010] QCA 316; *Resort Management Services Ltd v Noosa Shire Council* [1993] QCA 347.

<sup>229</sup> (2005) 221 CLR 99, [2005] HCA 7 (Gummow, Callinan and Heydon JJ).

<sup>230</sup> *Eastman v The Honourable Justice Anthony James Besanko and Attorney-General for the Australian Capital Territory* [2010] ACTCA 15 (17 August 2010) [200]–[205].

***Feedback is invited with respect to the following questions:***

**Question 3**

Should the definition of decision be broadened to include a decision or action that is necessary for the implementation of a statutory provision which operates to change the legal position of a person without any administrator having to make a decision so that such decisions are reviewable? If so, how should such a definition be worded?

**Question 4**

- (a) Is there a danger that the *JRA* will be used to bring premature or disruptive applications for review? If so, what is the best method of guarding against the danger — limiting the type of challenges which can be brought so as to rule out challenges which are premature and disruptive or giving the courts a discretion to rule out premature and disruptive challenges? Or do we need both methods?
- (b) Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the *JRA*? Or should they have some additional characteristics such as being ‘final and operative’ so that decisions made early in an administrative process are not reviewable, making premature and disruptive challenges more difficult?
- (c) If courts should have a discretion to rule out premature and disruptive challenges, should the concept of decision under an enactment be amended to include a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment?

## Part 5

# Decisions under an Enactment

## 5.1 Introduction

5.1.1 Sections 17, 18 and 19 of the *JRA* limit its scope to review of decisions, conduct relating to the making of decisions, and failure to make a decision. Section 4 of the *JRA* specifies that decisions to which the *JRA* applies must be administrative and made under an enactment. Limiting the scope of the *JRA* in these ways means that the scope of review under it is substantially narrower than review at common law. That reflected the policy of the first version of the Act, the Commonwealth *ADJR Act*, which was to leave review of decisions other than administrative decisions made under an enactment, to review under s 75(v) of the Constitution. It is arguable that it is not appropriate to limit the scope of the *JRA* in these ways in Tasmania today.

5.1.2 This Part commences by examining the definition of an enactment in the *JRA*, which is defined as an Act or statutory rule.<sup>231</sup> It is arguable that that definition is narrow and excludes some classes of legislation, including local government by-laws, planning schemes and other types of statutory plan, from the scope of review. Possible changes designed to broaden the definition are considered.

5.1.3 After considering the definition of enactment, this Part examines the approach which the courts have adopted to determining whether a decision is made under an enactment. The requirement that a decision to which the *JRA* applies must be made under an enactment has been interpreted as limiting review by reference to the legal source of the power to make the decision. In this it differs from other approaches to limiting the scope of judicial review, such as that of s 75(v) of the Constitution, which limits judicial review by reference to the person who made the decision, an officer of the Commonwealth, or the approach adopted in *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* (*Datafin*),<sup>232</sup> which defines the scope of judicial review by reference to the nature of the decision, whether it is public or private in nature.

5.1.4 Secondly, this Part examines the problems to which interpreting decisions under an enactment as limiting review by reference to the legal source of the power to make the decision has given rise and considers possible amendments to the *JRA* to overcome these problems. It then considers whether the scope of judicial review under the *JRA* should be extended beyond review under an enactment to review of decisions made under other sources of power such as the prerogative and contract.

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<sup>231</sup> *Rules Publication Act 1953* (Tas) s 2; *Legislation Publication Act 1996* (Tas) s 3.

<sup>232</sup> [1987] 1 QB 815; [1987] 2 All ER 770.

## 5.2 Issue 5: What is an enactment

***Should the definition of enactment in s 3 of the JRA be amended to include instruments as well as statutory rules and to make it clear that local government rules and by-laws are enactments although they are not statutory rules?***

5.2.1 Section 3 of the *JRA* defines an enactment as ‘an Act or statutory rule, and includes a part of an Act or statutory rule’. In some ways, this may be a narrow definition as there may be significant classes of legislation, such as local government by-laws, the State Planning Provisions and Local Planning Schedules adopted under the *Land Use Planning and Approvals Act 1993* (Tas) and Marine Farming Development Plans made under the *Marine Farming Planning Act 1995* (Tas) which fall outside the definition. In other ways it is broad in that it extends the definition of enactment to prerogative legislation applying in the State, such as Letters Patent.

5.2.2 The term ‘statutory rule’ is defined in the *JRA* as statutory rule within the meaning of the *Rules Publication Act 1953* (Tas). The *Rules Publication Act 1953* s 2 defines statutory rule as:

- (a) a regulation, rule, or by-law made under the authority of an Act by the Governor or by a rule-making authority;
- (b) a proclamation or notice, or an order-in-council, order, or other instrument that fixes the date of commencement of an Act or enactment or that –
  - (i) repeals or amends; or
  - (ii) extends, restricts, varies, modifies, or affects the operation of –
 the provisions, scope, or application of an Act or enactment; and
- (c) an instrument of a legislative character made in the exercise of the prerogative rights of the Crown and having force in this State –
 

but does not include a regulation, rule, or by-law, or any other instrument of a legislative character, that is made by a local authority or by a person or body of persons having jurisdiction limited to a district, locality, or part of the State.

5.2.3 The definition expressly excludes local government regulations and by-laws from the definition of an enactment. As a result, decisions of local authorities made under their by-laws are not reviewable under the *JRA*. There does not appear to be any good reason for this, especially as other decisions of local government made under legislation such as the *Local Government Act 1993* (Tas) are reviewable. Hence the definition of enactment needs to be amended to extend review to decisions of local authorities under their by-laws.

5.2.4 It is not clear whether planning provisions and marine farming development plans fall within this definition. It depends upon whether they can be classed as a regulation, rule or by-law made under the authority of an Act. They are made under the authority of an Act, State Planning Provisions and Local Planning Schedules being made under the *Land Use Planning and Approvals Act 1993* and Marine Farming Development Plans being made under the *Marine Farming Planning Act 1995*. If they are rules, regulations or by-laws, then the authorities which issue them, the Minister,<sup>233</sup> the State Planning

<sup>233</sup> The Minister after receiving a report from the State Planning Commission, makes State Planning Provisions, *Land Use Planning and Approvals Act 1993* s 27(1).

Commission<sup>234</sup> and the Minister acting on the recommendation of the Marine Farming Planning Review Panel<sup>235</sup> respectively, are rule making authorities for the purposes of the definition because the *Rules Publication Act 1953* defines a rule making authority as a person (other than the Governor) or a body of persons, whether incorporated or unincorporated, authorised by or under an Act to make statutory rules.<sup>236</sup>

5.2.5 Whether or not decisions under plans and planning provisions of the types mentioned are reviewable depends upon whether these plans and planning provisions are rules, regulations or by-laws. Two cases, *Fuller v Resource Management and Planning Appeal Tribunal*<sup>237</sup> and *Cameron v Resource Planning and Development Commission*<sup>238</sup> allowed review of decisions made under planning schemes issued under the *Land Use Planning Approvals Act 1993*. In both cases the issue was not raised and it was assumed that the planning schemes were enactments for the purposes of the *JRA*. If the issue had been raised, there is a reasonable possibility that the Court would have held that planning schemes were not regulations or rules, ruling out review.

5.2.6 It would be sensible to settle the issue by amending the *JRA* to make it clear that legislative instruments which are not obviously rules, regulations or by-laws are enactments for the purposes of the *JRA*. One way of doing that would be to define enactment as including legislative instruments other than rules, regulations and by-laws. The *ADJR Act* could be used as a model. It defines an enactment as including ‘an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A.’<sup>239</sup>

5.2.7 The courts have interpreted the term instrument broadly. *Chittick v Auckland*<sup>240</sup> held that to qualify as an instrument for the purposes of the *ADJR Act*, a document must be made under an enactment, authorise decisions of an administrative character and have the capacity to affect legal rights and obligations. Without qualification, this test is broad enough to give contracts made under authority conferred by statute the status of an instrument and hence of an enactment for the purposes of the *ADJR Act*.<sup>241</sup> To avoid this result, the Court qualified the test by adding that a document only qualified as an instrument if the authority which issued it had the power to make changes to it without the consent of the parties which it bound.<sup>242</sup>

5.2.8 The term instrument, as it has been defined is broad enough to include both local government by-laws and planning provisions and schemes such as those issued under the *Land Use Planning and Approvals Act 1993* and the *Marine Farming Planning Act 1995*.

5.2.9 However, it may be the best solution to substitute the term instrument for statutory rule in the *JRA* definition of enactment, bringing the *JRA* in line with the *ADJR Act*. If that were done, it would

<sup>234</sup> The State Planning Commission, with the approval of the Minister, makes Local Planning Schedules, *Land Use Planning and Approvals Act 1993* s 35L(1).

<sup>235</sup> *Marine Farming Planning Act 1995* s 31.

<sup>236</sup> Section 2(1).

<sup>237</sup> [2009] TASSC 51.

<sup>238</sup> [2006] TASSC 66.

<sup>239</sup> Section 3(1).

<sup>240</sup> (1984) 1 FCR 254.

<sup>241</sup> *Ibid* 264.

<sup>242</sup> *Ibid* 264–5.

exclude prerogative legislation from the definition of enactment, so that decisions made under such legislation would no longer be reviewable. Although prerogative legislation is not common in Tasmania and the provision is untested, it would be wrong to remove it from the *JRA*. There is little doubt that prerogative legislation was included in the definition of statutory rule incorporated from the *Rules Publication Act 1953* because in 1953, when that Act was passed, the Australia Act had not been adopted, so that the United Kingdom retained the power to legislate under the prerogative for the State. That power no longer exists<sup>243</sup> and little UK prerogative legislation remains applicable to Tasmania.

5.2.10 Because little UK prerogative legislation still applies in Tasmania and because the power to enact legislation under the prerogative of the Queen in the right of Tasmania is rarely used, the power to review decisions under prerogative legislation is currently not of great importance. Because Tasmania is no longer a colony, new prerogative legislation cannot alter the rights of the people.<sup>244</sup> However, prerogative legislation still has potential as a means of regulating schemes for the provision of benefits and services, especially where there is no intention to create a right to the benefit or service.<sup>245</sup> At some future time, prerogative legislation may be used more frequently because governments are relying more on the prerogative than they have in the past. It would be unfortunate if this happened after the power to review decisions under that type of legislation were removed from the *JRA*.

5.2.11 A better solution would be to add to the existing definition so that statutory rules and instruments were both included in the definition of enactments to ensure that the definition covers planning provisions and schemes as well as prerogative legislation. It would also be sensible to include a specific provision to the effect that local government and marine board rules and by-laws are enactments for the purposes of the *JRA* even though they are not statutory rules. These changes would deal with the problems while not changing the good features of the current definition.

***Feedback is invited with respect to the following question:***

#### **Question 5**

Should the definition of enactment in s 3 of the *JRA* be amended to include instruments as well as statutory rules to ensure that the definition covers planning provisions and schemes? Should a specific provision be added to the definition to make it clear that local government rules and by-laws are enactments although they are not statutory rules?

## **5.3 Decisions under an enactment – the current law**

### ***The source of the power to make the decision***

5.3.1 Almost since the inception of the *ADJR Act*, the term decision made under an enactment has been interpreted as requiring the Court to determine the legal source of the power to make the decision.

<sup>243</sup> *Australia Act 1986* (Cth) s 1.

<sup>244</sup> Prerogative legislation applying to a colony may affect rights, although to what extent is not clear; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038. However, prerogative legislation cannot alter rights and obligations in the country itself as distinct from its colonies and dependencies; *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co Rep 74, 77 ER 1352.

<sup>245</sup> See *R v Criminal Injuries Compensation Board; ex parte Lain* [1967] 2 QB 864, for a good example of such a scheme.

If an enactment is the source of the power, the decision is reviewable under the *ADJR Act*. If an enactment is not the source of the power, the decision is not reviewable although it may have other types of connection to an enactment.

5.3.2 Other approaches to determining whether a decision was made under an enactment which did not focus exclusively on the source of power to make the decision were suggested but abandoned. In an early decision under the *ADJR Act*, *Burns v Australian National University* (*Burns*),<sup>246</sup> Ellicott J suggested a test based on the core functions which the statute imposed on the decision-maker. If the decision related to the core functions which the enactment imposed on the decision-maker, the decision was made under the enactment, even if it was also made in the exercise of contractual powers:

Consistent with this approach, I am of the opinion that if a statutory authority makes a decision by which a person is aggrieved, which is made under broad statutory powers but which lies at the very heart of those functions for which the body was established by statute, the courts should be slow to find that such a decision, if administrative in character, is not made ‘under an enactment’ simply because the occasion for the exercise of the power arises out of a contractual situation. The clear object of the Act is to confer rights on aggrieved citizens as a result of the exercise of powers conferred by an enactment on Ministers, public servants, statutory authorities and others. In many cases the power exercised will be precisely stated in the legislation. In other cases the power to do a particular thing will be found in a broadly stated power. The Act should not be confined to cases where the particular power is precisely stated. In each case the question to be asked is one of substance, whether, in effect, the decision is made ‘under an enactment’ or otherwise.<sup>247</sup>

5.3.3 The case dealt with the dismissal of a professor. As decisions with respect to the employment of deans and professors related to teaching and research, core functions of the university, Ellicott J held that the decision was reviewable.

5.3.4 The source of power to make the decision was not irrelevant to this test. Ellicott J pointed out that the decision in question was made under broad statutory powers. However, it was not the only relevant consideration. The fact that the decision lay at the heart of the functions which the statute established the university to perform was also relevant to determining that the decision was made under an enactment.

5.3.5 In overruling that decision, the Full Court of the Federal Court rejected the core functions test on the grounds that it was impossible to distinguish between the core functions of the university and other functions which it performed. All were necessary so that contracts of employment with respect to those functions were equally necessary:

We cannot accept that to determine whether a decision is made ‘under an enactment’ it is legitimate to distinguish between decisions about matters lying at the very heart of the existence of the appellant or its Council and other matters. The powers vested in the Council by s. 23 are in substance to do whatever is necessary to control and manage the activities of the appellant. It is difficult to conceive of wider or more general powers. It is true that deans and professors are mentioned as the first objects of the power of appointment conferred by that section; but we attach no importance to that circumstance. We see no reason for

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<sup>246</sup> [1982] FCA 59.

<sup>247</sup> *Ibid.*

distinguishing between decisions of the Council of the appellant relating to professors and decisions relating to its other servants. A University cannot function without its teaching staff — whether they be deans, professors, readers, lecturers or tutors. Nor can it function without its other officers or servants — whether registrars, librarians, groundsmen or security officers.

Where is the line to be drawn to determine those who perform essential functions and those who do not? If deans and professors perform essential functions, do readers, lecturers and tutors perform them also? What of the appellant’s librarians or registrars? Many other examples spring readily to mind; but we need not mention them. In our opinion the particular position held by a member of the appellant’s staff is not itself determinative of the question whether a decision of the Council as the governing body of the appellant was made under the University Act. Our conclusion may be different if the University Act or Statutes made by the Council thereunder gave special statutory status, privilege or protection to people who held high positions or office in the appellant; but they do not do this.<sup>248</sup>

5.3.6 As it rejected the view that the core functions which the legislation vested in the decision-maker could be distinguished from its other functions, the Full Court rejected the core functions test for a test which looked to the source of the power. As the source of the power relied on to dismiss Burns was his contract of employment, the decision was made under that contract, not under the enactment. Hence the decision was not reviewable:

The primary Judge said that the word ‘administrative’ carries with it the notion of ‘managing, executing or carrying into effect’. Thus if any officer or servant of the appellant could show a ground for a review of a decision by the appellant or its Council dismissing him or otherwise affecting him adversely in his employment he may be entitled to apply for an order of review under the *Judicial Review Act*. Mindful of the far-reaching consequences of this conclusion his Honour drew the line between decisions about matters fundamental to the appellant’s existence and other decisions. But if that line of demarcation is impermissible, as we think it is, it follows that a vast array of decisions relating to the employment of the appellant’s officers and servants, and any other decisions of a managerial or administrative nature, may be susceptible of review under the *Judicial Review Act* simply because the Council’s charter (s. 23) empowers it, in effect, to do whatever is necessary to run the affairs of the appellant. *This serves to illustrate to our mind the correctness of the conclusion on the facts of this case that the Council’s decision to dismiss the respondent was made under the contract of engagement of 1966 and not under the powers conferred by s. 23 of the University Act* (emphasis added).<sup>249</sup>

5.3.7 Since *Burns*, the Court has used a source-based test rather than a test based on core functions or statutory purposes to determine whether a decision is under an enactment. In *Glasson v Parkes Rural Distributions Pty Ltd* (*‘Glasson’*)<sup>250</sup> the High Court applied the source of the power to make the decision test to hold that a decision that Parkes had been overpaid under a scheme to subsidise fuel prices in country areas was not a decision under an enactment for the purposes of the *ADJR Act*. In doing so, the High Court made it clear that the source of the power was to be determined by identifying the legal power under which the decision was made, not by considering whether the decision was made in

<sup>248</sup> *Australian National University v Burns* [1982] FCA 191; (1982) 64 FLR 166.

<sup>249</sup> *Ibid.*

<sup>250</sup> [1984] HCA 49; (1984) 155 CLR 234.

pursuance of Commonwealth legislation or a Commonwealth scheme. Since *Glasson*, that legalistic approach has been the dominant approach to determining whether a decision was made under an enactment.

5.3.8 Under the subsidy scheme considered in *Glasson*, the Commonwealth granted the States money under s 96 of the Constitution to be used to subsidise fuel prices in accordance with guidelines which the Commonwealth laid down. The State enacted legislation to implement the scheme. Under that legislation, the State appointed officers to determine the amount of the subsidy to be paid to rural fuel suppliers and to determine if there had been any over-payments. Glasson, an officer appointed under the State Act, decided that Parkes had been over-paid and issued Parkes with a certificate demanding repayment. Parkes applied for review of Glasson's decision under the *ADJR Act*. The Full Court of the Federal Court held that although the decision was made by a State officer under State legislation, it was a decision under a Commonwealth enactment for the purposes of the *ADJR Act* because it was made in pursuance of a Commonwealth scheme set out in a Commonwealth enactment. The fact that it could also be said to have been made under a State law was not relevant:

On the facts of the present case, the decision of the respondent was made under the Commonwealth Act and the Scheme and thus was made under an enactment within the *Judicial Review Act*. In making the decision the respondent acted in pursuance of the Scheme which had been formulated by the Minister pursuant to the Commonwealth Act. It is true that the respondent was authorised by an appointment under the State Act, but that is beside the point. The respondent was acting in pursuance of the Scheme being an instrument under the *Judicial Review Act*. The power conferred by the State Act was a necessary power in order to implement the Commonwealth Act. To say that the decision was also made under the *Petroleum Products Subsidy Act 1965* (NSW) would not be to deny these propositions.<sup>251</sup>

5.3.9 In arriving at the conclusion that the decision was made under an enactment for the purposes of the *ADJR Act*, the Full Court of the Federal Court held that matters other than the source of the legal power to make the decision were relevant. They took into account that the scheme in question was a Commonwealth scheme which had been formulated by a Commonwealth Minister under Commonwealth legislation.

5.3.10 The High Court reversed the decision of the Full Court of the Federal Court. In doing so, it focussed solely on the legal source of the power to make the decision. As the source of that power was a State law, the decision was not made under a Commonwealth enactment and hence was not reviewable under the *ADJR Act*:

The Full Court held that the decision embodied in the certificate was made under the Commonwealth Act and the scheme, notwithstanding that it was also made under the State Act. With all respect, we cannot agree. The appellant derived his authority to give the certificate in question from the State Act and from no other source. He was, as the scheme envisaged, appointed under the State Act to be an authorised officer, and the power which he exercised was conferred on him by s.8(3) of that Act. The certificate derived its legal efficacy to impose a legal liability on the distributor entirely from the State Act, and in particular from s.10. No action taken under the Commonwealth Act or under the scheme could either strengthen, or detract from, the force of the certificate under s.8(3). The State Act of course proceeds on the assumption that there was in force a scheme by reference to

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<sup>251</sup> *Glasson* [1983] FCA 152; (1983) 77 FLR 195.

which the amounts payable should be ascertained and an authorised officer, in giving a certificate, would be bound to consult the scheme and to ascertain the amounts payable in accordance with the scheme. However, although the scheme would give the authorised officer authoritative guidance, it did not give him power or authority to make the decision to issue the certificate and it was not the legal source of the rights and liabilities which the certificate created and imposed. Finally, the certificate issued by the appellant purports to have been issued under s.8(3) of the State Act and closely follows the words of that section, which although similar to are not the same as those of cl.E2(5) of the scheme. The issue of the certificate might have a practical effect on the rights and liabilities of the Commonwealth and the State inter se as measured by the scheme: it might lead to a repayment by the distributor to the State, and thereby affect the adjustment of accounts between the Commonwealth and the State pursuant to ss.3 and 11 of the Commonwealth Act and cl.E7 of the scheme, but that does not mean that it was issued under the scheme. When neither the Commonwealth Act nor the scheme is the source of the power to appoint the decision-maker, or the source of his power to make the decision, or the source of the decision's legal effect, it cannot be said that the decision was made under that enactment. For these reasons, we find it impossible to say that the certificate was issued under the authority, or in pursuance, of the Commonwealth Act or the scheme, or that it represents or embodies a decision made under the Commonwealth Act or the scheme. It was issued entirely under the State Act. It was not a decision 'under an enactment' within the *Administrative Decisions (Judicial Review) Act*, and it follows that the objection to the competency of the application was rightly upheld by McGregor J.<sup>252</sup>

5.3.11 In *Glasson*, the High Court gave its imprimatur to the legal source of the power to make the decision test for determining whether a decision was made under an enactment. Since *Glasson*, this test has been the accepted test and the courts have worked out its implications.

### Multiple sources

5.3.12 The adoption of the legal source of the power to make the decision test as the test for determining whether a decision was made under an enactment focussed attention on the problem of multiple sources of power to make the decision. The most common form of the problem involves a situation in which a statute confers a general power to contract on a government agency and using that power, the agency enters into contracts and exercises contractual powers. Are the decisions the agency makes in the exercise of powers conferred on it under contract made under the enactment or under the contract or under both? Often the answer is not clear because decision-makers rarely if ever specify the source of power on which they relied, statute or contract. As a result, courts have to deduce the answer from indirect evidence.

5.3.13 Both the judgment of Ellicott J and of the Full Court in *Burns* sought to solve the problem of multiple sources of power to make the decision. Ellicott J's core functions test allowed for the possibility that a decision could be made under an enactment even if the decision was also made under a contract. In principle, the source of power to make the decision test which the majority in the Full Court adopted is also consistent with that possibility; there is no reason why there should not be two sources of power to make a decision, a statutory source and a contractual source. However, the Full

<sup>252</sup> [1984] HCA 49; (1984) 155 CLR 234.

Court in *Burns* used the source of power test to rule out that possibility because it was seen as opening up a huge range of contractual and employment decisions to review under the *ADJR Act*.

5.3.14 The High Court's decision in *Glasson* was consistent with the approach which the Full Court of the Federal Court adopted in *Burns*. In *Glasson*, the High Court adopted a legalistic approach which led to the conclusion that there could only be one legal source of the legal power to make a decision, in that case the State Act. In doing so it rejected the broader approach of the Full Court of the Federal Court, which held that there could be more than one source of that power. In reaching this conclusion, the High Court encouraged courts to apply the legal source of the power to make the decision approach so as to rule out review where the enactment was not the ultimate source of the power to make the decision.

5.3.15 As a result, the courts have continued to use the source of power theory to rule out the possibility that a decision may be reviewable under the *ADJR Act* and the *JRA* where the decision was made under a contract. However, the issue is not clear cut because the Full Court conceded in *Burns* that the decision may have been reviewable if, as could have been the case, the terms governing dismissal had been set out in an enactment, such as university rules. Since *Burns*, the courts have struggled to develop criteria for determining when a decision is made under an enactment rather than under a contract or other source of power.

5.3.16 The current law with respect to when a decision is 'under an enactment' was laid down by the High Court in *Tang*.<sup>253</sup> That case was decided under the *Judicial Review Act 1990* (Qld) but it is accepted that it applies to the *ADJR Act* and it has been applied to the *JRA*.<sup>254</sup>

5.3.17 In that case, the majority laid down a two-pronged test for determining whether a decision was made under an enactment. Firstly, the decision had to be one which was required or authorised by the enactment and secondly it had to change rights and obligations:

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.<sup>255</sup>

5.3.18 Although *Tang* has been followed by the Tasmanian Supreme Court, it is arguable that it does not apply to the *JRA* because of differences between the *JRA* and the *ADJR Act*. The second limb of the *Tang* test requires that for a decision to be under an enactment, it must confer, alter or otherwise affect legal rights and obligations. That test may be inconsistent with the scope of the *JRA*, which

<sup>253</sup> [2005] HCA 7; (2005) 221 CLR 99.

<sup>254</sup> With respect to the *JRA* see *Smillie v Legal Aid Commission of Tasmania* [2014] TASSC 19.

<sup>255</sup> *Ibid* [89].

differs from the *ADJR Act* in that, on one interpretation, it specifically allows review of decisions which are legally incapable of altering or affecting legal rights and obligations. The definition of enactment in the *JRA* extends to a class of legislation, legislation under the prerogative, which is no longer legally capable of altering legal rights and duties, permitting review of decisions made under legislation of that type.<sup>256</sup> As this class of legislation cannot authorise decisions which alter rights and duties, the *JRA* specifically allows review of a class of decisions which do not alter rights and duties. The second limb of the *Tang* test, which requires that to qualify as a decision made under an enactment, the decision must confer or alter rights and obligations is inconsistent with this aspect of the *JRA* and cannot apply to it.

5.3.19 It may be objected that decisions made under UK prerogative legislation enacted while Tasmania was legally a British colony can affect rights and duties. Such decisions are decisions made under an enactment and are reviewable under the second limb of the *Tang* test. Hence extending review to review of decisions made under prerogative legislation does not necessarily extend review to decisions which cannot alter rights and duties. It simply extends review to decisions under prerogative legislation which can and do affect rights and duties, not to those decisions which cannot affect rights and duties.

5.3.20 Because it is not clear whether *Tang* applies to the *JRA*, it is necessary to consider whether it should do so. The *Tang* test reinforces the decision in *Bond* that to be reviewable, a decision has to be final and operative or required by the legislation in question.<sup>257</sup> The second limb of the test, the requirement that ‘the decision must itself confer, alter or otherwise affect legal rights or obligations’ repeats, in different words, the *Bond* requirement that decisions be final and operative or required by the statute. Both emphasise that the decision normally must alter the legal position by conferring powers or changing rights and duties, although *Bond* ameliorated this requirement by stating that the decision must, at least in a practical sense, be final and operative.<sup>258</sup> However, the *Tang* test narrows the *Bond* test by effectively ruling out review in cases where the decision is final and operative in a practical rather than legal sense, because these are cases in which rights and duties are not affected or altered. That is unjustifiable. The importance of allowing review where the decision is final and operative in a practical sense is discussed below.<sup>259</sup>

5.3.21 Although the majority decided that it was not a case of multiple sources of power to make a decision, *Tang* sought to settle the problem of multiple sources of power to make a decision. This problem arose in a string of cases in which the Federal Court was asked to review decisions made by a statutory authority under a contract or some other general law relationship. The common feature in these cases was that the source of the authority’s power to enter the contract or other legal relationship was its enabling statute, but the specific power to make the decision under challenge was set out in the contract or other relationship, not in the authority’s enabling legislation.

5.3.22 Much in *Tang* was designed to resolve this problem. The majority explicitly adopted the view that where power to make the decision under challenge and the rights and obligations in issue were set

<sup>256</sup> Prerogative legislation applying to a colony may affect rights. However, prerogative legislation cannot alter rights and obligations in the country itself as distinct from its colonies and dependencies; see n 244 above.

<sup>257</sup> *Bond* [1990] HCA 33; (1990) 170 CLR 321, [32].

<sup>258</sup> *Ibid* [32].

<sup>259</sup> See 5.7 below.

out in the contract or other legal relationship rather than in the enabling statute, the decision was made under the contract or other relationship, not under the enactment.<sup>260</sup> The majority overruled the decision in *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*<sup>261</sup> and the cases which relied upon it to the extent that they decided that decisions made under a contract which was authorised by an enactment were made under the enactment for the purposes of the *ADJR Act*.<sup>262</sup>

5.3.23 Having decided that where there are multiple sources of power for a decision, a decision was not under an enactment if it were made in the exercise of powers conferred by a contract or other legal relationship rather than by the enactment, it may seem that the Court had no reason to lay down a general test for determining when a decision was under an enactment. However, it did so for two reasons. Firstly, a number of tests for determining whether a decision was under an enactment had been proposed by the Federal Court and had been considered by the Queensland courts in *Tang* itself. The majority took the view that some of these tests were based on an error, that of immediacy or proximity, and sought to correct the error by developing a test which explained why decisions made under a contractual power were not made under an enactment without relying on notions of immediacy or proximity.

5.3.24 The second reason was that adopting the principle that a decision was not under an enactment if it were made in the exercise of powers conferred by a contract or some other legal relationship was of no assistance in *Tang* itself because in that case the Court held that the decision under challenge was not made under contract or other legal relationship between *Tang* and the university because there was no contract between them. Instead, the relationship was a voluntary one which could be terminated by either party at any time.<sup>263</sup>

5.3.25 In adopting their two-pronged test, the majority rejected a couple of earlier approaches to the problem in which notions of proximity played a role. The first adopted in the Federal Court, was an approach which considered whether the enactment was the immediate or proximate source of the power to make the decision. It had been adopted in cases such as *Post Office Agents Association Ltd v Australian Postal Commission*,<sup>264</sup> *James Richardson Corporation Pty Ltd v Federal Airports Corporation*,<sup>265</sup> *Chapmans Ltd v Australian Stock Exchange Ltd*<sup>266</sup> and *Hutchins v Commissioner of Taxation*.<sup>267</sup>

5.3.26 The second, adopted in the Queensland Court of Appeal in *Tang* itself, was based on the premise that if the decision could be made by any person in the community and the enactment in question merely facilitated that decision, it was not a decision under an enactment: ‘is it something that anyone in the community could do, which is simply facilitated by the statute, or is it something which a person can only do with specific statutory authority?’<sup>268</sup>

<sup>260</sup> *Tang* [2005] HCA 7; (2005) 221 CLR 99, [81]–[82].

<sup>261</sup> (1985) 7 FCR 575.

<sup>262</sup> *Tang* [2005] HCA 7; (2005) 221 CLR 99, [83].

<sup>263</sup> *Ibid* [57] and [91].

<sup>264</sup> (1988) 84 ALR 563, 571.

<sup>265</sup> (1992) 117 ALR 277, 280.

<sup>266</sup> [1996] FCA 1568; (1996) 67 FCR 402, 409.

<sup>267</sup> (1996) 65 FCR 269, 273.

<sup>268</sup> *Tang v Griffith University* [2003] QCA 571, [45].

5.3.27 Both the tests which were rejected attempted to deal with the problem of multiple sources of legal power to make a decision. The first did so by means of a spatial analogy, arguing that for a decision to be under an enactment, the enactment had to be the final or proximate source of the power to make a decision. The approach suggests a chain of powers leading to a decision. If the enactment is the last or proximate link in the chain leading to the decision, the decision is made under the enactment. If another source of legal power such as a contract is the last or proximate link in the chain leading to the decision, the decision is made under the contract, not the enactment. The majority rejected this solution on the grounds that proximity tests are problematic and that using one in this situation deflected attention from the interpretation of the Queensland *Judicial Review Act 1991* in the light of its subject, scope and purpose.<sup>269</sup>

5.3.28 The second proposed solution to the problem of multiple sources which the majority rejected attempted to deal with the problem by considering the nature of the power rather than its source. If the power was one which any legal person could exercise, simply by virtue of being a legal person, then making a decision in reliance on that power was not a decision under an enactment for the purposes of the Queensland Act, even if the decision-maker gained the power to make the decision from an enactment. So, for example, if an enactment conferred the power to enter into contracts on a statutory authority, decisions made in the exercise of that power were not decisions under an enactment because that power, the power to contract, is shared with a few exceptions such as minors, with every person in the community.

5.3.29 The Court rejected the test for two reasons. Firstly, the test required the Court to determine which of multiple sources of power was the source of the power to make the decision. Only after that power had been identified could one ask whether it was a power shared with every member of the community. The Court argued that seeking to identify the true source of power to make the decision suffered from the defects of the proximity approach, presumably detracting attention from the meaning of the words interpreted in the light of the subject, scope and purpose of the Act. To that extent it did not solve the problem of multiple sources.<sup>270</sup> Secondly, the majority argued that the cases relied on to support the test, including its own earlier decision of *Glasson*,<sup>271</sup> did not do so.<sup>272</sup>

5.3.30 The rejection of proximity tests led to a broad interpretation of the first limb of the court's two-pronged test, the requirement that the decision must be expressly or impliedly required or authorised by the enactment. It is broad enough to permit review where there are two sources of power for the decision in question, such as a statutory power to contract and a contract in the exercise of that power because the making of the contract and hence the decision under the contract are both authorised by the statute.

5.3.31 The majority formulated the second limb of the test in a couple of ways. They stated in one formulation that the second limb required that 'the decision in question derive from the enactment the capacity to affect legal rights and obligations', so that 'legal rights and obligations [are] affected not under the general law but by virtue of the statute'<sup>273</sup> and in another that 'the decision must itself confer,

<sup>269</sup> Ibid 69.

<sup>270</sup> Ibid [71].

<sup>271</sup> [1984] HCA 49; (1984) 155 CLR 234.

<sup>272</sup> *Tang* [2005] HCA 7; (2005) 221 CLR 99, [71].

<sup>273</sup> Ibid [80].

alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment'.<sup>274</sup> The first of these formulations rules out the possibility of review where there are multiple sources of power. If a decision is made under a contract, and a statute confers the power to contract, the decision, to the extent that it affects rights and obligations, does so under the general law rather than under the enactment.

5.3.32 Hence, when applied to the problem of multiple sources, the two limb test leads to the conclusion that a bare statutory power to contract does not entail that contracts made in the exercise of the power are made under an enactment:

a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.<sup>275</sup>

5.3.33 The two-limb test does not depend upon notions of proximity. However, it has the disadvantage that it limits the scope of review to cases in which rights and obligations are affected, excluding review where a person has an interest rather than a right at stake.

### **A decision required or authorised by an enactment which does not affect rights and duties but does affect interests**

5.3.34 As noted above, the High Court in *Tang*, adopted a two-pronged test for determining whether a decision was made under an enactment. The second limb of the test was that the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. This test entails that if the decision does not affect any legal rights or obligations, but does affect a party's interests, review under the *JRA* is not available. Hence *Tang* herself was not entitled to judicial review because the decision to exclude her from her degree did not affect her rights, as she had no contract with the university and no other enforceable legal right to pursue the degree.<sup>276</sup> Although *Tang* had an expectation that she would not be excluded from her degree without the proper procedures being followed, that expectation alone did not entitle her to judicial review.<sup>277</sup>

### **Decisions made under the general law but given effect to by statute**

5.3.35 *NEAT Domestic Trading Pty Limited v AWB Limited* ('*NEAT*')<sup>278</sup> is the leading example of a case of this type. In this case, the AWB, a corporation incorporated under the Corporations Law (Vic) had the power under s 57 of the *Wheat Marketing Act 1989* (Cth) to refuse to permit the export of bulk wheat. If the AWB refused to permit the export of wheat, the Wheat Export Authority, a government

<sup>274</sup> Ibid [89].

<sup>275</sup> Ibid [83].

<sup>276</sup> Ibid [12], [20] (Gleeson CJ) and [91] (Gummow, Callinan and Heydon JJ).

<sup>277</sup> Ibid [92].

<sup>278</sup> [2003] HCA 35; (2003) 216 CLR 277.

agency charged with approving all Australian wheat exports, had no power to permit the export of the wheat in question.

5.3.36 When the AWB refused to permit NEAT to export durum wheat, NEAT sought review of the decision under the *ADJR Act*. The majority refused the application for review on a number of grounds, including the ground, important for present purposes, that there was no decision under an enactment as required under the *ADJR Act*. They came to this conclusion because the decision in question was made under the Corporations Law and that was not a decision under an enactment:

The Authority may not give consent without AWBI's prior approval in writing. That approval was a condition which must be satisfied before the Authority might give its consent. It was, in that sense, a condition precedent which had to be met before the Authority could lawfully exercise the power which the 1989 Act conferred on it to give its consent to the proposed export[31].

Unlike the Authority, AWBI needed no statutory power to give it capacity to provide an approval in writing. As a company, AWBI had power to create such a document. No doubt the production of such a document was given statutory significance by s 57(3B) but that sub-section did not, by implication, confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing. Power, both to make the decision, and to express it in writing, derived from AWBI's incorporation and the applicable companies legislation[32]. Unlike a statutory corporation, or an office holder such as a Minister[33], it was neither necessary nor appropriate to read s 57(3B) as impliedly conferring those powers on AWBI.<sup>279</sup>

5.3.37 This reasoning suggests that *JRA* review may not be available in cases where private law or the common law grants the power to make a decision but a statute confers regulatory or administrative effects on that decision which otherwise it would not have.

### **Private law legislation and decisions under an enactment**

5.3.38 There was one problem which the High Court in *NEAT* did not tackle. As noted above, the Court held that the AWB's decision to veto an export licence was not reviewable because it was not made under the *Wheat Marketing Act* but under the Corporations Law. The majority did not explain why that fact ruled out review, because the Corporations Law is an enactment and hence the decision was made under an enactment. Some decisions made under the Corporations Law are excluded from *ADJR Act* review,<sup>280</sup> but they do not include decisions of the type considered in *NEAT*. If the judges in *NEAT* had addressed the issue, they no doubt would have concluded that as the Corporations Law in question was the Victorian version of that Act, the decision was made under Victorian law, rather than a Commonwealth enactment. Applying *Glasson*, review of a decision made under State legislation was not available under the *ADJR Act*.

5.3.39 Such an approach ducks a more important issue. Although the *ADJR Act* and the *JRA* on their face apply to all administrative decisions made under an enactment, it is arguable that there is a class of legislation which is not an enactment for the purposes of those Acts. This class of legislation is dealing with private law matters and is designed to regulate the relationships between citizens, rather than

<sup>279</sup> Ibid [53]–[54].

<sup>280</sup> *ADJR Act* Schedule 1, clauses (ha) and (hb).

government. It usually binds government when government enters into the class of transaction or relationship being regulated, but that is not its major purpose.

5.3.40 The issue of whether an administrative decision made under this type of enactment arose under the *JRA* in the case of *King v Director of Housing* (*King*).<sup>281</sup> King sought review of the Director of Housing's decision not to renew her lease and to serve her with a notice to vacate. The Director of Housing argued that the decision not to renew her lease and to serve on her a notice to vacate were not made under an enactment but under the general law. The case was decided on the assumption that the *Homes Act 1935* (Tas) gave the Director of Housing power to let out public housing but that the terms and conditions of the lease, including the ways in which leases were terminated, were determined by the general law, including the *Residential Tenancy Act 1997* (Tas):

Whilst the authority for the Director to act in the way he did comes from the HA, the force or effect of the decisions does not. The decisions derived their force from the contractual relationship between the parties, as that relationship is governed by the RTA. ... The decisions operate because of the general law.<sup>282</sup>

5.3.41 Although the judgment states that the decisions were made under the general law, that law includes an enactment, the *Residential Tenancy Act*. As the above passage makes clear, that Act governed the relationship between the parties. All the steps which the Director took were determined by that Act, rather than by the terms of the lease. Under the Act, when a fixed term lease expires, the landlord has three options. She or he can do nothing. In that case, the Act imposes a lease for no fixed term on the parties and determines the conditions on which such a lease may be terminated.<sup>283</sup> She may renew the lease,<sup>284</sup> or may serve a notice to vacate on the tenant.<sup>285</sup> The Director chose the third option and served a notice to vacate.

5.3.42 Given that the decision to issue a notice to vacate was made under an enactment, the *Residential Tenancy Act*, it is not clear why it was not reviewable under the *JRA*. There was no suggestion that it was not administrative. The Director of Housing or his or her delegate made it in the exercise of their authority to administer public housing in Tasmania.<sup>286</sup>

5.3.43 The Full Court held that the decision to serve a notice to vacate was final and operative in the sense required by *Bond*.<sup>287</sup> That holding was clearly correct. Serving the notice to vacate was final and operative in that it prevented a tenancy for no fixed term from coming into effect and was a precondition to a magistrate's having the power to make an order for vacant possession under s 45 of the Act.

<sup>281</sup> [2012] TASSC 82, on appeal [2013] TASFC 9.

<sup>282</sup> [2013] TASFC 9, [64].

<sup>283</sup> *Residential Tenancy Act 1997* (Tas), s 11(2), s 42(1)(b).

<sup>284</sup> *Ibid* s 12.

<sup>285</sup> *Ibid* s 42(1)(d).

<sup>286</sup> The *Homes Act 1935* (Tas) s 16 vested authority to let and by implication to cancel or not renew leases of public housing in Tasmania; see also s 6A(3A)(d) which gave the Director and his or her delegates power to 'do all such acts and things as may be ... appropriate for exercising the powers given to the Director'.

<sup>287</sup> *King v Director of Housing* [2013] TASFC 9, [48].

5.3.44 Although the issue was not discussed, the decision to issue a notice to vacate, considered as a decision under the *Residential Tenancy Act*, met the requirements of the *Tang* test for determining whether a decision was made under an enactment.<sup>288</sup> That test has two limbs: ‘first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.’<sup>289</sup>

5.3.45 The decision meets the first limb of that test because the *Residential Tenancy Act* authorised a person in the position of a landlord, such as the Director, to issue a notice to vacate when a tenancy expired. Secondly, the decision, exercising a power which the *Residential Tenancy Act* conferred, altered or affected legal rights in that it prevented a tenancy of no fixed term from coming into effect by operation of that Act, and was a precondition to a magistrate having the power to issue a notice to give vacant possession under s 45 of the Act.

5.3.46 Although the decision, considered as a decision under the *Residential Tenancy Act*, qualified as a decision under an enactment under the *Bond* and *Tang* tests, the Full Court decided that it was not reviewable because:

A decision not to extend or renew the lease beyond that expiry date has force because of the ordinary relationship between parties in that position. The service of the notice to vacate is to be treated in the same way. The decision derives its force from the relationship as governed by the RTA. As the primary judge said, the decision to serve the notice to vacate was a decision that any landlord could make, rather than a decision deriving from the HA. That the RTA governed the circumstances in which the Director had to deal with the expiry of the lease, and the issue of a notice to vacate, is irrelevant. The decisions operate because of the general law.<sup>290</sup>

5.3.47 The reasons assume that decisions made under the general law exercising powers which are not governmental but which any person may possess, are not reviewable under the *JRA*, even if they meet the *Bond* and *Tang* tests for decisions under an enactment. That assumption is based on the further assumption that there is a class of general law statutes which are not enactments for the purposes of the *JRA*, although there is nothing in the wording of the *JRA* which indicates that that is the case.

## 5.4 Issues to which the current law gives rise

5.4.1 The *JRA* and the way in which it is currently being interpreted give rise to a number of issues. Issues arising from the words decisions made under an enactment will be discussed under the heads set out above before a more general discussion of whether the *JRA* should extend to government decisions which are not made in the exercise of statutory powers such as decisions made in the exercise of prerogative and other common law power and decisions made with respect to the spending of money authorised by an appropriation.

<sup>288</sup> The Court at first instance and the Full Court both held that the decision to issue a notice to vacate was not a decision made under the *Homes Act 1935* because it did not meet the *Tang* test; [2012] TASSC 82 [21]–[2]; [2013] TASFC 9. That is not relevant for present purposes.

<sup>289</sup> *Tang* (2005) 221 CLR 99, [89].

<sup>290</sup> [2013] TASFC 9 [64].

## 5.5 Issue 6

### *Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment?*

5.5.1 As explained above, the Full Court of the Federal Court and the High Court in two early cases, *Burns*<sup>291</sup> and *Glasson*<sup>292</sup> held that a decision is made under an enactment for the purposes of the *ADJR Act* if the enactment is the source of the power to make a decision.<sup>293</sup> In doing so, the courts rejected broader approaches, an approach in which a decision was made under an enactment if the decision related to the core functions for which the enactment provided and an approach in which a decision was made under an enactment if it was made in pursuance of the enactment.

5.5.2 The High Court and the Full Court of the Federal Court rejected these two tests because they did not give clear answers and required difficult line drawing. The Full Court of the Federal Court made this particularly clear in *Burns*, arguing that because the appointment of groundsmen and security guards was as important to the proper functioning of a university as the appointment of deans and professors, it was not possible to say that one related to the core functions of the university as set out in its enabling Act and the other did not.<sup>294</sup>

5.5.3 The source of the power to make the decision as a test for whether a decision was made under an enactment anticipates *Bond*. By focusing on the statute as the legal source of power to make the decision, it implies that the decision must be required by the statute. Decisions made in the process of arriving at a final decision are usually not required by the statute in question. They are merely steps in the chain of reasoning leading to the final decision which the statute requires. Hence they may not be reviewable under this test.

5.5.4 If this is the case, it is arguable that the source of power test, like the *Bond* interpretation of decision, is inconsistent with s 13 of the *JRA*, which gives the Supreme Court a broad power to dismiss applications for review which are premature or disruptive. For reasons set out above,<sup>295</sup> s 13 assumes an interpretation of decision which is broader than a decision which is final and operative and required by the statute and extends to decisions made in the course of a proceeding leading a final decision. For the same reasons, the source of power test, to the extent that it excludes decisions not required by the enactment from review, is inconsistent with s 13. The amendment to the Act designed to overrule *Bond* suggested above,<sup>296</sup> which reads:

Decision under an enactment includes a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment,

overrules the source of power to make the decision test to the extent necessary to resolve the inconsistency.

<sup>291</sup> [1982] FCA 191; (1982) 64 FLR 166.

<sup>292</sup> [1984] HCA 49; (1984) 155 CLR 234.

<sup>293</sup> Part 5.3 above: *The source of the power to make the decision*.

<sup>294</sup> [1982] FCA 191; (1982) 64 FLR 166. The relevant passage is quoted above [5.3.5].

<sup>295</sup> Above [4.3.35]–[4.3.44].

<sup>296</sup> Above [4.3.76].

5.5.5 As noted above, the High Court and the Full Court of the Federal Court adopted the source of power test because it provided clearer answers. Although it does provide clearer answers, the source of power approach is potentially restrictive. Although not specifically referring to the source of power approach, in *Burns*, Ellicott J warned that adopting restrictive interpretations of terms such as decision made under an enactment might defeat the purposes of the *ADJR Act*. He was especially concerned that narrow interpretations would rule out review of decisions made under broad grants of power to perform functions such as establish a university and restrict the Act to review of powers to make a particular decision or do a specified act:

The clear object of the Act is to confer rights on aggrieved citizens as a result of the exercise of powers conferred by an enactment on Ministers, public servants, statutory authorities and others. In many cases the power exercised will be precisely stated in the legislation. In other cases the power to do a particular thing will be found in a broadly stated power. The Act should not be confined to cases where the particular power is precisely stated. In each case the question to be asked is one of substance, whether, in effect, the decision is made ‘under an enactment’ or otherwise.<sup>297</sup>

5.5.6 Ellicott J’s fears have been realised. The source of power to make the decision approach has led to a situation in which the Act can rarely be used to challenge decisions made in the exercise of broad grants of power such as the power considered in *Burns*, which was essentially the power to establish and run a university. To bring decisions made in the exercise of such powers within the scope of the *ADJR Act* and the *JRA*, it is arguable that we need a broader test for determining whether a decision was made under an enactment, such as Ellicott’s core functions test or the test of whether a decision was made pursuant to an enactment which the Full Court of the Federal Court adopted in *Glasson*.

5.5.7 The reason for this is that broad grants of power such as the power to establish and run a university give the recipient of the power authority to enter a wide range of legal relationships for the specified purpose, in this case the running of a university. But it may not specify the decisions which the recipients of the power may make or the actions which they may perform, except in the broadest terms. The broad grant of power will often be used to create other legal instruments which define powers and procedures more specifically and authorise particular decisions and actions.

5.5.8 Those legal instruments may take the form of subordinate legislation. An agency which is given broad powers to run an institution or to perform a wide range of functions is usually given power to make subordinate legislation for that purpose. That legislation is normally an enactment for the purposes of the *ADJR Act* and the *JRA*. If it confers the power to make a particular decision, that decision will be made under an enactment for the purposes of the source of the power to make a decision test and will therefore be reviewable. For example, in *Burns*, the Full Court of the Federal Court recognised that if the university had used its rule making power to enact rules governing the terms on which staff were to be employed and if those terms had been incorporated into Burns’s contract, they would have been the source of the power to make the decision to sack Burns. If that had been the case, the decision to sack Burns would have been a decision made under an enactment and he would have been able to challenge it.<sup>298</sup>

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<sup>297</sup> [1982] FCA 59.

<sup>298</sup> [1982] FCA 191; (1982) 64 FLR 166.

5.5.9 However, an agency given a broad grant of power to run an institution or implement a programme may not be bound to enact subordinate legislation to govern its exercise of its powers. It may choose to exercise its powers by delegating powers to its officers or committees, by adopting policy documents setting out how it will exercise its powers and by entering into contracts and other legal relationships. Griffith University had chosen to exercise its powers in this way in *Tang*.<sup>299</sup> In these situations, the contract or other legal relationship, not the broad grant of power is likely to be the immediate source of the rights and duties of the parties and of any power to make a decision affecting those rights and duties. This raises the issue of whether a decision is made under an enactment when there are two sources of power involved in the making of the decision, the grant of power and a contract or other legal relationship entered into in the exercise of that power.

***Feedback is invited with respect to the following question:***

#### **Question 6**

Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment?

## **5.6 Issue 7**

***Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the JRA?***

5.6.1 Where legislation gives a government officer or agency a broad grant of power to establish and manage an institution or implement a programme, and the officer or agency enters into contracts and other legal relationships under the authority of its broad grant of power, decisions made with respect to the contracts will be considered as made under an enactment if the courts recognise that the broad grant of power to the officer or the agency is a source of the legal power to make the decision. As pointed out above, the courts have usually not been willing to do that. In *Tang*, the High Court held that in cases of this type the contract, not the enactment was the source of power to make the decision, so that it was not a decision under an enactment.<sup>300</sup> In doing so, it reversed *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*<sup>301</sup> which permitted review of a tendering process leading to the making of a contract.

5.6.2 It is not clear that the common law is more liberal in allowing review in these situations. The common law, at least in England, permits review where government or a body connected to government uses contract as a regulatory or administrative device. In England, the courts have permitted review where the powers being exercised, whether contractual or not, can be seen as public, but have not permitted review where the powers are private and there is no connection between the

<sup>299</sup> (2005) 221 CLR 99.

<sup>300</sup> Ibid [81]–[82].

<sup>301</sup> (1985) 7 FCR 575.

body exercising them and government.<sup>302</sup> The Australian courts have yet to adopt the English position, but have not ruled it out.<sup>303</sup>

5.6.3 The cases in which a government body is vested with a statutory power to contract have an obvious connection with government. Hence there is a case for allowing review under the English doctrine. However, in many of the cases, the contracts are more akin to ordinary commercial contracts than to regulatory devices. In these cases, it is not clear that they ought to be subject to judicial review.

5.6.4 It may be necessary to distinguish government contracts which are essentially commercial from those which are essentially regulatory. There are strong arguments for not allowing judicial review of contracts which are essentially commercial. Private parties dealing with government on a commercial or semi-commercial basis need what may be called security of transaction; that is, they need to know that their contracts with government and government bodies are not open to challenge by third parties on administrative law grounds. Because the *JRA* allows standing to persons whose interests are adversely affected by a decision,<sup>304</sup> an across the board rule that contracts entered into under a statutory power to contract are decisions under an enactment and reviewable for the purposes of the *JRA* would allow such third party challenges.

5.6.5 It would be difficult to limit the scope of such challenges. Once decisions under and with respect to contracts entered into under a statutory power to contract are held to be decisions under an enactment for the purposes of the *JRA*, all grounds of review available under the *JRA* are available to the challenger.

5.6.6 In *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*,<sup>305</sup> the applicant challenged a tender process on the grounds of relevant and irrelevant considerations, unreasonableness and no evidence among other grounds. The court did not hold any of them to be inappropriate or unavailable in this type of challenge.

5.6.7 Opening up government agency contracts to challenges on these grounds would create a situation similar to that which existed under the old company law doctrine of ultra vires. Under that doctrine, contracts entered into by private companies were invalid if they fell outside the objects for which the company was founded as stated in its objects clause. These contracts could be set aside at the suit of shareholders. Similarly, if the contractual decisions of government bodies were subject to review under the *JRA*, it would be possible for interested parties to seek to have them set aside on the grounds that they were entered into for improper purposes, that is purposes which were inconsistent with the subject scope and purpose of the body's enabling Act and of its power to contract.<sup>306</sup>

5.6.8 The company law doctrine of ultra vires was found to be so inconvenient because of its impact on the security of company contracts and transactions that it was repealed. A general right to challenge

<sup>302</sup> *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815; [1987] 2 All ER 770; *R v Jockey Club Disciplinary Committee; Ex parte Agha Khan* [1993] 1 WLR 909.

<sup>303</sup> The Australian cases are discussed in Aronson, above n 223, 87–90. See also the discussion in *Acquista Investments Pty Ltd v Urban Renewal Authority* [2014] SASC 206. There is no reason to discuss them further here.

<sup>304</sup> *JRA* s 7.

<sup>305</sup> (1985) 7 FCR 575; [1985] FCA 300.

<sup>306</sup> In determining whether a statutory power has been used for an improper purpose, one must look at the subject scope and purpose of the enabling legislation; *R v Toobey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170.

the exercise of a statutory power to contract under the *JRA* is likely to lead to similar inconvenience and for that reason should not be adopted.

5.6.9 However, government powers to contract and the contracts themselves are regulated in a number of ways to protect the public interest. This regulation can take the form of legislation or of ‘soft law’ such as treasury and other policies, codes and guidelines which do not impose legal rights and obligations but which are enforced within the executive and administration. Where the regulation takes the form of legislation, decisions with respect to contracts which are subject to the regulation are almost certainly decisions under an enactment and reviewable under the *JRA*.

5.6.10 Where the regulation is in the form of ‘soft law’, the *JRA* is not available unless the Court adopts a broad view of decision under an enactment and holds that the contract is reviewable because it is an exercise of a statutory power to contract. That is not likely given the position which the High Court adopted in *Tang*.<sup>307</sup>

5.6.11 ‘Soft law’ regulation of government contracts does not create any legal rights but may create expectations that government will comply with soft law policies and guidelines, and if it does not, will give a hearing to affected parties and explain its decision. Where the government fails to do that, contract law often does not provide any remedy. If soft law policies and guidelines are incorporated into the contract, failure to comply with them may be breach of contract. If they are not incorporated, there will be no breach.

5.6.12 Because government contracts vary in the extent to which they are properly regarded as private rather than public agreements, different types of government contracts are regulated in different ways. Hence, it would be unwise to adopt a uniform approach to judicial review of decisions made with respect to government contracts. Instead, it may be preferable to adopt different approaches to different classes of contract, depending on the extent to which they have a public aspect and are regulated in the public interest. This could be done by extending the scope of decision to include decisions made with respect to or under specified types of contract.

### ***Issue 7(1) – Tenders and procurement contracts***

5.6.13 Procurement contracts involving large sums of money tend to be put out to tender. Tendering processes tend to be laid down either in legislation or in soft law policies and guidelines. The question of judicial review of tendering processes raises difficult issues. Tendering processes are designed to ensure that every person has an opportunity to bid to supply government with goods and services and that the bids are evaluated in a fair and even-handed way. The processes aim not only to ensure that the bidders are treated fairly but also to protect the public interest in ensuring that public moneys are spent wisely and not wasted.

5.6.14 Where tendering processes are laid down in legislation, judicial review under the *JRA* may be available for breach.<sup>308</sup> Where the processes are laid down in policies and guidelines enforced by Treasury or another government department, judicial review is less likely to be available. As there is no enactment, there is no possibility of judicial review under the *JRA*. Whether review is available under

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<sup>307</sup> (2005) 221 CLR 99.

<sup>308</sup> *General Newspapers Pty Ltd v Telstra Corporation* (1993) FCR 164, 173.

the prerogative remedies depends upon whether there is a public or regulatory element involved.<sup>309</sup> For example, if a local council sought to implement a planning policy through contract, that would be a sufficient public element to warrant judicial review.

5.6.15 Whether judicial review of tendering should be available depends upon a number of considerations. Disgruntled and disappointed tenderers are likely to use judicial review in an attempt to overturn a decision to award a tender to competitors.<sup>310</sup> In such cases the dispute is as much one between two private companies as it is between the company and the decision-maker who decided the tender. That is not in itself sufficient reason to rule out permitting an unsuccessful tenderer from challenging the decision. There are many situations in which government decisions are challenged as a way of furthering a dispute with a private party. This is especially true in environmental and development law, where challenges to government decisions permitting a development are a common way of pursuing a dispute with the developer.

5.6.16 Once a decision has been made and a contract entered into, allowing disappointed tenderers to challenge the decision or the process can interfere with the security of transactions and discourage would be tenderers from taking the risk. Intervention by the courts in the tendering process before a contract has been entered into may create similar problems.<sup>311</sup> Governments may adopt tendering policies and guidelines rather than legislation in order to minimise such disruptive challenges. It is arguable that governments should be free to do this and that judicial review should not be available to challenge breaches of the policies and guidelines.

5.6.17 However, such an approach may leave the tenderer whose tender was not properly considered without any adequate remedy. Internal review is unlikely to lead to the decision being reversed where to do so would overturn a contract as that could lead to the government being liable in damages. As a result, the best that can be hoped for in internal review is an improvement in the process for the future. Inadequate processes and failure to follow policies and guidelines may discourage businesses from tendering for government contracts as effectively as the threat of judicial review leading to the overturning of a contract.

5.6.18 ARC Report 32 considered a number of problems in allowing judicial review of procurement and tendering decisions.<sup>312</sup> Firstly, it noted that, because the government's power to contract is at large, it is not easy to identify appropriate criteria for review of the decision.<sup>313</sup> It is arguable that the principles of natural justice should not limit the discretion which a contracting party has under normal contract principles to choose between a number of tenders or offers.<sup>314</sup> It also noted doubts about the applicability of relevant and irrelevant considerations to the power to contract rather than to statutory powers.<sup>315</sup> Secondly, it noted concerns that to subject the government to administrative law oversight

<sup>309</sup> *Khuu & Lee Pty Ltd v Corporation of The City of Adelaide* (2011) 110 SASR 235; [2010] SASC 316; *Acquista Investments Pty Ltd v Urban Renewal Authority* (2015) 123 SASR 147; [2014] SASC 206; *Karimbla Properties (No 50) Pty Ltd v State of New South Wales* [2015] NSWSC 778.

<sup>310</sup> *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 7 FCR 575.

<sup>311</sup> *Karimbla Properties (No 50) Pty Ltd v State of New South Wales* [2015] NSWSC 778 [64]–[65].

<sup>312</sup> ARC, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report 32 (1989), [116]–[128].

<sup>313</sup> *Ibid* [118]–[124].

<sup>314</sup> *Ibid* [118] citing *White Industries Limited v Electricity Commission of NSW* (Supreme Court of NSW, 20 May 1987, unreported).

<sup>315</sup> *Ibid*.

of its contractual powers would place it in a worse position than private law contractors, being subject to both the law of contract and administrative law.<sup>316</sup> Because of these concerns, it concluded that Commonwealth tendering and contracting should not be subject to review under the *ADJR Act* except in cases where it is subject to statute.<sup>317</sup>

5.6.19 ARC Report 50 was sceptical of allowing judicial review of tendering and procurement processes. It considered that private law remedies were adequate and that there was no good reason for permitting public law remedies with respect to tenders.<sup>318</sup> However, it concluded that as some of these issues may be amenable to review under s 39B of the *Judiciary Act*, there is no good reason for excluding them from review under an amended *ADJR Act*.

5.6.20 The best solution, rather than attempting to deal with tendering in the *JRA*, may be to enact separate legislation on the lines of the Commonwealth Government Procurement (Judicial Review) Bill 2017.<sup>319</sup> That Bill proposes to give tenderers a right to seek an injunction and a right to compensation where Commonwealth Procurement Rules<sup>320</sup> are not properly complied with. As it is designed to complement rather than replace other avenues of review, it does not rule out judicial review in procurement cases.

5.6.21 The Bill contains two provisions designed to minimise the impact of judicial review on the procurement process. The first is cl 6, which permits the Court to award compensation rather than an injunction in certain cases where it is satisfied that granting an injunction would lead to a significant delay to the procurement concerned. The second is cl 23, which provides that a contravention of the Procurement Rules does not invalidate any resulting contract.

5.6.22 One aim of the Bill is to ensure that Australia complies with international obligations such as the procurement provisions in the Trans Pacific Partnership Agreement and the World Trade Organisation's Agreement on Government Procurement, both of which require a transparent dispute review process.<sup>321</sup> If Tasmania adopted legislation modelled on the Commonwealth Bill, it too would be compliant.

5.6.23 If it were decided not to enact legislation similar to the Commonwealth Government Procurement Judicial Review Bill, it may be possible to extend the *JRA* to cases in which tender processes were not complied with. However, such an extension should be subject to the proviso that the Court is not to invalidate the process where to do so would invalidate a resulting contract, unless the case involved corruption or other serious wrongdoing.

### ***Issue 7(2) – Contracts of employment***

5.6.24 Contracts of employment have also given rise to difficulties. Some of the leading cases under the *ADJR Act* with respect to the source of power to make a decision, enactment or contract, such as

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<sup>316</sup> Ibid [126]–[127].

<sup>317</sup> Ibid [154]–[156].

<sup>318</sup> ARC, above n 99, 5.53.

<sup>319</sup> This Bill has stalled in the House of Representatives. It remains a good model for Tasmanian legislation.

<sup>320</sup> These are subordinate legislation made under the *Public Governance, Performance and Accountability Act 2013*.

<sup>321</sup> Ibid.

*Burns*<sup>322</sup> and *Australian National University v Lewins*,<sup>323</sup> are contract of employment cases. In Tasmania, contracts of employment with the government typically involve elements of statute, such as the *State Service Act 2000*, awards under the *Industrial Relations Act 1984*,<sup>324</sup> and contract.

5.6.25 Where the decision involves breach of the provisions of an enactment, such as breach of the grounds of dismissal provisions in the *State Service Act 2000* s 44, the decision is under an enactment and *JRA* review is available. Where the decision is made under an award made under the *Industrial Relations Act*, the decision is also made under an enactment. Schedule I of the *JRA* excludes decisions of the Industrial Commission made under the *Industrial Relations Act* from *JRA* review,<sup>325</sup> but that does not exclude a decision which the government or its agencies make as an employer from *JRA* review.

5.6.26 The difficulty arises when a decision with respect to employment is made under the contract of employment rather than under an enactment or an award. Following *Tang*,<sup>326</sup> the decision is not reviewable because it is not made under an enactment even if an enactment conferred the power to contract on the agency.

5.6.27 Where the decision is made under a contract of employment rather than an enactment or an award, there may be ‘soft law’ such as policies and guidelines governing the situation. As noted above, these create expectations rather than rights unless they are incorporated into the contract. If they are incorporated into the contract, failure to comply with them may be breach of contract, leaving the aggrieved employee with a contractual remedy. If they are not incorporated into the contract, there is no remedy for failure to comply with them.

5.6.28 Whether there should be a remedy depends upon whether employees should be entitled to a hearing or an explanation if an employer decides not to comply with codes or policies in their case. Such codes and policies are often designed to ensure fair treatment and to prevent bullying and victimisation. Some form of judicial review may help to give a remedy to an employee who is aggrieved by a failure to follow the codes and policies. It also gives the trouble maker further opportunity to cause trouble.

5.6.29 Allowing judicial review in these cases prevents the government or its agencies from choosing to adopt informal codes and guidelines and informal dispute resolution procedures in its relations with its employees and to exclude the courts from the process except where there has been a breach of contract. It is arguable that it is wrong to prevent the government or its agencies from making such a choice. Involving the courts introduces delay and expense and may not be in the public interest.

5.6.30 On the other hand, if a decision not to apply a policy or guideline in a particular case was made under an enactment, the person affected would be entitled to a hearing and if denied it, would be entitled to judicial review.<sup>327</sup> It is arguable that a person should not be in a worse position because the

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<sup>322</sup> [1982] FCA 191; (1982) 64 FLR 166.

<sup>323</sup> (1996) 68 FCR 87.

<sup>324</sup> *Industrial Relations Act* s 34 empowers the industrial Commission to make awards with respect to the employees of State government and its agencies.

<sup>325</sup> But not from review under the prerogative remedies, *R v Tasmanian Industrial Commission; ex parte the Minister Administering the State Service Act 2000* [2015] TASSC 54.

<sup>326</sup> (2005) 221 CLR 99.

<sup>327</sup> A hearing is required where a decision-maker exercising a statutory discretion is considering not applying a settled policy to a particular case; Aronson, Groves and Weeks above n 13, 438–46.

decision not to apply the policy was made under a contract rather than under an enactment. That raises issues about the general desirability of extending judicial review to situations where the power the government is exercising is not a power under an enactment but is a common law power or a power conferred by a contract or other legal relationship. This issue is discussed below.

***Issue 7(3) – Contracts and other arrangements entered into in the implementation of a policy, or to deliver a service or benefit***

5.6.31 It is an administrative law commonplace that governments are relying more on contracts and other arrangements rather than legislation for the implementation of policy and the delivery of services and benefits. These contracts and other arrangements tend to be regulatory rather than commercial in nature. Where, as is typically the case, they involve the spending of government money, they are supported by an appropriation. The appropriation usually lacks any detail about how the money is to be spent. Instead, the content of the contract or other arrangement is set out in policies and guidelines which do not have the force of law.

5.6.32 Often, where the contract or arrangement is for the provision of a service or benefit, the ultimate recipient of the service or benefit is not a party to the contract or arrangement. Instead, the contract or arrangement is between the government and an outside service provider and sets out the terms on which the provider is to provide the service or benefit. Although the service provider may enter into an agreement with the recipient of the benefit under which the recipient agrees to comply with a set of conditions in return for the benefit, these agreements are rarely contracts.

5.6.33 As a result, the recipients of the service or benefit are in a very weak legal position. They have no contractual remedy available if the service provider treats them unfairly or wrongly denies them the service or benefit. It is doubtful that they have any right to judicial review. In the United Kingdom, judicial review has been extended to cases in which benefits are paid through an exercise of prerogative power rather than under an enactment.<sup>328</sup> It is not clear that, even in the UK, it extends to giving the recipient of a government funded service or benefit a right to judicial review against the service provider. In Australia, although there are statements in the cases that whether judicial review should be available depends more on the nature of the power being exercised rather than its source,<sup>329</sup> review has not been extended to recipients of a benefit or service provided by an outside service provider.

5.6.34 Whether or not review is available at common law, it is clearly not available under the *JRA* because there is no decision under an enactment, whatever test is adopted. It is arguable that review ought to be extended to such cases because recipients of such services and benefits are unlikely to have any other legal remedy. To deny them any remedy leaves them at the mercy of the service provider and may be inconsistent with the rule of law. A good example is the recent Tasmanian decision of *Smillie v Legal Aid Commission of Tasmania*.<sup>330</sup> In that case, a recipient of legal aid charged with murder and attempted murder requested that his grant of aid allow him to be represented by a private legal practitioner rather than a Legal Aid Commission of Tasmania lawyer. The Commission refused on the basis that the applicant already had a lawyer who had spent a considerable amount of time on the case. If a new lawyer were appointed, her efforts would be wasted, wasting some of the limited resources of

<sup>328</sup> *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864.

<sup>329</sup> There is a detailed discussion of the authorities in *Acquista Investments Pty Ltd v Urban Renewal Authority* (2015) 123 SASR 147; [2014] SASC 206, [245]–[283].

<sup>330</sup> [2014] TASSC 19.

the Commission. On review to the Supreme Court of Tasmania, Wood J found that the decision to refuse the request for a transfer of aid was not ‘of an administrative character ... made under an enactment’. In other words, because there was no statutory provision in the *Legal Aid Commission Act 1990* (Tas) expressly addressing the transfer of legal aid to other legal practitioners, or imposing any obligations with respect to transfer on the Commission or giving the complainant any right to a transfer or to apply for a transfer, the decision to refuse the transfer could not be said to have been made under an enactment. Therefore, it was not reviewable.

5.6.35 The ARC in Report 32, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* (1989), recommended that decisions under Commonwealth schemes and programmes funded by an appropriation should be reviewable under the *ADJR Act*. The ARC recommended review of these decisions under the *ADJR Act* for three reasons. Firstly, if a Commonwealth officer rather than a person providing an outsourced service made the decision, it was already reviewable under s 75(v) of the Constitution and s 39B of the *Judiciary Act*. Secondly, many schemes financed by an appropriation were similar to schemes set up under statute. Given the similarities, the fact that they were not set up under statute should not be the decisive factor in determining whether decisions made in their implementation were subject to judicial review.<sup>331</sup> Thirdly, the fact that such schemes and programmes were funded by a parliamentary appropriation gave them ‘the same public interest character as they would have if they were the subject of other legislation enacted in the public interest.’<sup>332</sup>

5.6.36 In the view of Report 32, these factors were sufficient to distinguish such schemes and programmes from other government decisions not made under legislation and justified extending *ADJR Act* review to them. Accordingly, Report 32 recommended that the definition of decision be extended to include a:

decision of an administrative character made, or proposed to be made, by an officer of the Commonwealth under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program.<sup>333</sup>

5.6.37 The Commonwealth has not adopted the recommendation, but it provided the inspiration for s 4 of the *Judicial Review Act 1991* (Qld). That section defines decision as including:

- (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.

5.6.38 The provision covers situations in which the state itself or a state agency provides the benefit or service from government funds under a non-statutory scheme. However, it does not extend to the situation in which the state grants money to an outside service provider which provides the service or

<sup>331</sup> ARC, above n 312, [161]–[167].

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid* Recommendation 1.

benefit on the state's behalf. If the provision were adopted, it could be extended to cover decisions made by an outside service provider under a scheme or programme involving government funds.

5.6.39 The Queensland provision has been seen as largely ineffective because it only extends to schemes and programmes and has not been used successfully very often.<sup>334</sup> But this may be because practitioners have not understood its potential as much as because of doubts about the interpretation of key terms such as scheme.<sup>335</sup> Although a one-off decision may be a scheme,<sup>336</sup> a number of cases have failed because the applicant was not able to show that the decision was made to implement a scheme or programme.<sup>337</sup> The simplest way of avoiding these problems may be to delete the words 'under a non-statutory scheme or program' so that the provision applies to all administrative decisions involving the expenditure of government moneys.

5.6.40 However, ARC Report 50, *Federal Judicial Review in Australia* (2012), the last ARC Report to deal with these issues, did not suggest the adoption of any provision along the lines of s 4 of the *Judicial Review Act 1991* (Qld). Nor did it consider any ways in which that or a similar section could be amended to deal with the problems in its scope and interpretation. Instead, it did not recommend any change to the *ADJR Act* other than to incorporate a jurisdiction equivalent to s 75(v) of the Constitution and s 39B of the *Judiciary Act* in it, leaving the common law to evolve with respect to judicial review of schemes and programmes funded by means of an appropriation.<sup>338</sup>

5.6.41 The Report was sceptical about the desirability of extending *ADJR Act* review to grants funded from appropriations. It pointed out that many grants were made to provide relief in emergencies and that they tended to be administered so as to ensure that assistance was given to all who suffered from the emergency as quickly as possible.<sup>339</sup> It also doubted that judicial review could provide an effective remedy for a person who was wrongly denied a grant in these circumstances, stating that;

remedies are likely to be ineffectual. The latter point is particularly significant, because the available grant money is likely to have been legitimately distributed to other persons when a judicial review remedy issues and thus a finding that a particular decision not to give a grant to a person was invalid is unlikely to lead to the money being granted to that person. Making a judicial review application of a grant decision is therefore unlikely to have much practical utility.<sup>340</sup>

5.6.42 These comments are most relevant to one-off grants and do not appear to be so applicable to continuing schemes financed through grants to outside service providers. In these situations, the money

<sup>334</sup> Justice Catherine Holmes, 'Not Making a Difference: Queensland's Extension of Statutory Review' (2016) 85 *ALAL Forum* 1; Matthew Groves, 'Should we follow the gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review* 452.

<sup>335</sup> Peter Billings and Anthony Cassimatis, Submission No 6 to ARC, *Federal Judicial Review in Australia* (2012), Report 50 (27 June 2011) 4.

<sup>336</sup> *Anghel v Minister for Transport (No 1)* [1995] 1 Qd R 465.

<sup>337</sup> *Wide Bay Helicopter Rescue Services Inc v Minister for Emergency Services* (1999) 5 QAR 1; *Mikitas v Director, Department of Justice and Attorney-General* (1999) 5 QAR 123; *Bituminous Products Pty Ltd v General Manager Road Systems and Engineering, Department of Main Roads* [2005] 2 Qd R 344.

<sup>338</sup> ARC, above n 99, 5.23–5.49.

<sup>339</sup> *Ibid* 5.40.

<sup>340</sup> *Ibid* 5.46.

is less likely to be exhausted when a remedy is granted so that it is more likely that the remedy will be effectual.

5.6.43 The Issues Paper has suggested that the legal position of beneficiaries of these schemes is weak because they are unlikely to have any private law remedy against the service provider and public law remedies may be unavailable. Therefore, there is good reason to provide a remedy in these cases by adopting an expanded version of s 4 of the Queensland *Judicial Review Act 1991*.

***Feedback is invited with respect to the following questions:***

**Question 7**

Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the *JRA*?

**Question 8**

Should there be judicial review of decisions made with respect to:

- Tenders and procurement contracts
- Contracts of employment
- Contracts and other arrangements entered into in the implementation of a policy, or to deliver a service or benefit.

## 5.7 Issue 8

***Should a decision made in pursuance of an enactment which affects interests but does not affect anyone’s rights or obligations be a decision under an enactment?***

5.7.1 As noted above, *Tang* held that to be a decision under an enactment, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. As Kirby J pointed out in *Tang*, that test for decision under an enactment prevented review in cases where the decision did not affect rights and obligations but did affect interests.<sup>341</sup> Because *Tang*’s rights and obligations were not affected, only her interests, she was not entitled to review under the *Judicial Review Act 1991* (Qld) and presumably, a person in a similar position would not be entitled to sue under the *JRA*.

5.7.2 There are numerous objections to limiting review to cases in which the decision confers, alters or otherwise affects legal rights or obligations; it can lead to injustice as happened in *Tang*. It also introduces the type of complexity that the *ADJR Act* was designed to remove. In order to qualify for review, litigants must show that the decision affected their legal position, whether or not that affect is minor compared to the effect on their practical situation. In *Tang* itself, it is arguable that *Tang*’s legal rights were affected by the decision. Before the decision, she had a licence to enter university property, to use university laboratory equipment to conduct experiments and for other research related purposes. The decision to exclude her ended that licence so that if she had attempted to continue her research, she could have been excluded as a trespasser. These effects on her legal position, although substantial

<sup>341</sup> (2005) 221 CLR 99, [135], [152].

in themselves, were minor compared with the practical consequences of the decision for her. By excluding her for plagiarism, the university labelled her a cheat, making it most unlikely that she would ever have the opportunity to pursue her chosen career or do research at any other university. But after the decision in *Tang*, any right to review depends upon whether the decision affects legal right and obligations, no matter how insignificant, not on the decision's practical effects, no matter how significant.

5.7.3 Besides, this aspect of the decision is inconsistent with the general trend of administrative law, which is to give greater protection to interests which are not legally enforceable rights and obligations. This is especially true of the law with respect to natural justice. As early as *FAI v Winneke*<sup>342</sup> and *Kioa v West* ('*Kioa*'),<sup>343</sup> the High Court extended the right to natural justice to cases in which the complainant did not possess any legal rights but had an interest in the decision. Both these cases and most of the later natural justice cases are ones in which the complainant has applied to be granted a permit or a licence such as a visa but has no right to that permit or licence. A decision not to grant the permit or licence would be reviewable under the *Tang* test because it is a decision not to confer a right. But in *Kioa* itself, Brennan J recognised that natural justice applied to cases more like *Tang*, in which the decision is not one to confer a right but is with respect to a benefit which an official has the power to grant or refuse:

There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests — licensing and permit systems, means of securing opportunities for acquiring legal rights, *schemes for the provision of privileges and benefits at the discretion of Ministers or public officials* — intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights (emphasis added).<sup>344</sup>

5.7.4 *Tang* narrowed the scope of the *ADJR Act* and the *JRA* to such an extent that at least in natural justice cases and perhaps in other areas, it is narrower than the common law. At common law natural justice is available in cases where interests, rather than rights are at issue, but under the Acts review is not available in such cases. Given that the *ADJR Act* and to a lesser extent the *JRA* were intended to be remedial, expanding the scope of review and clarifying the law, that result is inconsistent with their purpose.

5.7.5 Besides, the *Tang* test, to the extent that it rules out review where interests but no rights and duties are affected, is inconsistent with s 13 of the *JRA*. That section vests the Court with a power to dismiss applications to review decisions made in the course of a procedure on the grounds that they are premature or disruptive of good administration. It assumes that the Court has power to review decisions made in the course of a procedure whether or not they are final and operative or required by the enactment. As pointed out above,<sup>345</sup> it is inconsistent with the source of power to make the decision test for determining whether a decision is under an enactment.

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<sup>342</sup> (1982) 151 CLR 342.

<sup>343</sup> (1985) 159 CLR 550.

<sup>344</sup> *Ibid* 616–7.

<sup>345</sup> Above [5.5.4].

5.7.6 It is even more inconsistent with the *Tang* test because most decisions made in the course of a proceeding which are not required by the enactment do not affect the rights and duties of affected persons but do affect their interests. For example, the decisions challenged in *Edelsten v Health Insurance Commission*,<sup>346</sup> discussed above affected interests not rights.<sup>347</sup> Yet s 13 assumes that such decisions are reviewable. The amendment suggested to overrule the decision in *Bond*, to the effect that:

Decision under an enactment includes a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment,<sup>348</sup>

is probably sufficient to reverse the decision in *Tang* to the extent necessary. To ensure that that is the case, it may be wise to amend the suggested amendment to read ‘whether or not the decision is substantive or procedural, final and operative, required by the enactment or changes rights and duties’.

5.7.7 Kirby J argued in *Tang* that the requirement that to be a decision under an enactment, the decision must alter or affect rights and duties was inconsistent with s 3(4) of the *ADJR Act*, which gives standing to persons whose interests are affected by the decision being challenged:

To provide such a wide definition of ‘person aggrieved’ and then, by a judicial gloss, to narrow severely the parliamentary purpose in so providing (by obliging demonstrations of the ‘affecting of legal rights and obligations’ as a precondition to relief) is unacceptable as a simple matter of statutory construction. The text is not then internally harmonious and consistent as it should be assumed the Parliament intended. Judges must not impose interpretations on parliamentary law that contradict express provisions of such law or deny, or frustrate, its application.<sup>349</sup>

5.7.8 The inconsistency between the *Tang* test and the *ADJR Act* test for standing is not as clear as Kirby J argued. There is nothing in the *Tang* test which requires that the rights and duties affected be those of the applicant. They may be those of a third party. Hence, when s 3(4) is combined with the *Tang* test, a person whose interests are affected by the decision has standing to challenge it no matter whose rights and duties the decision affects, as long as it affects the rights and duties of someone. Challenges of this type are not uncommon. Land use, environmental and development decisions are often challenged by persons other than those whose rights and duties are affected by the decision. In these cases, the person whose rights and duties are affected is often the developer. The challengers, who are often objectors to the decision, challenge the decision on the basis that it affects their interests rather than their rights. So the *Tang* decision left s 3(4) of the *ADJR Act* with a reasonably broad operation.

5.7.9 The real problem with the rights and duties test is that it rules out review in cases which ought to be reviewed because the decision challenged has a serious impact on the applicant and the application for review is not premature or designed to disrupt administrative processes. To this extent, *Tang* compares unfavourably with *Bond*. In *Bond*, the Court sought to deal with a real problem, that of premature and disruptive challenges to decisions made in the process of arriving at a final decision. It

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<sup>346</sup> (1990) 27 FCR 26.

<sup>347</sup> See *Handling premature applications for review – the Bond rule or the s 13 discretion*, above [4.3.53]–[4.3.57].

<sup>348</sup> See *Legislation to reverse the decision in Bond*, above [4.3.76].

<sup>349</sup> *Tang* [2005] HCA 7; (2005) 221 CLR 99 [152]. See also [104].

did not seek to rule out review of those decisions entirely, but to prevent review of them until the final decision had been made.

5.7.10 *Bond* was also concerned with substance, not form in that it permitted review of decisions which were in a practical sense, final and operative.<sup>350</sup> The decision challenged in *Tang* met the *Bond* requirements for a reviewable decision in that it was final and operative in a practical sense; it ended once and for all Tang's chance to gain her doctorate at Griffiths University and almost certainly ruled out any chance she may have had to complete a doctorate at another university.

5.7.11 *Tang* ended the possibility of review where the decision was final and operative in a practical rather than a legal sense by holding that to be under an enactment, a decision had to alter rights and obligations. To this extent, it reverses the holding in *Bond* that decisions which are final and operative in a practical sense are reviewable. *Bond* focused on the meaning of the term decision in the *ADJR Act*, whereas *Tang* focused on the meaning of the phrase made under an enactment. As a matter of interpretation, the phrase made under an enactment must impose some restrictions on the decisions which may be reviewed under the Act. Otherwise, it would add nothing. However, it is odd that the restrictions which it imposes effectively change the definition of decision so as to prevent review of a class of otherwise reviewable decisions, those which are final and operative in a practical sense.

5.7.12 Whereas *Bond* was concerned with the practical operation of the *ADJR Act*, *Tang* was more concerned with the technicalities of devising a workable test for determining whether a decision was made under an enactment or under some other source of power. As noted above,<sup>351</sup> it rejected proximity tests for determining whether the source of the power to make the decision under review was an enactment or something else, such as a contract.

5.7.13 It is not clear that proximity tests are as problematic in this context as the majority in *Tang* assumed. The majority saw them as problematic because they had caused problems when used in the law of torts to determine legal responsibility for tortious acts and omissions and because they distracted attention from the real issue, the meaning of the words read in light of the subject, scope and purpose of the Act.<sup>352</sup>

5.7.14 Notions of proximity in the law of torts are associated with ideas about causation, especially of proximate cause. It is often arbitrary to separate one cause out in a chain of causation leading to an event, label it as the proximate and immediate cause of the event and attribute responsibility on the basis of that labelling because all events in the chain of causation are equally necessary for the event to occur.

5.7.15 The issues are different when a source of power is identified as the proximate immediate source of power to make a decision. No chain of causation is involved. The situation much more closely resembles that which arises when we trace subordinate legislation back to its source of validity in an enabling Act and ultimately in the Constitution. Lawyers are familiar with tracing a chain of validity back to determine the validity of a law or decision and forward to determine the immediate source of power to make the decision. This process is not arbitrary but is based on fundamental principles of legality and constitutionality.

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<sup>350</sup> [1990] HCA 33; (1990) 170 CLR 321.

<sup>351</sup> See above [5.3.25]–[5.3.30].

<sup>352</sup> *Tang* [2005] HCA 7; (2005) 221 CLR 99, [69].

5.7.16 The majority in *Tang* gave two other reasons for their decision, neither compelling. Firstly, they held that their task was to interpret the words made under an enactment in the light of the subject, scope and purpose of the *ADJR Act*, suggesting that the interpretation they adopted was justified on that basis. However, they did not consider the subject, scope and especially the purpose of the *ADJR Act*. There is a strong argument that the interpretation which they adopted frustrates that purpose. The *ADJR Act* was designed to be remedial and to give individuals remedies against government action which adversely affected them. Preventing its use in cases in which the legislation affects interests rather than rights and duties tends to frustrate its purpose by limiting the range of cases in which it provides remedies for no good reason. As argued below, it has led to a situation in which review under the *ADJR Act* and the *JRA* is narrower than at common law.<sup>353</sup> There are no good policy reasons for limiting the scope of review in this way. Although it is not inconsistent with the words made under an enactment, there are other plausible interpretations of those words which do not limit the scope of review to the same extent. An obvious one is that a decision is made under an enactment if it is made in pursuance of the Act or to implement it.

5.7.17 In conclusion, *Tang* adopted a very narrow interpretation of made under an enactment to solve problems which were seen as arising from the use of notions of proximity to determine whether a decision was made under an enactment. As argued above, those problems may be non-existent. The *Tang* test has nothing else to recommend it and is too narrow. Hence there are good reasons for legislating to reverse the decision and no good reasons for not doing so. It could be reversed by a provision stating that decision made under an enactment includes a decision, which affects a person's interests, whether or not it affects their legal rights and duties or the legal rights and duties of any other person.

5.7.18 Extending the scope of decision made under an enactment to include decisions which affect interests as well as rights aligns the test for made under an enactment with the test for standing. Any person with an interest in a decision has standing to sue; that person has, if the proposed test is adopted, a prima facie right to an order of review. That is a sensible outcome because the alternative adopted in *Tang* may create a situation in which a person may be entitled to standing although, even if they prove all their allegations, they are not entitled to review. A test for standing should not allow access to persons who cannot make out a prima facie case.

5.7.19 It may be objected that allowing an action whenever a person's interests are affected extends the reach of the *JRA* too far because people may have a wide range of interests in a wide range of government decisions. However, all *JRA* remedies are discretionary, so that the Court may refuse a remedy if the effect on the applicant's interests is minimal.<sup>354</sup>

***Feedback is invited with respect to the following question:***

**Question 9**

Should a decision made in pursuance of an enactment which affects interests but does not affect anyone's rights or obligations be a decision under an enactment?

<sup>353</sup> See [5.7.3]–[5.7.4].

<sup>354</sup> *JRA* s 27.

## 5.8 Issue 9

### *Should a decision made under the general law but given effect to by statute be reviewable?*

5.8.1 As noted above, in *NEAT*<sup>355</sup> the High Court held that AWB's decision to veto the export of wheat was made in the exercise of its general powers under the Corporations Law rather than under the *Wheat Marketing Act 1989* (Cth). However, the *Wheat Marketing Act* attached additional legal consequences to that decision. Under that Act the Wheat Export Authority could not permit the export of wheat unless the AWB approved it. If the *Wheat Marketing Act* had not attached these legal consequences to AWB's decision, the decision would have been pointless.

5.8.2 Although the decision derived its legal effect from the *Wheat Marketing Act*, the High Court held that it was not made under that Act but under the general law. Hence it was not a decision made under an enactment and *ADJR Act* review was not available.<sup>356</sup>

5.8.3 The decision entails that where legislation attaches additional legal consequences to a decision made under the general law, the decision is not reviewable under the *ADJR Act* or the *JRA*. This is the case even in situations where there would be no point in making the decision but for the legal consequences which the legislation attaches to it.

5.8.4 The decision is legalistic and ignores the reality of the situation. No doubt a company incorporated under the Corporations Law has power to pass a resolution approving or disapproving of a government action such as permitting the export of wheat. But the Corporations Law gives no legal effect to the decision to pass such a resolution. Without more, it is no more than the expression of an opinion. As the majority conceded, the decision derived its legal effect from s 57(3B) of the *Wheat Marketing Act*. Given that without s 57(3B), there would have been no point in AWB's making the decision which it did, it is difficult to avoid the conclusion that the power to make the decision derived from the *Wheat Marketing Act*, not from the Corporations Law. Indeed, the majority conceded that if the AWB had been a statutory authority or the power of veto had been vested in the Minister, it would have been appropriate to read s 57(3B) as impliedly conferring the veto power on them. The majority did not explain why the position of a corporation incorporated under the Corporations Law differed from that of the Minister, who, as a natural person had the power to make a decision as broad as that of AWB.

5.8.5 Kirby J in dissent made very similar points. He held that AWB's veto of the export of the wheat in question was a decision under an enactment, arguing that it was the *Wheat Marketing Act* which required and gave effect to AWB's decisions with respect to the export of wheat:

The notion that a private corporation, as such, could, by its decision, control the consent-making processes of the Authority (and thereby effectively control the occasions and terms on which other traders would be allowed to participate in its market) is unthinkable without the support of valid legislation. The only way that AWBI's 'decision' could take on a legal character affecting the conduct of the Authority, and the economic rights of NEAT (and its growers) and of other Australian growers who wished to export wheat to the world

<sup>355</sup> [2003] HCA 35; (2003) 216 CLR 277.

<sup>356</sup> Ibid [53]–[54].

market, is by force of the Act. And then only if the Act gives such authority in clear and unmistakable terms. ...

It follows that it is the Act that provides for, requires, and gives legal force to, AWBI's 'decisions' relevant to NEAT's applications. It is the role performed for the purposes of the Act, and not the corporate structure of AWBI, that determines the character of the 'decisions' in question in this appeal.<sup>357</sup>

5.8.6 The majority's conclusion that the decision was not made under an enactment but under the Corporations Law characterised the decision as a private law one rather than a public law one. By doing so, it prevented judicial review of the decision. That made AWB legally unaccountable for its decisions with respect to the export of wheat, as no private law remedies were available. These decisions were not subject to the *Trade Practices Act* and as the growers were not necessarily shareholders in AWB and there were no contractual or other private law relationship between the parties, no corporate law or contractual remedies were available:

In characterising the decisions to grant, or withhold, approval for bulk export of wheat, the relationship between AWBI and the applicant traders (and growers) seeking such approval is therefore also relevant. Grain traders seeking the Authority's, and consequently AWBI's, agreement for the export of wheat, are not in a contractual relationship with AWBI. Further, in a letter to the Authority, Mr David Mailler, the Chairman of the Durum Wheatgrowers Association (NSW), also pointed out that those growers who had not exported in the past or who joined the industry later were not shareholders of AWB. Remedies under the TPA were also foreclosed. As such, the only way that the decisions of AWBI, with their wide and significant impact, could be exposed to legal scrutiny or accountability was by way of administrative review. If such review were unavailable, AWB and AWBI, at least in this respect, would come close to possessing absolute legal power.<sup>358</sup>

5.8.7 The majority's characterisation of the decisions as private law ones is difficult to justify as it had the result that the decision could not be challenged legally. The fact that the decisions were exempt from the *Trade Practices Act* suggests that parliament intended that they be treated as public law ones. Their characterisation as public law is supported by the fact that they were essentially regulatory, affecting the interests of members of the public who had no private law relationship to AWB. The fact that the AWB was constituted as a private law corporation rather than a government agency does not prevent the characterisation of the power to veto wheat exports as a public law power as it is well recognised that private bodies can be vested with public power.<sup>359</sup>

5.8.8 There is no good reason for denying review in these cases. The *JRA* is designed to be remedial and to remove many of the technicalities and unnecessary restrictions which used to encumber the law of judicial review. It should not be interpreted in a way which creates additional technicalities and unjustifiable restrictions.

5.8.9 Even if it is seen as desirable to restrict review under the *JRA* to decisions made under an enactment, the decisions made in these cases ought to be seen as falling under an enactment because,

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<sup>357</sup> Ibid [121], [123].

<sup>358</sup> Ibid [105] (Kirby J).

<sup>359</sup> *Forbes v New South Wales Trotting Club Ltd* [1979] HCA 27; (1979) 143 CLR 242.

although they may be made under the general law, an enactment gives them their legal effect. Often, without the enactment's giving them that legal effect, they would be pointless and would not be made.

5.8.10 A simple amendment to the *JRA* to extend the meaning of decision under an enactment to situations in which the decision is made under the general law, but an enactment attaches additional legal consequences to it would solve the problem.

***Feedback is invited with respect to the following question:***

**Question 10**

Should a decision made under the general law but given effect to by statute be reviewable?

## 5.9 Issue 10

***Are there classes of legislation which should not be considered as an enactment for the purposes of the JRA?***

5.9.1 In *King*<sup>360</sup> the Full Court of the Tasmanian Supreme Court held that the decision of the Director of Housing not to renew a lease was not a decision under an enactment because it was not made under the *Homes Act 1935* (Tas) but under the general law of residential tenancies.<sup>361</sup> Much of the general law with respect to residential tenancies in Tasmania, including the law with respect to when and how a landlord may choose to terminate a lease, is governed by the *Residential Tenancy Act 1997* (Tas). Hence the decision not to renew the lease could have been characterised as a decision under an enactment, the *Residential Tenancy Act*. If the Court had characterised the decision in that way, it would have been reviewable because it met all the *Bond* and *Tang* requirements.<sup>362</sup>

5.9.2 However, the Full Court did not characterise the decision in that way. Instead, they held that the decision was made under the general law because the power to terminate a fixed term lease when the term expired was a power which any landlord could exercise.<sup>363</sup>

5.9.3 Although the Court did not confront this issue directly, the decision raises the issue of whether private law statutes, that is statutes which are primarily designed to govern relations and transactions between private citizens and corporations, but which apply to governments and government agencies when they enter into the relations and transactions in question, should be considered as enactments for the purposes of the *JRA*. If they are enactments, decisions made under Acts such as the *Sale of Goods Act*, the *Residential Tenancy Act*, the Corporations Law and consumer legislation are decisions under an enactment for the purposes of the *JRA*.

5.9.4 It is arguable that the holding in *King* was wrong because the decision was clearly made under an enactment, the *Residential Tenancy Act*. There is nothing explicit in the *JRA* which rules out decisions made under an Act like the *Residential Tenancy Act*, which confers the same powers on all persons,

<sup>360</sup> [2013] TASFC 9.

<sup>361</sup> Ibid [64] quoted above [5.3.46].

<sup>362</sup> Above [5.3.42]–[5.3.45].

<sup>363</sup> *King v Director of Housing* [2013] TASFC 9, [64] quoted above [5.3.46].

whether government officers and agencies or private individuals. Hence, the Court should have held that the decision not to renew the tenancy was reviewable under the *JRA*.

5.9.5 Holding that the decision in *King* was reviewable would not allow challenges to all government decisions made under general legislation such as decisions to buy small amounts of office supplies under the *Sale of Goods Act*. To be reviewable, a decision must be administrative as well as made under an enactment. There is a line of cases, which holds that decisions made by government officials and agencies with respect to contracts and other similar transactions which are essentially private and have no public or regulatory aspects, are not reviewable.<sup>364</sup>

5.9.6 Although these cases were not decided under the *JRA* or similar judicial review statutes, they provide guidance in the interpretation of the term administrative in this context. Just as contractual decisions in which there are no public or regulatory elements are not reviewable, decisions made under private law statutes such as the *Sale of Goods Act* which have no public element should not be regarded as administrative decisions and hence would not be reviewable under the *JRA*.

5.9.7 However, decisions made under a private law statute which do have a public regulatory aspect should be regarded as administrative for the purposes of the *JRA* and hence as reviewable. It is not always easy to determine whether a decision has sufficient public element to justify being classed as administrative and hence reviewable. In *King*, the decision arguably had a public element in that it was made by a government officer, the Director of Housing, in the administration of government policy with respect to public housing. However, it is also arguable that the decision was essentially private and had no public elements. It was simply a decision which any landlord might make that a tenant was not suitable and hence should not have his or her lease renewed. The Full Court tended to view the decision in this way.<sup>365</sup> The TLRI's view is that treating the decision as completely private ignores the fact that the Director is not in the same position as a private landlord in that it is his or her responsibility to provide housing to those who are unlikely to be able to obtain housing in the private rental market. That responsibility, which is owed to the community at large, colours decisions which the Director may make with respect to tenants, giving them a public aspect.

5.9.8 It may be desirable to amend the *JRA* to provide guidance in cases such as *King*. That could be done by adding a provision to the effect that a decision made under a private law enactment is a decision under an enactment if it is properly regarded as administrative or has a public, regulatory aspect. Such a test does not provide a bright line distinction between reviewable and non-reviewable decisions. That is not a good reason for rejecting it. It reflects the fact that the distinction between public and private is not clear-cut. However, it is a necessary distinction which necessarily plays an important role in defining the scope of judicial review.

5.9.9 Allowing decisions under private law statutes to be reviewed as decisions under an enactment may be seen as introducing an element of arbitrariness into the law, denying judicial review in cases where a decision was made at common law but making it available in areas such as the sale of goods and residential tenancies, where the law has been codified. That is not a good reason for denying review

<sup>364</sup> *Khuu & Lee Pty Ltd v Corporation of The City of Adelaide* (2011) 110 SASR 235; [2010] SASC 316; *Acquista Investments Pty Ltd v Urban Renewal Authority* (2015) 123 SASR 147; [2014] SASC 206; *Karimbla Properties (No 50) Pty Ltd v State of New South Wales* [2015] NSWSC 778.

<sup>365</sup> [2013] TASFC 9 [64].

in these cases. Instead it is a reason for extending review to cases where the decision was not made under an enactment but under common law or other powers.

*Feedback is invited with respect to the following question:*

#### Question 11

Are there classes of legislation which should not be considered as an enactment for the purposes of the *JRA*?

## 5.10 Issue 11

*Should the scope of the JRA be extended to cover administrative and governmental decisions whether made under an enactment or not?*

5.10.1 The five issues discussed above may be seen as aspects of the one bigger issue — should the scope of the *JRA* be extended to all administrative or governmental decisions, whether made under an enactment or not.

5.10.2 Governments have become increasingly reliant on sources of power other than legislation, such as prerogative powers and powers conferred by contracts and other agreements, to implement programmes and to control the delivery of services. Governments also have tended to outsource service delivery to a greater extent than they did in the past. It may be necessary to extend the scope of review under the *JRA* to decisions other than those made under an enactment to reflect these changes in the way governments operate.

5.10.3 It is arguable that the rule of law requires that decisions made under prerogative powers and under contract plus decisions of service providers acting on behalf of government be subject to judicial review. If they are not so subject, there is no way of ensuring that the government and its servants and agents are not exceeding their legal powers. Besides, individuals who are adversely affected by these decisions should have some recourse to an independent procedure for resolving their complaints.

5.10.4 The need to provide a remedy in these cases suggests that the scope of the *JRA* should be extended to cover decisions made in the exercise of non-statutory governmental powers. If the *JRA* were extended to cover the five types of case dealt with above, it would extend judicial review to many situations in which the power on which the government was relying was not a statutory power. In particular, it would cover those situations which involved the spending of appropriated money. However, it would not cover cases such as *Datafin*,<sup>366</sup> which did not involve the spending of money but the establishment of an industry regulatory agency which had no statutory powers but which was tied to government.

5.10.5 It is arguable that there is little point in extending the scope of the *JRA* because even if extended, the remedies it could provide are too limited in scope to be effective. Judicial review of decisions made under prerogative powers or under contracts and other arrangements is limited in scope compared with review of decisions made under an enactment. Where a decision is made under a legislative grant of power, the enactment imposes clearly defined and legally enforceable limits on that power. Many of the grounds of review in the *JRA*, such as lack of statutory authorisation for the

<sup>366</sup> [1987] 1 QB 815; [1987] 2 All ER 770.

decision which was made, improper purpose, relevant and irrelevant considerations and *Wednesbury* unreasonableness, are designed to enforce the limits on statutory powers and are not available for reviewing decisions made under non-statutory powers. Sections 18 and 19(2)(e) of the *JRA* limit their scope to cases which are an improper exercise of the power conferred by the enactment under which the decision is proposed to be made, so that in their current form they would not be available for review of non-statutory powers. It would be pointless to extend review under the *JRA* to decisions under non-legislative powers without amending ss 18 and 19 to extend the scope of these grounds of review to cases which are an improper exercise of non-statutory powers as well as of powers conferred by an enactment.

5.10.6 Removing the limitation which ss 18 and 19 impose on their scope may not make these grounds of review generally available for review of decisions made under non-statutory powers. These grounds of review were developed for the review of decisions made in the exercise of statutory powers because legislation imposes binding and enforceable legal limits on government power. Although non-statutory powers are often exercised in accordance with written policies and guidelines, grounds of review such as relevant and irrelevant considerations, improper purpose and unreasonableness may not be available for ignoring the guidelines and policies because guidelines and policies do not impose legal limits on the scope of the power. The ARC has expressed concern that applying these grounds of review to policies and guidelines may convert non-binding guidelines into binding legal standards.<sup>367</sup> The courts have no power to do that.

5.10.7 Despite the concern, there may be a role for grounds of review such as relevant considerations in reviewing decisions made in accordance with soft law such as policies and guidelines, even in cases where the source of power to make the decision is not legislative. Policies and guidelines are relevant in making decisions under statutory powers and discretions,<sup>368</sup> as long as they are consistent with the legislation.<sup>369</sup> In *Minister for Immigration, Local Government and Ethnic Affairs v Gray*, French and Drummond JJ gave the following analysis of the role of policy in decision making under a statutory discretion:

The place of government policy in the Tribunal's decision making will depend upon the interests of good government and consistent decision-making on the one hand and the ideal of justice in the individual case on the other. But its decision must be the result of an independent assessment of all the circumstances of the particular case and not the uncritical application of policy – *Drake* (supra) at 421. This is nothing more than a statement of what is sometimes called the non-fettering principle which applies generally to statutory tribunals and decision-makers – see Bayne, *The Exercise of Discretion According to Policy Guidelines* (1993) 67 ALJ 214.

24. The proposition that government policy cannot bind the Tribunal does not imply that the policy can be ignored. It is reasonable to associate with the legislative intent that is taken to inform the construction of a wide statutory power, an acceptance of the likelihood that policies or guidelines will be developed by the Executive at either or both Ministerial or departmental levels to govern its application. As Bowen CJ and Deane J observed in *Drake* (supra) at 420:

<sup>367</sup> ARC, above n 312, [169].

<sup>368</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206.

<sup>369</sup> *Green v Daniels* (1977) 13 ALR 1.

‘... the consistent exercise of discretionary administrative power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power.’

5.10.8 The role of policies and guidelines developed to guide the exercise of non-legislative powers is very similar. There is no reason why a similar approach to guidelines and policies could not be taken when they have been developed to guide the exercise of non-statutory powers. The relevant considerations ground of review requires that where there is a duty to take a consideration into account, it must be considered but the decision-maker is free to determine the weight to be given to it. Policies and guidelines developed to guide the exercise of statutory discretions are relevant considerations which cannot be ignored. Policies and guidelines developed to guide the exercise of non-statutory powers could be regarded as relevant considerations which must be considered but which do not bind the decision-maker.

5.10.9 Currently, the grounds for review of non-statutory powers are narrower than those available to review statutory powers, making it less attractive as a form of review. However, it would not be valueless. In particular, it could be used to ensure that persons who are adversely affected by the exercise of a non-legislative power are granted procedural fairness, including a right to be heard before a decision is made. That is an important protection. And the above discussion has demonstrated that there is room for expanding the grounds available for reviewing the exercise of non-legislative powers to include relevant and irrelevant considerations without any fundamental departure from accepted principles. Once that is done the grounds of review may extend to include related grounds such as unreasonableness and no evidence.

5.10.10 Besides, the fact that the scope of the *JRA* is limited to decisions under an enactment does not rule out the possibility of judicial review of non-legislative powers. The Constitution requires that the Supreme Court retain the jurisdiction conferred on it by the prerogative remedies, whether they are incorporated into the *JRA* or retained as separate remedies.<sup>370</sup> Those remedies may extend to the review of some non-statutory powers, especially some prerogative powers.

5.10.11 The Federal Court has accepted that there is no general rule excluding exercises of prerogative powers from review.<sup>371</sup> However, not all exercises of prerogative powers are reviewable. Whether the exercise of a particular prerogative power gives rise to reviewable decisions depends upon the nature of the power and the subject to which it relates.<sup>372</sup>

5.10.12 However, because the extent of review of sources of non-legislative government power other than the prerogative is ill-defined and may not cover all situations in which review is justified, it may be advisable to define its scope more clearly in the *JRA*. Besides, there are good reasons for extending the procedural and other advantages of the *JRA* to the review of non-legislative powers, even where those powers are reviewable under the prerogative remedies.

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<sup>370</sup> The constitutional requirement that State Supreme Courts retain their jurisdiction with respect to the prerogative remedies is discussed in detail in Part 3.1 – *The Abolition of the prerogative remedies and Constitutional protection of the supervisory jurisdiction of State Supreme Courts*.

<sup>371</sup> *Minister for Arts Heritage and the Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218. The High Court refused leave to appeal in this case, effectively endorsing the decision.

<sup>372</sup> *R v Toobey: ex parte Northern Land Council* (1981) 151 CLR 170.

5.10.13 Because of the difficulties in defining when judicial review of the exercise of non-legislative powers is desirable and when it is undesirable, the ARC has not endorsed proposals to define in the *ADJR Act* the scope of review more closely than does the common law. In Report 32, the Council recommended that the *ADJR Act* be amended to allow review of decisions of government officers made under schemes funded by an appropriation.<sup>373</sup> The Council limited its recommendations in this way to ensure that it did not extend review beyond areas reviewable at common law, especially areas such as government tendering and contracting.

5.10.14 In its report on federal judicial review, the ARC suggested a compromise in which the scope of the *ADJR Act* would be extended to incorporate a jurisdiction equivalent to the jurisdiction of the High Court under s 75(v) of the Constitution,<sup>374</sup> but there would be no extension of the scope of review to particular classes of non-legislative decisions.<sup>375</sup> Its rationale was to give litigants challenging the exercise of non-legislative government power the procedural and other advantages of the *ADJR Act* while leaving the courts free to determine the scope of review of non-governmental powers according to common law principles.<sup>376</sup>

5.10.15 This compromise is equivalent to a proposal to incorporate the prerogative remedies into the *JRA* without extending the scope of review under the other provisions of the Act.<sup>377</sup> It would have the effect of limiting review of non-statutory decisions to review for jurisdictional error as the prerogative remedies are largely limited to that.<sup>378</sup> That is not likely to be a serious limitation on the scope of review because denial of procedural fairness, one of the few grounds of review currently available for non-legislative decisions and the most commonly used, is a jurisdictional error.<sup>379</sup>

5.10.16 Despite the concerns of the ARC, it may be desirable to extend jurisdiction under the *JRA* to include all or most administrative or governmental decisions. There are a number of ways in which the *JRA* could be amended to allow a general right to review regardless of the nature of the power under which the decision was made. Firstly, all decisions which have a public or regulatory aspect could be brought within the scope of the *JRA*, regardless of the source of legal power relied on to make the decision. Secondly, it could be done by reference to government decision-makers, bringing all decisions of government officers, agents, agencies and service providers within the scope of the Act, regardless of the source of legal power relied on to make the decision. Thirdly, all decisions subject to the requirements of procedural fairness could be brought within the scope of the *JRA*, regardless of the source of legal power relied on to make the decision.

<sup>373</sup> ARC, above n 312, Recommendation 1.

<sup>374</sup> ARC, above n 99, Recommendation 1, 77.

<sup>375</sup> Ibid [5.22], 83.

<sup>376</sup> Ibid [4.4] 72–3.

<sup>377</sup> This Paper suggests that the prerogative remedies be incorporated in the *JRA*: See [3.1.37]–[3.1.43] above.

<sup>378</sup> Certiorari is also available for error of law on the face of the record, but non-statutory decisions rarely generate a record of the relevant type.

<sup>379</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [2000] HCA 57.

***Issue 11(1) – Should the JRA be extended to permit review of all decisions of an administrative or public nature?***

5.10.17 This proposal would extend jurisdiction under the *JRA* in a way which is similar to the jurisdiction of the English courts under the *Dataphin* doctrine. It has the advantage of simplicity, focussing on one question, is the decision administrative or public. In doing so, it focuses attention on the key issue; is the decision administrative or public and hence suitable for judicial review? Hence, it could be used to exclude government contractual decisions from review on the grounds that they are not usually administrative or public but are analogous to the private contractual decisions of ordinary citizens.

5.10.18 Although this test may exclude most contracts from review, it may allow review in cases such as *King*,<sup>380</sup> where contract was used as a means of implementing a government programme and hence had a greater public or administrative element than a normal contract.

5.10.19 The major weakness in the proposal is that it has proven difficult to distinguish public from private decision making in borderline cases. Aronson, Groves and Weeks give a list of the results in English cases applying the doctrine, showing that it has not been easy to distinguish exercises of public from exercises of private power in borderline cases.<sup>381</sup> This is not surprising, given that there is a tendency for governments to confer regulatory functions on private bodies subject to some government oversight. The fact that current practice tends to blur the distinction between public and private and that that is reflected in the cases is not a good reason for rejecting the proposal.

***Issue 11(2) – Should the JRA be amended to permit review of all decisions of government officers, servants, agents, agencies and service providers?***

5.10.20 A provision extending *JRA* review to all decisions of government officers, servants, agents, agencies and service providers appears to have the advantage that it does not present the court with the difficult task of distinguishing public from private power. Instead, it presents the court with the easier task of determining whether the decision-maker is a government officer, servant, agent, agency or service provider.

5.10.21 However, there are problems in adopting a provision extending review to all decisions of government officers, servants, agents, agencies and service providers. It extends review without exception to decisions of the named classes of decision-maker, unless they are specifically exempted from review by provisions such as those found in Schedule 1 and 2 of the Act. This grant of review may be too broad in that it does not recognise that government officers and agents may make decisions, such as those with respect to many government contracts, which have no public element other than that they are made by a government officer or agent. Given the understandable reluctance to subject all government contracts to judicial review, it may be necessary to supplement the test with other limitations to filter out those decisions of government officers and agents which should not be subject to judicial review.

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<sup>380</sup> [2013] TASFC 9.

<sup>381</sup> Aronson, Groves and Weeks, above n 13, 144–149.

5.10.22 To prevent overreach into areas that should not be reviewable, the ARC recommended that a provision authorising review of the decisions of government officers be limited to schemes and projects financed from appropriations.<sup>382</sup> That proposal was adopted in the *Judicial Review Act 1991* (Qld) s 4(b) and has been considered in some detail above.<sup>383</sup> As pointed out above, it does not extend to every case where review may be desirable, including cases of public/private regulation subject to government oversight as in *Datafin*.<sup>384</sup>

5.10.23 To cover cases such as *Datafin*, it is necessary to extend review to situations which do not involve the spending of appropriated funds. If that were done without adopting some other limitation on the scope of review of decisions of government officers and agents, it would lead to the unlimited review of government contracts entered into by government officers and agents.

5.10.24 The most obvious limitation to impose would be to require that to be reviewable, the decision must be public, administrative or governmental in character. If that limitation were adopted, the proposal becomes very similar to the proposal that review be extended to all decisions of an administrative, public or governmental character. Once this limit is added, the requirement that the decision be made by a government officer, servant, agent or agency seems superfluous and could easily be dropped, so that the two proposals become identical.

5.10.25 Secondly, the requirement that the decision be made by a government officer, servant, agent, agency or service provider is not as clear as it may seem. It is broader, but similar in some ways to the requirement in s 75(v) which gives the High Court original jurisdiction over matters in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth. The earliest cases suggest two ways of identifying officers of the Commonwealth. On one view, an officer of the Commonwealth was a person who had been appointed to a Commonwealth office. The other view was that an officer of the Commonwealth was a person who performed a Commonwealth government function, whether or not they held an office under the Commonwealth.

5.10.26 The former of the two views prevailed, leading to some technical limitations on who could be a Commonwealth officer. The majority in the early case of *R v Murray and Cormie* held that it was not enough that a person was performing a Commonwealth function. To be a Commonwealth officer, they had to be appointed to a Commonwealth office. Hence, a judge of a State court exercising Commonwealth jurisdiction under s 77(3) of the Constitution was not an officer of the Commonwealth because they held a State not a Commonwealth office.<sup>385</sup>

5.10.27 Similar problems may arise under any provision which confers jurisdiction to review decisions of government officers, servants, agents, agencies or service providers. It would be open for a court to adopt an interpretation of officer, servant, agent, agency, or service provider analogous to the interpretation of officer adopted in *R v Murray and Cormie*. That interpretation would limit the phrase to persons who had been appointed as government officers, servants, agencies, and service providers, so that it would not include persons performing functions on behalf of the government without being appointed as officers, servants, agents or service providers. That would be an unnecessary restriction

<sup>382</sup> ARC, above n 312, Recommendation 1, discussed at [5.6.35]–[5.6.39].

<sup>383</sup> See above, *Contracts and other arrangements entered into in the implementation of a policy, or to deliver a service or benefit*, [5.6.31]–[5.6.43].

<sup>384</sup> *Ibid.*

<sup>385</sup> *R v Murray and Cormie* [1916] HCA 58; (1916) 22 CLR 437, (Isaacs, Higgins Gavan Duffy and Rich JJ).

on the scope of review as the availability of review of the decision of a person performing a government function should not depend upon whether they had been appointed as a government officer, servant or agent. Instead, it should depend upon whether the decision is a public or private one.

5.10.28 In conclusion, it may not be desirable to adopt a provision extending judicial review under the *JRA* to all decisions of a government officer, servant, agent, agency or service provider because the requirement is not sufficient in itself to prevent review of decisions which probably should not be reviewed, such as contractual decisions. If it is combined with another limitation, such as the requirement that to be reviewable, the decision must be public, administrative or governmental in nature, in order to rule out review of normal contract decisions, it adds little to that requirement. It is also open to a narrow technical interpretation which would prevent review of some decisions which ought to be reviewable for no good reason.

***Issue 11(3) – Should the JRA be amended to permit review of all decisions which are subject to the requirements of natural justice?***

5.10.29 Section 2 of Victoria’s *Administrative Law Act 1978* limits review to situations where the decision-maker is bound by one or more of the rules of natural justice. It does so by limiting review to the decisions of tribunals which are defined as:

“Tribunal” means a person or body of persons ... who, in arriving at a decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

5.10.30 Matthew Groves has argued that this formula is a better way of defining the scope of review than the *JRA* formula of administrative decisions made under an enactment.<sup>386</sup> He argues that it is much simpler than the *ADJR Act* formula because the situations to which the rules of natural justice apply are well understood and the arguments now tend to be about what it requires in particular cases. Those arguments are irrelevant to the jurisdictional formula because it requires that the decision-maker only be required to exercise one of the rules of natural justice which might be to provide notice or to act without bias.<sup>387</sup>

5.10.31 Groves also points out that the scope of natural justice has expanded greatly since the *Administrative Law Act* was adopted in 1978. In 1978, natural justice was only available to a person whose rights were affected by a government decision or action. Cases such as *FAI Insurances Ltd v Winneke*<sup>388</sup> and *Kioa v Wes*<sup>389</sup> have extended the reach of natural justice so that persons whose interests or legitimate expectations are affected by a government decision or action as well as those who have rights at stake are entitled to natural justice. The expansion of natural justice has led to a great expansion of the right to review under the *Administrative Law Act*.

5.10.32 Defining the scope of review by reference to natural justice has the potential to enable the courts to avoid the distinction between public and private, which has caused so much difficulty in the

<sup>386</sup> Groves, above n 12, 463–5.

<sup>387</sup> *Ibid.*

<sup>388</sup> (1982) 151 CLR 342.

<sup>389</sup> (1985) 159 CLR 550.

United Kingdom. Natural justice has long extended to clubs, professional associations and other related private organisations which exercise disciplinary powers such as the power to expel.<sup>390</sup>

5.10.33 A broad reading of the natural justice formula could extend judicial review to such bodies, ruling out any need to distinguish public from private.

5.10.34 However, extending judicial review to that extent would create new problems. If natural justice were adopted as the jurisdictional formula in the *JRA*, it could expose clubs and professional bodies to the full gamut of *JRA* grounds for review. That would pose huge problems for clubs and professional bodies, many of which do not have the resources or expertise to operate in accordance with administrative law standards. It would be unreasonable to require them to.

5.10.35 The only way to protect clubs and professional associations from the full gamut of grounds of review is to limit judicial review to the public sphere. The Victorian courts have done that under the *Administrative Law Act*. With one or two exceptions they have limited judicial review under the Act to review of the decisions of public bodies.<sup>391</sup>

5.10.36 Given that the public private distinction may be needed to prevent judicial review's extension to private bodies with disciplinary and other powers over their members, defining the scope of review by reference to natural justice may have little advantage over defining it by reference to the distinction between public and private power. Reliance on the distinction between public and private power seems inevitable unless we are prepared to permit judicial review under the *JRA* to extend to private clubs and organisations which possess disciplinary powers over their members.

5.10.37 Hence the best option for extending the *JRA* beyond the five situations outlined above is by extending judicial review to decisions and conduct made in the exercise of public power, regardless of its source. The distinction between public and private power remains relevant even if some other jurisdictional test such as natural justice or decisions of public officers, servants, agents, agencies or service providers is adopted. Little is gained by supplementing the requirement that the decision be made in the exercise of public power with additional requirements such as the decision-maker must be subject to the requirements of natural justice or must be a government officer or agent.

## 5.11 Issue 12

***If the scope of the JRA is extended to all decisions made in the exercise of public power, should that grant replace or be in addition to the existing grant of power and others suggested in the above discussion?***

5.11.1 If the scope of the *JRA* is extended to all decisions made in the exercise of public power, it will be necessary to decide whether to add the additional grant of jurisdiction to that already in the Act and others proposed to solve specific problems identified as arising from the requirement that decisions be made under an enactment or to replace the existing grant of jurisdiction with one broad grant designed to cover all cases.

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<sup>390</sup> The cases are discussed in Aronson, Groves and Weeks, above n 13, 496–500.

<sup>391</sup> *Monash University v Berg* [1984] Vic Rp 30; [1984] VR 383; *Dominik v Eutrope* [1984] Vic R 54; [1984] VR 636; *Davidson v Australian Mensa Inc* (1996) 10 VAR 42.

5.11.2 The second option has the virtue of apparent simplicity. However, it may lead to its own problems. There is much to be gained from keeping the existing jurisdictional formula which is well understood and gives rise to no problems in the majority of cases. It may also be worthwhile to extend that jurisdiction in ways which are designed to overcome specific problems before adding a final general grant. To prevent that general grant from being read down in the light of the other grants, there could be a general grant of jurisdiction over all exercises of public power, regardless of the source and of the person who exercises the power. It could then be made clear that that general grant includes but is not limited to jurisdiction with respect to all the other more specific grants.

***Feedback is invited with respect to the following questions.***

**Question 12**

- (a) Should the scope of the *JRA* be extended to cover administrative and governmental decisions whether made under an enactment or not?
- (b) Should the *JRA* be extended to permit review of all decisions of an administrative or public nature?
- (c) Should the *JRA* be amended to permit review of all decisions of government officers, servants, agents, agencies and service providers?
- (d) Should the *JRA* be amended to permit review of all decisions which are subject to the requirements of natural justice?
- (e) Should judicial review under the *JRA* be extended to all decisions and conduct made in the exercise of public power, regardless of its source?

**Question 13**

- (a) If the scope of the *JRA* is extended to all decisions made in the exercise of public power, should that grant replace or be in addition to the existing grant of power and others suggested in the above discussion?
- (b) Should the general grant of jurisdiction over all exercises of public power include but not be limited to jurisdiction with respect to the other more specific grants of jurisdiction which currently exist and which are proposed in this Issues Paper?