



**Justice &
Attorney General**

DISCUSSION PAPER

REFORM OF JUDICIAL REVIEW IN NSW

NSW DEPARTMENT OF JUSTICE & ATTORNEY GENERAL

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EXECUTIVE SUMMARY

Judicial review provides an avenue to challenge the legality of administrative and / or executive decisions. It is the mechanism by which the judiciary enforces the legal limits on executive action and statutory powers and, as such, is an important component of the rule of law.

As part of major administrative law reforms in the late 1970s the Commonwealth Government created a statutory form of judicial review through the enactment the *Administrative Decisions (Judicial Review) Act 1977* (the 'ADJR Act'). This reform has been described as 'overwhelmingly beneficial'.¹ The success of those reforms (and the adoption of very similar legislation three other states and territories) raises the question whether NSW should adopt a similar course. This discussion paper responds to that question.

The discussion paper analyses the current operation of judicial review in NSW and reforms in other jurisdictions, with particular focus on the ADJR Act. It asks whether there is a need for reform of judicial review in NSW and if so, what are the key issues that should be addressed in any reform measures. In particular, it asks:

- whether a statutory judicial review jurisdiction should be established,
- whether any such statutory jurisdiction should be modelled on the ADJR Act, or
- whether there are alternative options for the reform of common law judicial review in NSW.

The discussion paper considers the following options for reform:

Option 1: Creating a statutory right to reasons;

Option 2: Reform of common law judicial review, including standing;

Option 3: Creating a statutory judicial review jurisdiction modelled on the provisions of the ADJR Act, subject to a number of key modifications;

Option 4: Creating a statutory judicial review jurisdiction that adopts a 'natural justice' test to define the scope of decisions that should be subject to judicial review;

Option 5: Creating a statutory judicial review jurisdiction that adopts a 'public function' test to define the scope of decisions that should be subject to judicial review;

Option 6: Introducing a 'public function' test, extending the scope of judicial review at common law.

The common law does not recognise any general obligation on administrative decision-makers to provide a statement of reasons for their decisions. One of the significant reforms of the ADJR Act was the creation of a statutory right to reasons for decisions that may be subject to judicial review (without having to first apply for judicial review). Option 1 considers the creation in NSW of a similar statutory obligation on decision-makers to provide a statement reasons upon request. Option 1 could be undertaken in conjunction with or independently of any of the other possible reforms canvassed in this paper.

Option 2 considers possible procedural reforms to the operation of judicial review at common law as well as possible reforms to the rules of standing. In relation to standing, Option 2 considers whether a uniform test for standing should apply to judicial review in NSW (as is the case under the ADJR Act) as well as whether rules of standing should explicitly recognise standing for persons or organisations representing a special or public interest. While the reforms considered in Option 2 could be made to apply to common law judicial review, they could equally be implemented in relation to a statutory judicial review jurisdiction.

Options 3, 4 and 5 each relate to the establishment of a statutory judicial review jurisdiction in NSW. The discussion paper starts from the proposition that, setting aside significant issues as to defining jurisdiction, the ADJR Act otherwise provides a useful model for reform. The jurisdictional test of the ADJR Act has, however, created significant difficulty. Options 3, 4 and 5 consider

¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157] per Justice Kirby.

alternative ways of defining the scope of actions and decisions subject to judicial review under any NSW judicial review statute.

Option 3 considers adopting the ADJR Act jurisdictional test, but with key modifications and additions that are intended to more closely reflect the scope of review at common law. Option 4 considers adopting a jurisdictional test that would permit judicial review of decisions in respect of which a decision-maker is already required to observe the rules of natural justice. Option 5 considers adopting a jurisdictional test that would permit judicial review of decisions that are made in the exercise of a 'public function'.

Option 6 considers a possible expansion of the substantive law of common law judicial review in NSW, by providing for judicial review of decisions that are made in the exercise of a public function.

1 Introduction

- 1.1 The purpose of this discussion paper is to obtain comments from interested individuals and organisations on the development of legislation to reform the law of judicial review in NSW.
- 1.2 This discussion paper analyses the current operation of judicial review in NSW and reforms in other jurisdictions. It asks whether there is a need for reform of judicial review in NSW. In particular, it asks whether a statutory judicial review jurisdiction should be created in NSW based on the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act') or whether there are alternative options for the reform of common law judicial review in NSW.
- 1.3 Interested individuals and organisations are invited to make a submission regarding the questions and proposals outlined in the paper by 14 April 2011. Submissions should be directed to:

Director
Legislation, Policy & Criminal Law Review Division
Department of Justice & Attorney General
GPO Box 6
SYDNEY NSW 2001

DX 1227 SYDNEY

Email: lpd_enquiries@agd.nsw.gov.au

2 What is Judicial Review?

- 2.1 Judicial review is concerned with the legality of administrative decision-making. It provides for courts to determine whether administrative bodies and officials have acted within the legal boundaries of their powers and functions. It is the mechanism by which the judiciary enforces the legal limits on executive action and statutory powers and, as such, is a crucial component of the rule of law.
- 2.2 Judicial review does not, strictly speaking, permit a court to consider the merits of administrative action. That is, it does not allow a court to ask whether a decision was a 'good' or 'wise' decision, or one that the court agrees with in terms of policy. It only allows courts to ask whether administrators have acted within the legal boundaries of their powers. For example, a court might ask whether a decision-maker has taken into account all the factors required by the legislation in granting a fishing licence, but cannot ask whether, in terms of good policy or resource allocation, the licence should be granted.
- 2.3 Examples of the 'grounds' of review which could render an administrative decision unlawful include: a failure to consider factors required by legislation to be considered; consideration of irrelevant matters; denial of procedural fairness; impermissible delegation of the decision to someone other than the person chosen by Parliament; and failure to properly exercise discretion by 'acting under the dictation' of a third party.
- 2.4 Even where a court finds that a decision has been made unlawfully, it cannot substitute its own decision on the merits of the matter. Judicial review does not allow a court to grant a 'substantive' remedy. Courts will quash a decision unlawfully made and commonly remit the matter back to the original decision-maker for determination in accordance with the law. For example, a court may be able to order a licensing body to reconsider the grant of a licence, but cannot actually order that the licence be granted.
- 2.5 The history of judicial review has had a significant effect on its nature and scope. Judicial review originally developed at common law, not through statute. The common law provided for review of executive action by way of the specific remedies, known as

the “prerogative writs” of certiorari (to quash a decision), mandamus (to compel the performance of a lawful duty), prohibition (to prevent unlawful action), habeas corpus (to challenge unlawful detention) and quo warranto (requiring public office holders to demonstrate the source of their authority) and the equitable remedies of injunction or declaration.

- 2.6 There are two basic rationales for judicial review.
- 2.7 Judicial review provides an avenue for individuals to challenge the legality of particular decisions by government agencies affecting rights, interests or legitimate expectations and to obtain binding determinations as to the legality of such decisions. As such, it is a crucial component of the rule of law and permits individuals to hold government to account.
- 2.8 At a systemic level, judicial review is thought to promote lawful and accountable decision-making by public agencies, primarily through the ‘psychological impact’ of government agencies knowing that their actions may be subject to review. Evidence from the Commonwealth level suggests that judicial review can indeed play an important role in encouraging compliance with the law in agency decision-making. This evidence suggests that in a substantial number of cases where applications were successful, judicial review has led to substantive changes to agency practice.²
- 2.9 There are limitations on the capacity of judicial review to provide remedies for individual disputes. As previously noted, judicial review allows for challenge only on the basis of the legality, not the merits, of a decision. In a practical sense, the costs of judicial review proceedings are also likely to be prohibitive in many cases.
- 2.10 There are also limitations on the impact of judicial review at the systemic level. The ‘psychological impact’ may be limited in government agencies whose decisions are only rarely challenged by way of judicial review. While government decision-making increasingly impacts on many areas of life, only a few areas of administrative activity are routinely subject to judicial review, such as planning and development decisions.

3 The Australian context

- 3.1 In Australia, judicial review is available at common law in all jurisdictions. The power of the High Court to review decisions of ‘officers of the Commonwealth’ is also entrenched by section 75 of the Constitution (this is sometimes referred to as the ‘constitutional writ’ jurisdiction). A parallel right of review is vested in the Federal Court by section 39B of the *Judiciary Act 1903* (Cth).
- 3.2 At the Commonwealth level, a simplified statutory judicial review code has also been introduced by the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).
- 3.3 The ADJR Act arose out of a major review of the system of review of Commonwealth government administrative decisions in the late 1960s and early 1970s. The Kerr,³ Bland⁴ and Ellicot⁵ reports resulted in a fundamental restructure of the system of administrative review at the Commonwealth level, including the introduction of the ADJR Act. Problems identified by the Kerr report that relate specifically to judicial review included:

² Creyke, R., and McMillan, J., ‘Judicial review outcomes – An empirical study,’ (2004) 11 *Australian Journal of Administrative Law*, 82, at 87; Robin Creyke and John McMillan, ‘Executive Perceptions of Administrative Law – An Empirical Study’ (2002) *Australian Journal of Administrative Law* 163, at 168. It should be noted however, that agency views on the impact of judicial review on agency practice were, in many instances, qualified.

³ *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971.

⁴ *Interim Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 of 1973; *Final Report of the Committee on Administrative Discretions*, Parliamentary Paper No 53 of 1973.

⁵ *Prerogative Writ Procedures: Report of Committee of Review*, Parliamentary Paper No 56 of 1973.

- The technical difficulties associated with obtaining review and the restrictions on the availability of the various remedies;⁶
 - The absence of any legislative requirement requiring the provision of a statement of reasons for administrative decisions.⁷
- 3.4 The ADJR Act responded to these issues by:
- establishing a standard application procedure for judicial review;
 - allowing more flexible grant of remedies (encompassing the functions of the common law writs); and
 - establishing a statutory right to reasons for decisions.
- 3.5 The ADJR Act also made a number of other reforms to judicial review by:
- introducing a uniform test for standing (that is, the question of who has a right to seek judicial review);
 - creating a number of procedural discretions relating to the conduct of judicial review proceedings by the courts;
 - introducing a simple itemisation of the grounds of review.
- 3.6 These reforms aimed to make judicial review more flexible and accessible. It was also believed that the creation of a statutory right of review and, in particular, the codification of the grounds of review, would have an educative function for administrative decision-makers and the legal profession.
- 3.7 The statutory right to judicial review created by the ADJR Act co-exists with the common law judicial review jurisdiction exercisable by the Federal Court under s39B *Judiciary Act 1903* and by the High Court under section 75(v) of the Australian Constitution.
- 3.8 The state Supreme Courts (including in NSW) are also empowered to conduct judicial review. The recent decision of the High Court in *Kirk v Industrial Relations Commission* held that the ‘supervisory jurisdiction’ of the Supreme Courts, which includes the powers of the Supreme Court for judicial review on the basis of jurisdictional error, is constitutionally entrenched.⁸ It is fundamental to any reform of judicial review in NSW that this ‘supervisory jurisdiction’ of the NSW Supreme Court cannot be displaced.
- 3.9 Legislation modelled on the ADJR Act, conferring a statutory judicial review jurisdiction on state Supreme Courts, has also been enacted in Queensland (*Judicial Review Act 1991* (Qld)) (the ‘Queensland Act’), Tasmania (*Judicial Review Act 2000* (Tas)) (the ‘Tasmanian Act’) and the ACT (*Administrative Decisions (Judicial Review) Act 1989*). In each case, judicial review legislation co-exists with the common law judicial review jurisdiction.
- 3.10 A statutory form of judicial review was also introduced in Victoria by the *Administrative Law Act 1978* (Vic).

4 The NSW context

- 4.1 In NSW, judicial review is currently only available at common law.

⁶ Kerr Report, above n3, at 27-29.

⁷ Kerr Report, above n3, at 30.

⁸ *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* (2010) 239 CLR 531, [98] – [100] (French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ).

- 4.2 In NSW, much of the complexity historically associated with obtaining judicial review has been removed by procedural reforms.⁹ In particular, the court may hear proceedings for the grant of the remedies of prohibition, mandamus and certiorari in accordance with the simplified procedures established by the *Supreme Court Act 1970* and *Uniform Civil Procedure Rules 2005* and may grant those remedies by the simplified means of a judgment or order. These reforms have provided for greater procedural flexibility but have not otherwise altered or codified the common law basis of judicial review in NSW.
- 4.3 In NSW, common law judicial review may be exercised by the Supreme Court and, for matters arising under planning or environmental laws¹⁰, by the Land and Environment Court.¹¹
- 4.4 In NSW, the Supreme Court has also introduced some practical initiatives to enhance accessibility of judicial review, through its Practice Note SC CL 3, in particular by:
- permitting the Court to direct a person or body whose decision has been challenged to provide a statement of reasons for the decision (although only after an application for review has been made); and
 - including a list of the common law grounds of review for educative purposes.¹²

5 Other Common law jurisdictions

- 5.1 This discussion paper does not look in depth at other common law jurisdictions, except to consider the reforms in the United Kingdom, which introduced a 'public function' test which now determines what decisions are subject to judicial review in that jurisdiction.
- 5.2 In considering the experience in other common law jurisdictions it is important to note significant differences in the constitutional context in which judicial review has developed. In particular, the strict separation of judicial and executive power that is central to defining the limits of judicial review in Australia is not replicated in other common law systems.

6 First Principles: Is there a need for reform of judicial review in NSW?

- 6.1 There are a number of threshold questions to be considered before any reform of judicial review in NSW is undertaken:

Question 1:

(a) Are there problems with the substance of, or procedures for, common law judicial review in NSW?

(b) If there is a need for reform, what are the key issues that should be addressed in any reform measures?

(c) If there is a need for reform, should NSW introduce a statutory code for judicial review, based on the ADJR Act model, another statutory model (which would in either case co-exist with the existing common law judicial review), or would it be preferable to reform some aspects of common law judicial review only?

- 6.2 A consideration of these questions requires an assessment of how the common law judicial review jurisdiction is currently operating in NSW. It should take into account the

⁹ See *Supreme Court Act 1970* ss69-71; *Uniform Civil Procedure Rules 2005* (NSW) Part 36 r 1, Part 51 r 52; See also *Dickinson v Perrignon* [1973] 1 NSWLR 72 at 79 (Moffit JA) and 82-83 (Street CJ in Eq).

¹⁰ Section 20(3) *Land and Environment Court Act 1979*.

¹¹ Section 20(2) *Land and Environment Court Act 1979*.

¹² Supreme Court Practice Note SC CL 3, issued 9 July 2007.

lessons from experience with the ADJR Act, as well as changes in the administrative law system since the time the ADJR Act model was established in the 1970s. Matters to consider include the following.

- 6.2.1 The enactment of the ADJR Act in 1977, as well as the other administrative law reforms of that period and subsequently (including the creation of generalist administrative appeals tribunals and Ombudsmen at Commonwealth and State levels) have substantially transformed the administrative law system in Australia. Administrative law is more accessible and much more broadly used and understood than it was before these reforms were introduced. To the extent that some reforms of the ADJR Act (such as itemising the grounds of review) were expected to have an educative effect on administrative decision-makers, the legal profession and the public, some argue that this has been largely achieved already.
 - 6.2.2 In the Commonwealth administrative law context, recent years have seen a move away from the use of the ADJR Act.¹³ This has been accompanied by the emergence of a constitutional basis for common law judicial review with a focus on jurisdictional error as 'an overriding, unifying concept'.¹⁴ This renewed focus on the common law highlights the distinction between the scope of decisions that are reviewable under the ADJR Act (which are restricted to decisions 'made under an enactment') and those that are reviewable at common law (which are not limited in that way). The continued development of common law judicial review also means that the ADJR Act cannot now be described as the dominant jurisdiction for judicial review in Australia.
 - 6.2.3 The extension of constitutional protection to the judicial review powers of state Supreme Courts where 'jurisdictional error' is found¹⁵ is another significant development that places significant constraints on any possible reform of judicial review in NSW. Any reform must not attempt to displace or alter the 'supervisory jurisdiction' of the NSW Supreme Court to review decisions affected by 'jurisdictional error'.
- 6.3 There have also been changes to the government context in which the administrative law system operates since the reforms of the 1970s. These include significant changes to the administration of government and provision of government services, through deregulation, commercialisation, corporatisation, public sector downsizing, outsourcing of services and privatisation.¹⁶ The result is that regulatory functions and core services that were previously carried out by government are now sometimes performed by incorporated government enterprises or private enterprises. For people affected by the exercise of these functions the issues of accountability, transparency and fairness remain the same, but the availability of judicial review may be circumscribed (particularly under the ADJR Act).
- 6.4 This discussion paper will consider these issues and questions in relation to the following options for reform:
- Option 1:** Creating a statutory right to reasons;
 - Option 2:** Reform of common law judicial review, including standing;
 - Option 3:** Creating a statutory judicial review jurisdiction modelled on the provisions of the ADJR Act, subject to a number of key modifications;

¹³ Due principally to the Federal Government's extensive use of privative clauses reducing the jurisdiction of the ADJR Act.

¹⁴ The Hon JJ Spigelman, 'Public law and the executive', (2010) 34 *Australian Bar Review* 10.

¹⁵ *Kirk* decision, above n8.

¹⁶ Creyke, R., and McMillan, J., 'Administrative Law Assumptions... Then and Now' in Creyke, R., and McMillan, J., *The Kerr Vision of Australian Administrative Law*, 1998, Centre for International and Public Law, Australian National University, at 22.

- Option 4:** Creating a statutory judicial review jurisdiction adopting a 'natural justice' test to define the scope of decisions that should be subject to review;
- Option 5:** Creating a statutory judicial review jurisdiction adopting a 'public function' test to define the scope of decisions that should be subject to review;
- Option 6:** Introducing a 'public function' test extending the scope of judicial review at common law.

7 Option 1: Creating a statutory right to reasons

- 7.1 There is no general common law obligation for administrative decision-makers to provide reasons for their decisions.¹⁷
- 7.2 However, in what is regarded as one of its most significant reforms, the ADJR Act created a statutory right to obtain a statement of reasons regarding decisions that are reviewable under that Act, regardless of whether an application for judicial review is made.
- 7.3 The right to obtain a statement of reasons (prior to lodging any application for review of a decision) is significant because it assists individuals to assess whether a decision could and should be challenged (whether by judicial review, or through other available means). It also enhances transparency and accountability in government decision-making and so enhances the legitimacy of decisions.
- 7.4 A statutory right to obtain reasons for decisions that would be subject to judicial review could be created in NSW. Such a reform could be modelled on the provisions of the ADJR Act, the Queensland and Tasmanian Acts, which provide that:
 - 7.4.1 the duty to give written reasons arises only when a person affected by a reviewable decision makes a request for reasons to be provided;
 - 7.4.2 the statement of reasons provided is to include findings on material questions of facts, referring to the evidence or other material on which those findings were based and is to include the reasons for the decision;¹⁸
 - 7.4.3 reasons are to be provided as soon as practicable but within 28 days after the request;¹⁹
 - 7.4.4 the decision-maker may refuse to provide a statement of reasons where the person making the request is not entitled to obtain such a statement or does not make the request within 28 days from when the document recording the decision was given (where the decision was recorded in writing) or otherwise within a reasonable time;²⁰
 - 7.4.5 where a dispute arises as to whether a person is entitled to request a statement of reasons or as to whether a statement of reasons provided is sufficient this may be adjudicated by the court;²¹ and
 - 7.4.6 in respect of decisions by the Governor in Council or by Cabinet, a request for reasons is to be made to the responsible Minister.²²
- 7.5 The ADJR Act model operates on the principle that reasons for decisions should be provided for any decisions that may be subject to judicial review, but recognises that there may be some circumstances in which the obligation to provide reasons should

¹⁷ *Public Service Board v Osmond* (1986) 159 CLR 656.

¹⁸ ADJR Act s13(1), Qld Act ss3, 34, Tasmanian Act ss 3, 31.

¹⁹ ADJR Act s13(2), Qld Act s33(2), Tasmanian Act s30(2).

²⁰ ADJR Act s13(5), Qld Act s33(4), Tasmanian Act s30(4).

²¹ ADJR Act s13(3), (4A), Qld Act ss38-40, Tasmanian Act ss35-37.

²² Qld Act s32(2)(a), Tasmanian Act s29(2)(a).

not apply. Such decisions are expressly excluded from the obligation in a schedule to the ADJR Act.

- 7.6 The question of what, if any, decisions should be excluded from the operation of the ADJR Act was considered extensively by the Commonwealth Administrative Review Council (the 'ARC').²³ The ARC identified the public law values that underlie judicial review as 'the rule of law, the safeguarding of individual rights, accountability, and consistency and certainty in the administration of legislation'.²⁴ It recommended that, as these are 'paramount values', a 'strong justification is needed to reduce judicial in such a way as to allow unlawful conduct to proceed without the availability of any kind of remedy'.²⁵
- 7.7 In its Report No. 47, the ARC considered a number of factors put forward as relevant to limiting the scope or availability of judicial review²⁶ and developed a 'Framework of indicative principles'.²⁷ There were only two factors listed in the Framework where the ARC considered that limits on judicial review were justified or justified in most cases. These were:
- 7.7.1 decisions relating to criminal, civil penalty or extradition proceedings; and
 - 7.7.2 decisions where there is neither a right to a benefit nor a duty on the decision maker to consider conferring a benefit.
- 7.8 A similarly principled approach could apply to any NSW statutory right to obtain reasons. In NSW, categories of decision that could be exempted from an obligation to provide reasons include:
- 7.8.1 decisions made under the *Constitution Act 1902* (NSW), so that decisions of Parliament and its Committees are not subject to review;
 - 7.8.2 decisions to make subordinate legislation (on the basis that administrators exercising delegated legislative power are usually giving effect to the details of the policy intent of the parent Act and Government should not be required to justify its policy position through the provision of reasons to individuals);
 - 7.8.3 decisions relating to the administration of criminal justice;
 - 7.8.4 decisions relating to the institution or conduct of proceedings in civil courts;
 - 7.8.5 certain government personnel and appointment decisions; and
 - 7.8.6 decisions of statutory authorities and non-government entities in relation to their competitive commercial activities.
- 7.9 The ADJR Act model also provides that, in relation to decisions for which there is a right to obtain reasons, there may be certain kinds of information that should be excluded from a statement of reasons, such as:
- 7.9.1 confidential information that relates to certain personal affairs or business affairs of a person other than the person making the request; or
 - 7.9.2 information, the disclosure of which the Attorney General has certified as being contrary to the public interest;²⁸ and
 - 7.9.3 confidential information, "the publication of which would, or could reasonably be expected to, adversely affect a State authority or local government authority in relation to its competitive commercial activities."²⁹

²³ See report numbers 1, 9, 26, 32 and 47.

²⁴ Administrative Review Council, *The Scope of Judicial Review* – Report No.47, (2006) paragraph 5.1

²⁵ Ibid. paragraph 5.1

²⁶ Ibid. Chapter 5.

²⁷ Ibid. Chapter 6.

²⁸ ADJR Act ss13A, 14, Qld Act ss35-36, Tasmanian Act ss32-33.

²⁹ Qld Act, s35(2)(c).

However, such information should not be excluded from a statement of reasons where the decision maker knows, or ought reasonably know, that the information is otherwise available to the public.³⁰

- 7.10 The creation of a statutory obligation to provide reasons may be capable of abuse by vexatious or unreasonably persistent requests for reasons. Any statutory right could also include a mechanism allowing decision-makers in receipt of such requests to refuse to provide a statement of reasons and for the resolution of any disputes arising out of such a refusal.
- 7.11 Further issues arise depending on the extent of other reform of judicial review that is undertaken. For example, if Option 3 is adopted (creation of a statutory right to judicial review), it is likely that the statutory right to obtain reasons would largely apply to the same class of decisions to which the statutory judicial review jurisdiction applied (subject to any express exceptions). However, if no statutory judicial review jurisdiction is created, some other mechanism will be needed to define the decisions to which the statutory right to reasons will apply. The mechanism will be required to create certainty for agencies who may be required to provide reasons, while at the same time reflecting the sometimes complex jurisdictional limits of common law judicial review. Should a 'public function' test be adopted, the extent to which the right to obtain reasons should apply to non-government entities whose decisions may be subject to judicial review may also need further consideration.

Question 2:

(a) Should a statutory right to obtain reasons for judicially reviewable decisions be created in NSW?

(b) Should any decisions or classes of decision be excluded from the requirement to provide reasons? On what basis?

(c) If a statutory right to obtain reasons is created, but no statutory judicial review jurisdiction is created, how should the class of decisions to which the right to obtain reasons be defined? In particular, would any of the tests discussed in relation to Options 3, 4 and 5 below be an appropriate means of determining when the right to reasons would apply?

(d) Would possible reforms expanding the rules of standing require any further limitation on the scope of the right to obtain reasons?

8 Option 2: Reform of common law judicial review

- 8.1 If there is a need for reform of judicial review in NSW a key question is whether any such reform should create a separate statutory judicial review jurisdiction (as has occurred in other jurisdictions), or whether it should reform some aspects of common law judicial review only. One argument for limiting reform to the common law is that there may be limited practical utility in establishing a separate, but largely overlapping, statutory jurisdiction if common law judicial review is generally functioning satisfactorily and/or that any reforms proposed do not require the creation of an entirely separate review jurisdiction.
- 8.2 This part of the discussion paper explores options for reform that might usefully be made to common law judicial review and that would not require the creation of entirely separate statutory judicial review jurisdiction.
- 8.3 An immediate practical issue for reform of common law judicial review is the means by which it could be achieved. It is possible that reforms could be made by amendments to the relevant court acts for those courts in which judicial review is available in NSW,

³⁰ Administrative Review Council, *Administrative Decisions (Judicial Review) Amendment Bill 1980* – Report No.9, 1997, at paragraph 10.

being the *Supreme Court Act 1970* and the *Land and Environment Court Act 1979*. Limited procedural reforms could also be made by amendment to the *Uniform Civil Procedure Rules 2005*, which apply in both the Supreme Court and the Land and Environment Court.

Application and remedies

- 8.4 While no statutory judicial review jurisdiction has been established in NSW, the procedural reforms to common law judicial review in NSW made through amendments to the *Supreme Court Act 1970* and *Uniform Civil Procedure Rules 2005* have mirrored some of the reforms of the ADJR Act, in particular, by simplifying the procedures to make an application for judicial review and allowing flexible grant of remedies.

Question 3:

(a) Are the procedures for applying for judicial review in NSW satisfactory? Is there any further need for reform of application procedures?

(b) Are there any restrictions on the availability of judicial review remedies in NSW that should be altered or removed?

Discretionary powers of the Courts as to the conduct of proceedings

- 8.5 Currently, the *Supreme Court Act 1970*, the *Land and Environment Court Act 1979* and the *Uniform Civil Procedure Rules 2005* provide courts with discretionary powers regarding the conduct of judicial review proceedings, such as powers to dismiss claims for an abuse of process and powers to awards costs.

- 8.6 There may be additional discretionary powers as to the conduct of proceedings that could, if implemented, improve the responsiveness of courts to issues arising in the context of judicial review proceedings. Possible reforms could include:

- 8.6.1 A discretionary power to make supplementary findings of fact: By definition, judicial review is concerned with the legality of a decision, not its merits. As a consequence, the fact-finding role of the judicial review court is strictly limited. In some circumstances, this may require a judicial review court to remit a matter for further findings by the original decision-maker, with the result of increased costs and delay. However, it may be consistent with the role of a judicial review court to make some supplementary findings of fact, provided there is no inconsistency with those facts already found by the administrative decision-maker. Such circumstances might include where further findings of fact are required for the review court to decide a question of law that was not decided or not properly addressed by the original decision-maker.

A similar provision is included in section 44(7) of the *Administrative Appeals Tribunal Act 1975* (Cth), which provides that in the context of appeals on questions of law from the Administrative Appeals Tribunal (AAT), the reviewing court may make findings of fact (including where necessary by receiving further evidence) if they are not inconsistent with findings of fact made by the decision maker and if it would be convenient for the reviewing court to do so.

- 8.6.2 A discretionary power to suspend the operation of the original decision: Under the ADJR Act the making of an application for judicial review of a decision does not affect the operation of the decision or prevent any action to implement the decision. However, the court is given discretion to suspend the operation of the decision or stay any or all of the 'proceedings under the decision'. The court may exercise the discretion of its own motion or on the application of a party and may exercise the discretion subject to such

conditions as it thinks fit.³¹ Similar provisions could be adopted in relation to common law judicial review in NSW.

8.6.3 A discretionary power to award costs incurred in proceedings before a tribunal: Judicial review courts in NSW already have discretionary powers in relation to the award of costs. However, the power of a judicial review court to award costs is limited to the costs incurred in bringing the review application. Costs incurred in a tribunal are presently within the tribunal's sole domain, and the court is powerless to make any order in that regard.³² Provision could be made to allow review courts to make orders regarding costs incurred in a tribunal or any other forum whose decision is under challenge in the judicial review proceedings, provided that such tribunal or other forum itself had a power to order costs.

8.6.4 A discretionary power to dismiss an application or refuse relief for an application that is brought prematurely: Judicial review courts in NSW already have a power to dismiss an application that is an abuse of process, frivolous or vexatious, or where no reasonable cause of action is disclosed.³³ However, there is currently no power to allow dismissal of an application that has been brought prematurely.

A concern sometimes expressed in relation to judicial review is that an unscrupulous applicant can seek to frustrate or delay executive decision-making by making repeated applications for review at every stage of a decision-making process. This issue was raised by the facts surrounding the case of *Australian Broadcasting Tribunal v Bond*³⁴, and has created significant difficulties for the determination of what constitutes a 'decision' under the ADJR Act.

A discretion to dismiss an application that has been brought prematurely would provide courts with powers to deal with such problematic litigation, even where the issue falls short of being a clear abuse of process.

Question 4:

(a) *Should courts hearing judicial review proceedings in NSW be empowered to make supplementary findings of fact, provided there is no inconsistency with those facts already found by the administrative decision-maker?*

(b) *Should courts hearing judicial review proceedings in NSW be empowered to suspend the operation of the original decision or stay any or all of the 'proceedings under the decision'?*

(c) *Should courts hearing judicial review proceedings in NSW be empowered to make orders regarding costs incurred in a tribunal or any other forum whose decision is under challenge in the judicial review proceedings, where that tribunal or other forum itself had a power to order costs?*

(d) *Should courts hearing judicial review proceedings in NSW be empowered to dismiss an application or refuse relief for an application that is brought prematurely?*

(e) *Are there other discretionary powers that could usefully be given to judicial review courts?*

Standing

8.7 Rules of standing determine when a person is entitled to institute proceedings for judicial review. Standing is not restricted where a person seeks review of an action or

³¹ ADJR Act, ss15, 15A; Qld Act s29, Tasmanian Act s26.

³² *Kirk decision*, above n8. See paragraph 112 of the majority decision.

³³ Rule 13.4 *Uniform Civil Procedure Rules 2005*.

³⁴ (1990) 170 CLR 321.

decision that directly affects their private interests. However, rules of standing do regulate the circumstances in which, if at all, a person can litigate either 'third party rights or interests, or general issues of public concern with which no private person has any immediate connection'.³⁵

- 8.8 Historically, common law standing tests also varied according to the remedy sought. In recent years the High Court has tended to minimise these differences by substantially relaxing the standing tests for certiorari (to quash a decision) and prohibition (to prevent unlawful action), which, with quo warranto (requiring public office holders to demonstrate the source of their authority), are now said to be available to 'strangers',³⁶ that is, to persons not directly affected by the impugned decision. The standing test for mandamus (to compel the performance of a lawful duty) may remain narrower than this.³⁷
- 8.9 The standing test for injunctions and declarations is stricter, requiring either that applicants have a private right or equity at stake or a 'special interest' affected by the disputed action or decision.³⁸ The 'special interest' test was laid down by the High Court's decisions in *Australian Conservation Foundation Inc v Commonwealth*³⁹ ('ACF') and *Onus v Alcoa of Australia Ltd*,⁴⁰ ('Onus'). The test requires that a person must have a 'special interest' in the subject matter of an action when seeking to enforce public rights where no private right or interest of theirs is affected. A 'special interest' need not be a pecuniary interest, but must be more than 'a mere intellectual or emotional concern'.⁴¹ In *Onus*, Stephen J noted that the criterion of 'special interest' required a consideration of 'the importance of the concern which a plaintiff has with a particular subject matter and of the closeness of that plaintiff's relationship to that subject matter'.⁴²
- 8.10 The prevailing 'special interest' test represents a liberalisation of earlier rules of standing to seek declaratory or injunctive relief. However, the flexibility of the test has led to some uneven results, particularly in environmental cases.⁴³
- 8.11 Views as to whether standing rules should be relaxed depend in part on whether the principal purpose of judicial review is understood as allowing for challenge of decisions as they affect private individuals, or whether its purpose is to allow more broadly for challenges to unlawful action in some aspect of public administration.⁴⁴ If the latter view is taken, then according standing to representative groups is a legitimate means of promoting lawfulness and accountability of administrative decisions. The difficulty that is sometimes raised with extending standing to such persons is that a court's discretion to allow or refuse standing may, in some such cases, be intensely political.⁴⁵

³⁵ Aronson, M., Dyer, B., and Groves, M., *Judicial Review of Administrative Action* (4th ed. 2009), at 742.

³⁶ See for example, *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 652-653 (Kirby J), 670 (Callinan J), 599-600 (Gleeson CJ and McHugh J) 611 (Gaudron J) 627-628 (Gummow J); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 413-414 (McHugh J) and 464-465 (Hayne J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 (Gaudron, Gummow and Kirby JJ).

³⁷ Aronson et.al. (2009), above n35, at 781.

³⁸ Aronson et.al. (2009), above n35, at 754.

³⁹ (1980) 146 CLR 493.

⁴⁰ (1981) 149 CLR 27.

⁴¹ *ACF decision*, above n39 at 530-531.

⁴² *Onus decision*, above n40 at 42.

⁴³ Groves, M, 'Standing and related matters', (May 2010) 59 *Admin Review* 62, at 62-63.

⁴⁴ See for example Lord Justice Sedley, 'The last 10 years' development of English public law', (2004) 12 *AJ Admin L* 9 at 10-11: "... the purpose of standing in the public jurisdiction is not to vindicate someone's entitlement, though very frequently it has that effect. It is to call to the court's attention to a justiciable flaw in some aspect of public administration, and it is therefore only the true busybody who needs to be kept out".

⁴⁵ Aronson et.al. (2009), above n35, at 796; Queensland Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions* (December 1990), at [8.20].

- 8.12 Reform of standing laws has received considerable attention in Australia. As noted above, the ADJR Act created a uniform test for standing, allowing persons who are 'aggrieved' by a decision to seek review and any of the remedies provided for under that act.⁴⁶ A 'person aggrieved' is defined as a person whose interests are or would be adversely affected by the decision or conduct. The standing provisions under the ADJR Act are at least as wide as the common law and equitable formulation of the standing rule.⁴⁷
- 8.13 A number of law reform reviews have recommended further liberalising standing to allow applications that represent a public interest view.⁴⁸ The Australian Law Reform Commission ('ALRC') has twice recommended significant reform to ease standing requirements, including in relation to judicial review remedies.⁴⁹ It proposed that the only limitations on standing where an applicant did not have a personal stake in the outcome of proceedings should be:
- 8.13.1 the suitability of the litigant to represent the interests of the sector of the public claimed to be represented (the 'open door, but with a pest screen');⁵⁰ and
 - 8.13.2 considerations as to whether the proceeding 'would unreasonably interfere with the ability of a person having a private interest in the matter to deal with it differently or not at all.'⁵¹
- 8.14 The Queensland Electoral and Administrative Review Commission⁵² also supported liberalised standing rules, but proposed a number of additional factors to give some content to what makes a representative party 'suitable' to represent the interests it claims to represent, including:
- 8.14.1 whether a group is genuinely representative of the interest or sector of the public that it claims to represent;
 - 8.14.2 whether it is capable of effectively representing that interest; and
 - 8.14.3 whether or not that interest is too remote from the subject matter of the proceeding.⁵³
- 8.15 In light of the brief discussion above, two aspects of standing rules may warrant reform in NSW:
- 8.15.1 Firstly, a uniform approach to standing could be adopted for all forms of relief (as is the approach under the ADJR Act), which could include some liberalisation of the requirements of standing for injunctive and declaratory relief and mandamus;
 - 8.15.2 Secondly, in so far as standing affects the capacity of representative groups to make applications for judicial review, the rules could be modified to provide for a more objective and certain determination of whether a party has standing in any particular case.

⁴⁶ ADJR Act ss5(1), 6(1) & 7; see also Qld Act ss20(1), 21(1), 22(1) and (2) and s7; Tasmanian Act ss 7, 17(1), 18(1), 19(1) and (2).

⁴⁷ Lane and Young, *Administrative Law in Australia* (2007), at 214.

⁴⁸ Including Law Reform Commission of Western Australia, (December 2002), *Project No 95: 'Report on Judicial Review of Administrative Decisions'*, at 32; Bayne, P., *The Reform of Judicial Review in Victoria: A report to the Attorney-General's Law Reform Advisory Council* (1994), recommendation 6, at 33.

⁴⁹ Australian Law Reform Commission, *Report No 27: Standing in Public Interest Litigation* (1985); Australian Law Reform Commission, *Report No 78: Beyond the Door-Keeper: Standing to Sue for Public Remedies* (1996).

⁵⁰ *Ibid.* (1985), at xxi.

⁵¹ *Ibid.* (1996), at paragraph [5.24]. See also Peter Bayne's 1994 Report, above n48, at 29-33, which also emphasised the importance of considering the impact that a judicial review application may have on the interests (including private interests) of other persons.

⁵² In 1990 the Queensland Electoral and Administrative Review Commission considered proposals for the enactment of judicial review legislation in Queensland.

⁵³ Queensland Electoral and Administrative Review Commission, above n45 at paragraph [8.18].

- 8.16 There are a number of existing formulae in other statutory contexts that liberalise standing rules for representative groups, but stop short of giving courts an unfettered discretion to determine whether according a party standing is in the 'public interest'. For example, section 27 of the *Administrative Appeals Tribunal Act 1975* ('AAT Act') provides that an application for review may be made '... by or on behalf of any person or persons whose interests are affected by the decision'. An organisation (whether incorporated or not) is taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation, *unless* the decision was made before the organisation was formed or before the objects or purposes of the organisation included the matter concerned. Similarly, section 475(7) of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') provides that an organisation (whether incorporated or not) is an 'interested person' if:
- its interests are or would be affected by the conduct or proposed conduct; or
 - its objects or purposes include certain relevant matters *and* it has engaged in a series of certain relevant activities over the previous two years.
- 8.17 These legislative formulae have the advantage of providing a more objective standard to determine whether an organisation that seeks to represent a special or public interest may establish standing.
- 8.18 Section 475(1) of the *EPBC Act* also provides for unincorporated organisations that fit the definition of an 'interested person' to bring proceedings under that Act through the mechanism of allowing a person acting on behalf of the unincorporated organisation to bring the proceedings.

Question 5:

(a) Is there a need to reform the common law rules of standing for judicial review in NSW?

(b) If so, should the same standing rules apply to all forms of relief?

(c) Should the current rules of standing be reformed to make clear that persons or organisations representing a special or public interest may seek judicial review of decisions which affect issues related to those they represent?

(d) Do the legislative provisions cited provide a sufficiently objective model as to how standing rules could be expanded to recognise standing for persons or organisations representing a special or public interest?

9 Creating a statutory judicial review jurisdiction

- 9.1 A further option is to create a stand-alone statutory judicial review jurisdiction in NSW based on the ADJR Act model. The rationale for doing so could include:
- 9.1.1 that the adoption of the ADJR Act has had a positive impact on the development of administrative law at the Commonwealth level and that creating a similar statutory jurisdiction at the State level may have a similarly positive effect on judicial review in NSW;
- 9.1.2 that substantially replicating an ADJR Act model in NSW would provide greater uniformity of laws across jurisdictions. This would also allow for the substantial body of existing case law regarding the ADJR Act (and the state equivalents) to inform the operation of the new statutory review jurisdiction in NSW.
- 9.2 In asking whether NSW should enact an ADJR Act-style avenue for judicial review, it is necessary first to examine the successes of the ADJR Act and then to ask whether those outcomes are needed in NSW and could be replicated.

ADJR Act – Achievements

- 9.3 The positive achievements of the ADJR Act reforms are generally agreed to be:⁵⁴
- 9.3.1 that the legislation made judicial review more accessible by simplifying the procedures required to seek judicial review, creating a uniform test of standing and providing for flexible application of judicial review remedies;⁵⁵
 - 9.3.2 the creation of a statutory right to reasons for decisions (discussed above);
 - 9.3.3 that by setting out the grounds of review, it has provided greater clarity and simplicity than is the case with respect to the common law grounds of review.
- 9.4 At least some of these reforms have already been, or could be, implemented in NSW without the creation of an entirely separate statutory review jurisdiction. For example, some of the successes of the ADJR Act in making judicial review more accessible have, arguably, already been achieved in NSW through procedural reforms simplifying the procedures for applying for judicial review and allowing the flexible grant of remedies [see 4.2 above].
- 9.5 Possible reforms to the rules of standing, including a uniform test of standing and liberalised standing for representative applicants, are discussed above [at 8.7 to 8.18]. Such reform could form part of a new statutory judicial review regime, but could also simply apply to the existing common law judicial review jurisdiction. While possibly a useful avenue for change, the reform of standing rules does not, in itself, require the creation of a separate statutory jurisdiction.
- 9.6 The creation of a right to reasons for decisions could also be implemented either as part of a new statutory judicial review regime, or established independently.
- 9.7 The ADJR Act itemisation of the grounds of review is cited as one of the legislation's significant achievements. It is often stated that, particularly in the early period after its enactment, the codification of the grounds of review had an educative effect, both on the legal profession (so making judicial review more accessible),⁵⁶ and on decision-makers (leading to better administrative decision-making). More recently, it has been said that the ADJR Act grounds of review provide a much simpler guide to the available scope of judicial review in any particular case than the 'frustratingly elusive' distinction between jurisdictional and non-jurisdictional errors of law that is now a central feature of common law judicial review.⁵⁷
- 9.8 There is an argument that creation of a statutory list of the grounds of review could have a significant educative purpose in NSW. Codification of the main principles of judicial review creates an accessible first point of reference for non-specialists who may be called upon to deal with judicial review principles. This might include bureaucrats, non-specialist lawyers and members of the public.
- 9.9 Some commentators have also said that ADJR Act has expanded the scope of the existing common law grounds of review in relation to errors of fact, errors of law and procedure.⁵⁸ The adoption of the ADJR Act grounds of review in NSW could thus also allow for a limited expansion of the available grounds of review in NSW.
- 9.10 There is also an argument against adopting the ADJR Act grounds: that the codification of grounds in the ADJR Act may have hampered the growth of Australia's judicial

⁵⁴ See for example: Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, at 123; Aronson, M, 'Is the ADJR Act hampering the development of Australian administrative law?', (2005) 12 *AJ Admin L* 79.

⁵⁵ Aronson (2005), above n54, at 91; Griffiths, J, 'Commentary on Professor Aronson's article "Is the ADJR Act hampering the development of Australian administrative law?"' (2005) 12 *AJ Admin L* 98, at 100.

⁵⁶ Aronson (2005), above n54, at 91; Griffiths, above n55, at 100.

⁵⁷ Griffiths, above n54, at 100.

⁵⁸ Aronson (2005), above n54, at 91, paraphrasing Robertson A, 'The Administrative Law Jurisdiction of the Federal Court – Is the AD(JR) Act Still Important?' (2003) 24 *Aust Bar Review* 89.

review at common law.⁵⁹ The counter argument is that the ADJR Act grounds of review leave open the possibility of expanding judicial review.⁶⁰ In particular, the two 'catch-all' grounds⁶¹ are said to allow scope for further development in the grounds of review, either under the statute or by accommodating any development of the common law grounds.⁶²

- 9.11 In light of the constitutional protections of the NSW Supreme Court's judicial review jurisdiction, any codification of the grounds of judicial review in NSW would require the creation of a stand-alone statutory judicial review jurisdiction, which would co-exist with common law judicial review grounds.

ADJR Act problems – Jurisdiction

- 9.12 Arguments against creating a statutory judicial review jurisdiction in NSW based on the ADJR Act model centre on the difficulties posed by the 'jurisdictional formula' of the ADJR Act. That is, the definition of the scope of actions and decisions in respect of which judicial review is permitted under the ADJR Act.
- 9.13 The jurisdictional formula of the ADJR Act is the subject of much criticism and debate. In particular, while aimed at creating a more accessible and procedurally simple avenue to obtain judicial review, it both:
- 9.13.1 applies to a more restricted class of decisions than that which is reviewable at common law, and
 - 9.13.2 has itself generated significant hurdles to obtaining review because of disputes as to the classes of decision to which it should apply.
- 9.14 The basic jurisdictional formula of the ADJR Act provides for judicial review of 'decisions to which the Act applies', 'conduct for the purpose of making a decision to which [the] Act applies' and a failure to make a decision where there is a duty to make a decision to which the Act applies.⁶³ 'Decisions' to which the Act applies are defined to mean decisions 'of an administrative character made, proposed to be made, or required to be made... under an enactment.'
- 9.15 However, while the ADJR Act only provides for review of decisions under an enactment, it is clear that at common law a range of non-statutory executive and prerogative powers are also subject to judicial review (subject to being 'justiciable').⁶⁴ Examples of decisions that are excluded from review under the ADJR Act that may be reviewable at common law include the making of subordinate legislation; decisions relating to government programs that are not governed by statute; and certain decisions of the Governor (provided they are justiciable).⁶⁵
- 9.16 Judicial interpretation of the ADJR Act jurisdictional formula has also been criticised for further narrowing the scope of the decisions subject to statutory judicial review and in some respects over-complicating the test. In particular:

⁵⁹ See Justice Kirby's dissenting judgment in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant s20/2002* (2003) 198 ALR 59 at [157].

⁶⁰ See Aronson (2005), above n54, discussing Justice Kirby's comments in *Applicant s20/2002* (2003).

⁶¹ See s5(1)(j): that the decision was otherwise contrary to law' and s5(2)(j) any other exercise of a power in such a way that constitutes abuse of the power.

⁶² Griffiths, above n54, at 99.

⁶³ Sections 5, 6 & 7 ADJR Act.

⁶⁴ *Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121; *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 ("the GCHQ Case") and *Minister for the Arts, Heritage and Environment v Peko-Wallsend Limited* (1987) 15 FCR 274.

⁶⁵ Developments at common law following the enactment of the ADJR Act clarified (at the Commonwealth level) that acts of the Crown representative, at least in the exercise of a statutory discretion, are reviewable by the Courts: See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; See also discussion in Administrative Review Council (ARC), *Report to the Attorney-General; Review of the Administrative Decisions (Judicial Review) Act: the ambit of the Act, Report No 32*, (1989), recommendation 2(1) and (2), xii.

9.16.1 The case of *Australian Broadcasting Tribunal v Bond* ('*Bond*')⁶⁶ and its subsequent application limited the character of reviewable decisions to those which:

- (a) have the character of being a final or operative decision; or
- (b) are without that character, but which are prescribed decisions under an enactment.

The decision in *Bond* also restricted the nature of reviewable 'conduct' to the procedural rather than the substantive aspects of decision-making.⁶⁷

It has been argued that these limitations on the nature of 'decisions' and 'conduct' are not warranted by a plain reading of the words of the Act.

9.16.2 A number of cases have also narrowly defined what is necessary to establish the link between the enactment and the decision potentially subject to review.⁶⁸

(a) In *Griffith University v Tang* (*Tang*)⁶⁹ a decision that was authorised only in general terms by the relevant 'enactment', where the decision was also referable to an alternative source of power, was held to be unreviewable under the ADJR Act. The majority of the High Court held that to be 'under an enactment' a decision must be expressly or impliedly required or authorised by the enactment and must itself confer, alter or otherwise affect legal rights and obligations, and in that sense the effect of the decision must derive from the enactment.⁷⁰

(b) In *Neat Domestic Trading Pty Ltd v AWB Ltd* (*Neat*)⁷¹ the High Court excluded from review a decision by a private corporation which had a statutory veto power (and a virtual statutory monopoly) over wheat export approvals, because the decision was said not to be 'authorised' by this enactment, but rather by the corporation's powers under the corporations law. The High Court held the decision was therefore not 'under' an enactment, even though the corporation's decision only had the effect of a veto because of the Act.

9.16.3 Commentators have argued that these cases have adopted overly complex and restrictive tests and questioned whether such tests serve any useful policy purpose.⁷²

9.17 One way of describing the divergence between common law and statutory judicial review is that the ADJR Act limits judicial review by reference to the *source* of the power exercised (an enactment), while common law judicial review increasingly 'looks to the *subject matter* of the decision in the context of whether or not there is a public duty or power in the nature of a public power being exercised'.⁷³

⁶⁶ Above n34.

⁶⁷ Above n34 at 352.

⁶⁸ *Griffith University v Tang* (*Tang*) (2005) 221 CLR 99; *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179. See also Aronson (2005), above n54, at 85

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 130.

⁷¹ Above n68.

⁷² See for example: Aronson, M, 'Private Bodies, Public Power and Soft Law in the High Court', *University of New South Wales Faculty of Law Research Series*, (2009) Paper 47; Aronson (2005), above n54, at 85; Cassimatis, A, 'Judicial Attitudes to Judicial Review: A comparative examination of justifications offered for restricting the scope of judicial review in Australia, Canada and England', (2010) 34 *Melbourne University Law Review* 1; Taggart, M., "'Australian Exceptionalism" in Judicial Review', (2008) 26 *Federal Law Review* 1, at 20

⁷³ Sir Anthony Mason (1989), above n54, at p.407; See also Robinson, M, '*Private Law vs Public Law: Issues in Government Liability*', Paper delivered at a BLEC Conference, 1995.

- 9.18 Arguably, the common law focus on the nature of the power being exercised better accords with the underlying rationale for judicial review, that is, that it should promote lawful and accountable decision making by public agencies and provide an avenue for redress where decisions are not lawfully made.
- 9.19 By contrast, there does not appear to be a clear public policy purpose achieved by limiting the jurisdictional formula to decisions made 'under an enactment'. For example, it is not clear why decisions of an administrative character, that affect an individual's rights, interests or legitimate expectations, involve the expenditure of public funds and / or the provision of government services, should only be reviewable where the decision is specifically provided for in statute. The principles of government accountability and protection of individual rights may apply equally where the decision is not made under specific statutory authority.
- 9.20 Some commentators have argued that the discrepancy between the decisions in respect of which judicial review is available at common law and under the ADJR Acts is so great as to have created a 'fundamental and unworkable tension' between statutory and common law judicial review remedies and that legislative reform to remedy the situation is urgently required.⁷⁴
- 9.21 These arguments raise significant questions as to whether the ADJR Act jurisdictional formula should be replicated in any NSW statutory judicial review jurisdiction and / or how the problems associated with the ADJR Act jurisdiction could be avoided in a NSW Act.

Question 6:

(a) Are there significant benefits to be gained from establishing a statutory judicial review jurisdiction in NSW?

(b) Leaving aside the question as to defining its jurisdiction, should NSW introduce a statutory code for judicial review, otherwise based on the ADJR Act model?

(c) If so, should the statutory code for judicial review adopt any of the reforms canvassed above in Part 8 (there discussed in relation to possible reforms of common law judicial review)?

(d) Can the jurisdiction of statutory judicial review in NSW be defined so as to avoid some of the problems associated with the ADJR Act?

Options for statutory judicial review in NSW

- 9.22 Parts 10 11 and 12 of this discussion paper concern Question 6(d) above, that is, whether the scope of the jurisdiction of any NSW statutory judicial review code can be better defined so as to avoid some of the problems that have been associated with the ADJR Act jurisdiction.
- 9.23 This discussion paper considers three options for introduction of a statutory judicial review code in NSW, each adopting a different approach to defining the scope of decisions subject to review:
- 9.23.1 A NSW statutory judicial review jurisdiction that retains the ADJR Act jurisdictional formula, subject to some key modifications and additions that are intended to more closely reflect the scope of review at common law [Option 3 – see Part 10 below];
- 9.23.2 A NSW statutory judicial review jurisdiction with a jurisdictional formula that permits judicial review of decisions in respect of which a decision-maker would

⁷⁴ Robinson, M, and Harvey, I, 'Government Liability, Issues in Public Law: 4th Annual Workshop', Paper to BLEC Conference, May 1995, downloaded from <http://www.wentworthchambers.com.au/marobinson/priv.htm>

be required to observe the rules of natural justice [Option 4 – see Part 11 below];

9.23.3 A NSW statutory judicial review jurisdiction with a jurisdictional formula that permits judicial review of actions or decisions in the exercise of a ‘public function’ [Option 5 – see Part 0 below].

9.24 A basic requirement of any statutory judicial review jurisdiction created in NSW is that it cannot alter the constitutionally entrenched jurisdiction of the Supreme Court to review exercises of power that are affected by ‘jurisdictional error’. The approach taken in other jurisdictions is to provide that statutory judicial review applies in addition to the other available avenues for seeking review. Consequently, it is envisaged that for each of the options for discussed below, the statutory review jurisdiction would supplement the existing common law jurisdiction, rather than modify it.

9.25 A further practical consideration is the question of who would exercise the statutory judicial review jurisdiction in NSW. The common law judicial review jurisdiction in NSW is currently exercised in both the NSW Supreme Court and the Land and Environment Court (LEC) (in relation to ‘planning and environmental laws’⁷⁵). Consequently, it is envisaged that any new statutory judicial review jurisdiction would be similarly split between the Supreme Court and the LEC. The LEC would thus retain its exclusive jurisdiction with respect to judicial review proceedings relating to decisions under planning laws, both under the common law and under any statutory judicial review jurisdiction.

10 Option 3: Creating a NSW statutory judicial review jurisdiction – a modified ADJR Act test?

10.1 If NSW would benefit from the introduction of a statutory judicial review jurisdiction, it may be possible to modify some key aspects of the ADJR Act jurisdictional formula to remedy some of the problems identified above.

10.2 A number of commentators and law reform reviews have suggested amendments to the ADJR Act jurisdictional formula to extend judicial review to:

10.2.1 decisions by government officers or agencies made in the exercise of non-statutory prerogative or executive powers;

10.2.2 non-statutory decisions made pursuant to formally published policy documents, such as guidelines or codes of conduct;

10.2.3 the making of subordinate legislation;

10.2.4 certain decisions of the Governor (where justiciable); and

10.2.5 decisions made in the exercise of a ‘public function’.

Each of these proposals, with the exception of the proposal to introduce a ‘public function’ test, is explained in the following discussion. The proposal to introduce a ‘public function’ test is discussed separately in Part 0 below.

Exercise of non-statutory prerogative or executive powers

10.3 In 1989 the ARC considered whether the ambit of the ADJR Act should be extended, in line with the ambit of common law judicial review, to include some decisions made in the exercise of prerogative or executive powers (which by definition are not authorised “under an enactment”).

10.4 The ARC considered that there were important policy reasons to provide for judicial review of such decisions, including that there is reduced opportunity for parliamentary

⁷⁵ Section 20(2) *Land and Environment Court Act 1979*.

scrutiny of executive decision-making where decisions are not made under an enactment, and that many such decisions are already reviewable at common law.⁷⁶

10.5 Specifically, the ARC considered whether an alternative limb should be added to the definition of 'decisions to which this Act applies', which would remove the requirement that the decision be 'under an enactment' and instead require that the decision be a decision of an 'officer of the Commonwealth'.⁷⁷ Ultimately the ARC did not recommend the adoption of this formula, as it considered that it was too broad, and could include many decisions that might not be subject to common law judicial review.⁷⁸

10.6 However, the ARC considered that there was a clear case for the ADJR Act to encompass a more limited class of non-statutory officer decisions and recommended that these should be defined as decisions

*...under a non-statutory scheme or program that is authorised by an exercise of executive power and funded by an appropriation made by the Parliament specifically for the scheme or program.*⁷⁹

10.7 Arguments for adopting this formula include that:

10.7.1 it will often be merely an 'accident of birth' that a government-funded scheme is authorised by executive action rather than having a statutory basis; and

10.7.2 'the funding of such schemes by a specific item in appropriation legislation passed by the Parliament gives them the same public interest character as they would have if they were the subject of other legislation enacted in the public interest'.⁸⁰

10.8 The ARC's recommendation was not implemented by the Commonwealth in the ADJR Act, but was adopted in a modified form in the Queensland Act. Section 4(b) of the Queensland Act expands the reviewable classes of decision to:

...decisions of 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) out of amounts appropriated by Parliament, or from a tax, charge, fee or levy authorised by or under an enactment.

10.9 In practice, the grounds of review that may apply to a non-statutory decision caught by this definition may be limited,⁸¹ but there are some grounds that may apply.⁸² The ARC considered that the limited availability of grounds of review might mean in practice that non-statutory decisions would be unlikely to be the subject of many judicial review applications.⁸³ This has been borne out by the Queensland experience, where relatively few applicants have sought review under s4(b) of the Queensland Act.

10.10 While there are relatively few cases that have considered the term, there is also some uncertainty about the requirements to establish the existence of a 'scheme or program'. Concerns have been raised as to whether the efficiency of the administrative process could be fragmented if review extended to the individual elements of a wider scheme or program.⁸⁴

⁷⁶ ARC, above n24, at paragraph [103].

⁷⁷ ARC, above n24, Chapter 4.

⁷⁸ ARC, above n24, at paragraph [150].

⁷⁹ ARC, above n24, at paragraph [161].

⁸⁰ ARC, above n24, at paragraph [164].

⁸¹ ARC, above n24, at paragraph [168] – See in particular, the grounds of review as set out in ss5(1)(d) and (e) and 6(1)(d) and (e) ADJR Act, which are constrained by reference to the enactment under which they are made.

⁸² For example, the natural justice or error of law grounds.

⁸³ ARC, above n24, at paragraph [171].

⁸⁴ Homes J in *Bituminous Products Pty Ltd v General Manager (Road System and Engineering), Dept of Main Roads* [2005] 2 Qd R 344, as discussed in Groves, M., 'Should We Follow the Gospel of the ADJR Act?' (2010) 34 *Melbourne University Law Review*, (forthcoming).

10.11 Nevertheless, despite its 'disappointing career',⁸⁵ there may be value in adopting this aspect of the jurisdictional test, so that any statutory review jurisdiction in NSW includes scope for review of this class of non-statutory decisions.

Non-statutory decisions made pursuant to formally published policy documents

10.12 Formal policy documents (such as guidelines or codes of conduct) often direct the exercise of a government agency's discretionary powers and can have a significant impact on individual rights and interests.⁸⁶ Where a discretion is consistently exercised according to a publicly available policy, it may give rise to a legitimate expectation that it will continue to be exercised in that way in relation to any particular case.⁸⁷

10.13 In many cases decisions made in accordance with a policy document will also be made 'under an enactment', as policy documents largely exist to structure existing statutory discretions. Such decisions may be amenable to review under the ADJR Act. However, where decisions are made pursuant to formally published policy documents but the policy is not explicitly authorised in legislation, it will not be amenable to review under the ADJR Act.

10.14 Arguably, statutory judicial review should be available if a departure from formal policy documents adversely affects a person's legitimate expectations in circumstances where natural justice has been denied, regardless of whether the policy has a basis in legislation.

10.15 It is likely that only limited grounds of review would apply to applications for review of decisions under policy documents not authorised by legislation. These would include breach of natural justice, and inflexible application of policy. For example, a claim of breach of natural justice could arise where an agency makes a decision that departs from a published policy in circumstances where a person has a clear expectation of a benefit that they do not receive because of the failure to observe the policy. In such a case, the rules of natural justice might require the agency to bring the proposed departure from policy to the attention of the affected individual and give them a hearing about why the policy should apply. Alternatively, an individual might be entitled to a hearing about why a policy *should* be departed from in their particular case.

Review of subordinate legislation

10.16 Professor Mark Aronson has argued that the making of subordinate legislation should be subject to review under the ADJR Act, given that review of subordinate legislation is clearly reviewable at common law in some circumstances.⁸⁸

10.17 In practice, there would be limitations on the review of subordinate legislation, given that:

10.17.1 The available grounds of review will be limited. Most commonly, the available grounds would be that subordinate legislation is not authorised by the enactment in pursuance of which it was purported to be made, or that procedures required by law to be observed in connection with the making of the subordinate legislation were not observed. On rare occasions, subordinate legislation may be invalid if it is so uncertain that its intended operation cannot be ascertained.

10.17.2 Subordinate legislation is often authorised under very broad statutory provisions that require only that regulations may be made that are not

⁸⁵ Lane and Young, above n47, at 94.

⁸⁶ This reality is reflected in the provisions of the *Government Information (Public Access) Act 2009* (GIPA Act), which require that an agency's policy documents be publicly available.

⁸⁷ Although failure to observe the substance of a policy, in itself, will not constitute a basis for judicial review as, in accordance with the doctrine of the separation of powers, the executive is free to depart from and change its policies.

⁸⁸ See Aronson (2005), above n54, at 82-83.

inconsistent with and are necessary or convenient for giving effect to the enabling Act.

Decisions of the Governor

- 10.18 In 1989 the ARC recommended that the ADJR Act be amended to remove the exclusion of decisions of the Governor-General made under an enactment.⁸⁹ The ARC argued that in many cases decisions by the Governor (which are, by convention, made on advice from a relevant Minister or Cabinet) are decisions of an ‘administrative’ character. In the ARC’s view, it would be anomalous if a decision of a Crown representative, who is bound to exercise statutory powers with the advice of Ministers, were not reviewable, while a decision of a Minister in the exercise of a statutory power was reviewable.⁹⁰
- 10.19 While issues may arise as to the extent of the decisions made by the Governor that should be reviewable, these will be largely the same considerations that apply to the review of any decisions of the executive government, and will be constrained by general legal principles regarding justiciability. Courts will not review a decision, including a decision of the Governor, if the decision is not ‘justiciable’.
- 10.20 In its broadest sense ‘justiciability’ refers to the notion that courts exercise judicial power and, due to the separation of powers, may not decide questions that do not fall within the scope of judicial power. The criteria to determine whether any particular question is ‘justiciable’ can be difficult to define precisely, but include the extent to which the legitimacy of the decision depends on ‘legal standards’ rather than ‘political considerations’.⁹¹ The decision or action that is subject to review must have consequences that affect a person or a person’s rights, obligations or legitimate expectations. Decisions setting general policy will not fall within this category, as it is ‘not enough that that the decision be one which is likely to influence some subsequent decision affecting the rights, obligations or legitimate expectations – the instant decision must itself have that effect’.⁹² Consequently, decisions of high government policy or political sensitivity are unlikely to be justiciable.⁹³
- 10.21 Notably, the Queensland and Tasmanian judicial review Acts do not exclude decisions by the Governors of those States from coverage by those acts.

The form of the NSW test

- 10.22 In summary, the following modifications could be made to the ADJR Act jurisdiction as it might apply under a NSW judicial review statute:
- 10.22.1 The Act could apply to decisions by government officers or agencies made in the exercise of those non-statutory powers exercised pursuant to a scheme or program involving funds from amounts appropriated by Parliament. This could be achieved by adopting the second limb of the definition of “decision to which this Act applies” at s4(b) of the Queensland Act.
- 10.22.2 The Act could apply to decisions made pursuant to formally published policy documents such as guidelines or codes of conduct – specifically to ‘policy documents’ as that term is defined in s23 of the *Government Information*

⁸⁹ ARC, above n24, recommendation 2(1) and (2), xii. See also Aronson (2005) n46 above, at 83-84.

⁹⁰ ARC, above n24, at paragraph [91].

⁹¹ *Stewart v Ronalds* (2009) 232 FLR 331, (2009) 259 ALR 86, [2009] NSWCA 277 (Allsop P, Hodgson JA, Handley AJA) at [42].

⁹² *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 (see in particular Wilcox J citing Lord Diplock); *South Australia v O’Shea* (1987) 163 CLR 378; See also Sir Anthony Mason, 1989, above n54, at 769.

⁹³ As argued in *Church of Scientology v Woodward* (1982) 154 CLR 25 (in relation to ASIO) and, *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 and, on appeal in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 (in relation to the appointment of judicial officers, especially Mason CJ).

*(Public Access) Act 2009 (NSW)*⁹⁴ (including policy documents that are not made under an 'enactment');

10.22.3 The Act could apply not only to decisions that are 'administrative' in nature, but also to the making of subordinate legislation;

10.22.4 The Act could apply to decisions of the Governor (where justiciable); and

10.22.5 The definition could be amended to clarify that the expression 'under an enactment' applies also to decisions where the decision is not specifically authorised by an enactment, but is given force by an enactment (that is, where the impact of the decision on a person's rights and interests is as a result of their significance in a statutory scheme, as was the case in the *Neat* decision).

10.23 It is envisaged that this could be effected by amending the drafting of the definition of a 'decision to which this Act applies' at s.3 of the ADJR Act in a NSW Act so as to include the following categories of decisions:

- (a) *a decision of an administrative or subordinate legislative character made, proposed to be made, or required to be made ... under or given force by an enactment"*
- (b) *decisions of 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) out of amounts appropriated by Parliament, or from a tax, charge, fee or levy authorised by or under an enactment;*

10.24 A further amendment could be made to the definition of the term 'enactment' at s3 of the ADJR Act so that 'instruments' (which are currently included in the definition of 'enactment') include also 'policy documents' as that term is defined in s23 of the *Government Information (Public Access) Act 2009 (NSW)*, including policy documents that are not made under an Act or Ordinance.

Question 7:

(a) Should the jurisdiction of a NSW judicial review act be based on the ADJR Act model?

(b) Which if any of the suggested modifications to the ADJR Act jurisdiction should be adopted in the NSW legislation?

11 Option 4: An alternative model for statutory judicial review – introducing a 'natural justice' test

11.1 The suggestions for reform of the ADJR Act model of statutory judicial review discussed in relation to Option 3, while addressing important issues, are limited in their scope. They are intended to retain the ADJR Act jurisdictional test, but remove

⁹⁴ Section 23 of the GIPA Act defines policy documents to include:

"...such of the following documents as are used by the agency in connection with the exercise of those functions of the agency that affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject (but does not include a legislative instrument):

- (a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents,*
- (b) a document containing particulars of any administrative scheme,*
- (c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme,*
- (d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme,*
- (e) any other document of a similar kind."*

unnecessary restrictions on the interpretation of that test as well as bring within the ambit of the test some classes of non-statutory decisions that are subject to judicial review at common law.

- 11.2 Arguments also exist for identifying a more principled basis on which to identify the kinds of decisions that should be subject to judicial review. An alternative mechanism for statutory review could depart entirely from the ADJR Act jurisdictional formula of 'decision ... under an enactment...'.⁹⁵
- 11.3 Dr Matthew Groves' study of statutory judicial review in Victoria led him to propose that the test for a reviewable decision should be linked to the test for the implication of the rules of natural justice,⁹⁵ in a manner similar to the jurisdictional formula adopted in Victoria's *Administrative Law Act 1978*. That is, broadly speaking, where a decision-maker is required to observe the rules of natural justice, then that decision should be subject to judicial review.
- 11.4 The test for the application of the rules of natural justice is relatively straightforward and broad in scope, capturing most public decision-making that affects a person's rights, interests or legitimate expectations in their individual capacity.⁹⁶ Only a clear statement of legislative intent can exclude the duty in these circumstances.
- 11.5 More specifically, Dr Groves' proposed test would authorise statutory judicial review of the 'decisions or conduct of an official', extending to 'decisions or conduct or failure to make a decision or engage in conduct which affected the rights, interests or legitimate expectations of a person'.⁹⁷ An 'official' could be defined as 'a person authorised to make or alter, or refuse to make or alter, any decision or action, who, when doing so, or refusing to do so, is required to observe one or more rule of natural justice'. 'Official' could be defined expansively to include persons employed, paid or appointed by government, or who exercise functions under statutory provisions, or who are acting under the authorisation, delegation or agency of such persons.
- 11.6 Advantages to this test are that it may:
 - 11.6.1 be less complex than the ADJR Act test, and free of the associated complex jurisprudence, particularly the *Tang* decision;
 - 11.6.2 be broader than the scope of the ADJR Act test, extending beyond decisions made under an enactment, and not being limited to decisions of an administrative character;
 - 11.6.3 be less indeterminate than a 'public function' test [see Part 0 below]; and
 - 11.6.4 link to the established body of case law in relation to the application of the rules of natural justice.
- 11.7 Some disadvantages of this test include the following:
 - 11.7.1 It would set NSW on a divergent path from other jurisdictions (the ACT, Queensland and Tasmania) and reduce the uniformity of Australian administrative law.
 - 11.7.2 It would be unlikely to extend to the making of subordinate legislation (although it is possible that separate provision could be made for this).
 - 11.7.3 It could exclude certain matters from review where there is no duty of natural justice because no person is affected in their individual capacity. This could limit judicial review of cases in which a representative group seeks review of unlawful action relating to a public interest, for example, environmental cases.

⁹⁵ Groves, M., 'Should the Administrative Law Act 1978 be Repealed?' (2010) 34 *Melbourne University Law Review* 451-479; Groves, M., (forthcoming), above n84.

⁹⁶ *Kioa v West* (1985) 150 CLR 500, at 582 – 584 per Mason J.

⁹⁷ Groves (2010), above n95, at 459-460.

- 11.7.4 It will tend to restrict judicial review of decisions or conduct of non-government bodies exercising public powers, as decisions of such bodies may only rarely be subject to requirements of natural justice. To the extent that contemporary forms of government administration devolve regulatory and decision-making powers to non-government entities, this test may not provide significant accountability for the practices of such entities.

Question 8:

- (a) *If NSW were to create a statutory avenue for judicial review, should the test for a reviewable decision be that the rules of natural justice apply to the making of the decision?*
- (b) *If the test for a reviewable decision is that one of the rules of natural justice applies, is this broad enough to allow (i) public interest organisations to seek review and (ii) review of actions / decisions or exercise of 'public functions' by the private sector?*

12 Option 5: Introducing a 'public function' test

- 12.1 Some commentators have argued for, and some jurisdictions have introduced, a jurisdictional test based on the principle that an exercise of public powers or functions should be subject to judicial review.
- 12.2 A 'public function test' is focused on identifying the exercise of powers or functions that are public by *nature* rather than by *source*. Arguably, such a test would also reflect the increasing focus of the common law on the subject matter of the decision in the context of whether or not there is a public duty or public power being exercised.
- 12.3 A 'public function' test would allow for review of decisions made pursuant to legislation, but would also permit review of some non-statutory prerogative or executive powers (where such powers are justiciable). Review of some such decisions is already available at common law.⁹⁸
- 12.4 A 'public function' test could also potentially extend judicial review to some decisions made by non-government bodies. This is consistent with a body of common law authority that has allowed judicial review of the actions of a range of non-government bodies that exercise significant powers in relation to individuals. Such cases have imposed procedural fairness obligations on unions,⁹⁹ professional disciplinary bodies,¹⁰⁰ sporting tribunals¹⁰¹ and religious bodies.¹⁰²
- 12.5 Judicial review of non-government bodies could have an increasingly significant role in ensuring accountability, in light of contemporary government practices such as the delivery of core government services by private or mixed public / private bodies, outsourcing and industry self-regulation. Such practices mean that private bodies are involved in decision-making that is regulatory, governmental or coercive in its nature and may significantly affect individuals' and corporations' rights and interests. Arguably, decisions of this kind involve the exercise of 'public' powers or functions, which were conventionally the provenance of governments and should be subject to judicial review.

⁹⁸ *Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121; *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 ("the GCHQ Case") and *Minister for the Arts, Heritage and Environment v Peko-Wallsend Limited* (1987) 15 FCR 274.

⁹⁹ *Cains v Jenkins* (1979) 28 ALR 219 at 239; *Australian Workers Union v Bowen* (No 2) (1948) 77 CLR 601.

¹⁰⁰ *General Medical Council v Spakman* [1943] AC 627.

¹⁰¹ *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242; *Maloney v NSW National Coursing Association* [1948] 1 NSWLR 161; *Trivett v Nivison* [1976] 1 NSWLR 312; *Ex p Appleton* [1982] Qd R 107; *Greenberg v Australian Ice Hockey Federation Inc* [1995] SASC 5422.

¹⁰² *Plenty & Plenty v Seventh Day Adventist Church of Port Pirie* [2003] SASC 68.

- 12.6 Whether decisions by private entities such as these may be subject to judicial review under the existing judicial review statutes, is presently uncertain in Australia. The *Neat* decision¹⁰³ demonstrated that private bodies, exercising regulatory powers that are essentially statutory, may well fail the ‘under an enactment’ test.
- 12.7 As well as broadening the kinds of decision-makers whose decisions may be subject to judicial review, a test focused on ‘public functions’ has the potential to *exclude* judicial review of decisions by government in the exercise of what may be characterised as ‘private’ powers – such as decisions affecting purely commercial matters like contracts and tendering. Such decisions have generally been held to be unreviewable at common law.¹⁰⁴
- 12.8 Proposals to adopt a ‘public function’ or ‘public power’ test have attracted both significant criticism and support. Opponents of the proposal argue that the test is indeterminate.¹⁰⁵ That is, the determination of whether a function or power is ‘public’ may require the Courts to apply broad principles that are capable of varying interpretation. Those who support the proposal argue that courts are well placed to determine such questions in the context of particular cases and more generally, can be trusted to draw an appropriate line between those decisions that should be reviewable and those that should not.
- 12.9 There is no doubt that the adoption of a ‘public function’ test for statutory judicial review in NSW would broaden the scope of statutory judicial review beyond the existing ADJR Act model (indeed, it would be intended to do so). The extent to which it might constitute an expansion of the scope of review at common law is less clear. In any case, there would remain a number of important limitations on the scope of judicial review under a public function test, including the following:
- 12.9.1 The grounds of review that would apply to decisions of non-government bodies, particularly decisions not empowered by an enactment, would be limited.¹⁰⁶
- 12.9.2 It is to be expected that Courts would be reluctant to extend judicial review remedies in ways that limit the private law rights of non-government decision-makers. (For example, in the *Neat* case Gleeson CJ acknowledged the corporation’s valid profit motive, and indicated that the grounds of review could be tailored accordingly).
- 12.9.3 General principles of justiciability may also apply and could be incorporated in the drafting of the test [see 10.20 above].
- 12.10 The implications of adopting a ‘public function’ test in Australia may be explored by considering the experience of adopting a public function test in the United Kingdom.

The United Kingdom experience

- 12.11 The United Kingdom has not created a statutory regime for judicial review, but its *Civil Procedure Rules* explicitly link the scope of judicial review to controlling ‘the exercise of a public function’. Rule 54.1 states that a ‘claim for judicial review’ is defined as a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.
- 12.12 There is now a significant body of case law considering the meaning of ‘public functions’ in the United Kingdom. The application of the ‘public function’ test is uncontroversial in the great majority of cases.

¹⁰³ Above n68.

¹⁰⁴ *R v Jockey Club Disciplinary Committee; Ex parte Aga Khan* [1993] 1 WLR 909.

¹⁰⁵ Aronson et.al. (2009), above n35, at p89. The test has also been the subject of strong criticism in the United Kingdom: see Aronson et al (2009), above n35, at 137.

¹⁰⁶ *Kioa v West* (1985) 150 CLR 500.

12.13 The leading United Kingdom case, *Datafin*,¹⁰⁷ applied the 'public function' test to permit judicial review of the exercise of a regulatory power by a private, non-government 'Panel on Take-Overs and Mergers'. The Panel in question had no statutory powers, but effectively exercised regulatory power by administering a code, and exercising enforcement powers, including sanctions for breach of the code.

12.14 The United Kingdom cases since *Datafin* have not generated an easily encapsulated definition of 'public function'. No single factor is determinative. However, the following factors may be relevant to classifying the activities of a 'private' body as 'public' functions:

12.14.1 Government involvement: An element of Government membership of the body, some level of involvement in a regulatory scheme or statutory recognition of the regulatory role exercised by the body will tend to suggest the existence of a 'public function'.¹⁰⁸

12.14.2 Nature of the function performed: The existence of regulatory or coercive powers, or the exercise of functions that the State exercises or has traditionally exercised, will tend to suggest the existence of a 'public function'. Where a body operates primarily for the purpose of returning a profit, this would weigh against a finding of a 'public function'.

12.14.3 Remedies: Where, absent judicial review, there are no private law remedies for an abuse of the power, Courts will be more likely to find that a public function exists.

12.14.4 Public funding: Where a body relies on public funds to carry out all or some of its functions this will tend to suggest that the functions are 'public'.

12.14.5 Source of power: Where the source of power of a private body is entirely consensual (such as where it is based on contract) the function is likely to be classified as a private function and judicial review is unlikely to be available.¹⁰⁹

12.15 Some of the non-governmental bodies that have been held to be reviewable under the 'public function' test in the United Kingdom include:

- an advertising standards authority;
- a professional conduct committee of the Bar Council;
- a product accreditation committee of the pharmaceutical industry;
- an independent body created by the major telephone companies to regulate companies using telephone networks for the provision of recorded services; and
- statutorily recognised (but not statutorily created) regulatory bodies regulating and controlling investment bankers and unit trust managers.¹¹⁰

12.16 Other non-governmental bodies that have been held *not* to be reviewable in the United Kingdom include:

- several sporting associations;
- most private school cases;
- the crime prevention committee of a retail industry's self-regulatory body;
- the British Labour Party;
- industry bodies determining disputes between or with its members; and

¹⁰⁷ *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 (CA).

¹⁰⁸ *Ibid.*; see also Aronson et al (2009), above n35, at 135-146.

¹⁰⁹ Aronson et.al. (2009), above n35, at p.146. See also Lord Donaldson [1987] 1 QB 815 at 838-839 [quoted at Aronson et.al. (2009), above n35, at p.136].

¹¹⁰ Aronson et.al. (2009), above n35, at 141-143.

- the Insurance Ombudsman Bureau.¹¹¹

12.17 Some of the more borderline cases have occurred where private bodies receive significant public funds to conduct functions which the State exercises or has traditionally exercised, but where the private body is not subject to a significant degree of statutory control, does not exercise a significant regulatory role or where it has a legitimate profit motive.

12.18 Significantly, in the United Kingdom the 'public function' test has not led to a flood of judicial review cases regarding decisions of ordinary private corporations. Rather, applications relying on the 'public function' test have tended to relate to private sector bodies that have a regulatory function, or that spend large amounts of government money according to strict government guidelines in situations where the law requires that the government either provide a service or ensure that another entity provides that service.

Application of a public function test to statutory judicial review in NSW

12.19 It is expected that general principles of justiciability would limit the scope of decisions subject to review under a public function test [see 10.20 above]. To ensure that any public function test that may be introduced is constrained by principles of justiciability it may be appropriate to draft the test in a way that captures only decisions directly affecting legal rights, legitimate expectations or interests and not general policy decisions. A possible formulation could be:

decisions made in the exercise of public function, where the decision directly affects a person's legal rights, legitimate expectations or interests.

12.20 While there would be considerable overlap, the creation of a public function test is undoubtedly a significant departure from the ADJR Act model. In order to preserve some continuity with the existing ADJR Acts, a NSW judicial review statute could retain the existing jurisdictional tests under the ADJR Act and the Queensland Act, by including the public function test as an additional test. If so, it would not be necessary to rely on the public function test where decisions are already clearly reviewable under the existing tests.

12.21 In summary, it is envisaged that the drafting of the definition of a 'decision to which this Act applies' at s3 ADJR Act could be amended in a NSW Act to provide for three categories of decisions to which a NSW Act would apply:

- (a) *a decision of an administrative or subordinate legislative character made, proposed to be made, or required to be made ... under or given force by an enactment";*
- (b) *decisions of 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) out of amounts appropriated by Parliament, or from a tax, charge, fee or levy authorised by or under an enactment; or*
- (c) *decisions made in the exercise of public function, where the decision directly affects a person's legal rights, legitimate expectations or interests.*

Question 9:

(a) Would the expansion of statutory judicial review to decisions made in the exercise of a public function appropriately clarify the range of decisions that should be subject to judicial review, including the decisions of a greater range of government and non-government entities and the exercise of appropriate executive and prerogative powers?

¹¹¹ Ibid.

(b) If adopted, should a public function test be additional to the existing jurisdictional tests under the ADJR Act and the Queensland Act?

(c) If adopted, would a public function test be limited by principles of justiciability? Should the drafting of a public function test be expressly limited to decisions directly affecting legal rights, legitimate expectations or interests?

13 Option 6: Applying a public function test to common law judicial review?

- 13.1 This final option considers a more substantive reform to common law judicial review in NSW.
- 13.2 Proposals to introduce a public function test in Australia have been directed to modifying the jurisdiction of statutory judicial review regimes. However, the adoption of the public function test in the United Kingdom is directed to the availability of common law judicial review.
- 13.3 An alternative option for reform in NSW would be to introduce a public function test into common law judicial review in NSW in a manner similar to the United Kingdom approach. This could be achieved by amendments to the *Supreme Court Act 1970* and the *Land and Environment Court Act 1979* to provide that the exercise of a public function (subject to any questions as to justiciability) may be reviewed by the court, in accordance with its existing common law judicial review jurisdiction. Given the constitutional protections of the Supreme Court's judicial review jurisdiction, any such reform could not limit or exclude review of any decision that would otherwise be subject to judicial review as part of the NSW Supreme Court's constitutionally entrenched 'supervisory jurisdiction'.
- 13.4 The benefits of reforming the scope of common law judicial review in this way could include the following:
- 13.4.1 It may clarify that common law judicial review should apply to the exercise of public functions, powers or duties in the context of new forms of administrative regulation.
- 13.4.2 It would be clear that existing common law principles, such as principles of justiciability, would continue to apply to limit the appropriate scope of review.
- 13.4.3 Any possible difficulties with introducing a new statutory judicial review jurisdiction might be avoided, including for example, undue limitations on the scope of review, or any issues created by a tension between the statutory and common law grounds of review.

Question 10:

(a) Would the application of a 'public function' test expand the scope of common law judicial review?

(b) Would the availability of judicial review for decisions made in the exercise of a public function appropriately clarify the range of decisions that should be subject to judicial review, including to a greater range of government and non-government entities?

*(c) Could a statutory amendment (to the *Supreme Court Act 1970* and the *Land and Environment Court Act 1979*) extend the provision of judicial review at common law to exercises of a public function?*

(d) How else could a public function test be applied to common law judicial review?