SHOULD THE *ADMINISTRATIVE LAW ACT 1978* (VIC) BE REPEALED?

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[The Administrative Law Act 1978 *(Vic) was a significant reform to judicial review in Victoria. The Act introduced several changes such as a simplified test for standing and a right to reasons for decisions, which appeared to create a simpler statutory avenue of judicial review. But the Act has many flaws. Some are technical, but others, such as the uncertain relationship the Act creates between statutory and common law judicial review, are substantive. This article examines the operation and limitations of the Act and considers whether it should be reformed or repealed.]*

CONTENTS

I INTRODUCTION

The enactment of the *Administrative Law Act 1978* (Vic) ('*ALA*') placed Victoria at the forefront of Australian administrative law. The *ALA* was the first statutory vehicle for judicial review at the state level in Australia and introduced many important procedural changes to judicial review in Victoria, such as a single standing test, a right to reasons for decisions and streamlined remedies. Although these reforms were useful, the purpose of the *ALA* was arguably fairly limited because it did not reform the substantive law of judicial review. The *ALA* did not codify the grounds of judicial review, introduce new grounds of review or make significant changes to the supervisory jurisdiction of the Supreme Court of Victoria.

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While the *ALA* may have been a modest legislative attempt to reform judicial review, its goal of procedural reform was still a potentially valuable one. The procedures governing the prerogative writs, which were the primary vehicle for judicial review in Victoria prior to the enactment of the *ALA*, were notoriously technical and costly. A simplified legislative procedure for judicial review could therefore have provided an important reform to Victorian administrative law, but the *ALA* is widely regarded to have failed to achieve even this relatively limited procedural goal. The Act is not widely used, does not appear to have stimulated any significant changes to the law and has given rise to many technical and interpretive problems. It is also clear that the *ALA* has not provided a model for reform in other Australian jurisdictions. Several other states and territories have enacted a judicial review statute that is modelled upon the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), and the *ALA* does not appear to have influenced these statutes.[1]

This article considers the operation of the *ALA* and whether it should be reformed or repealed. The article explains the main features of the *ALA* and its perceived deficiencies, and it considers several possible reforms to specific provisions of the Act. The article also examines the relationship between the statutory form of judicial review created by the *ALA* and judicial review proceedings at common law. It will be argued that the connection between the statutory and common law avenues of judicial review remains uncertain and frequently gives rise to the very sort of technicalities that the *ALA* was intended to overcome. The article will conclude that the *ALA* is beset with so many technical and structural problems that it should be repealed rather than reformed.

II THE STRUCTURE AND OPERATION OF THE *ALA*

A *The Purpose of the* ALA *and Its Connection to the Common Law*

The main purpose of the *ALA* was to overcome the technical problems of judicial review at common law arising from the prerogative writs.[2] To achieve this objective, the *ALA* introduced a statutory alternative to judicial review at common law. Proceedings commenced under this new statutory avenue of review were subject to several important procedural reforms, such as a single test for standing, a right to reasons for decisions and a uniform remedy for all applications.[3] While these changes simplified the procedure for judicial review,

[1] The judicial review statutes adopted since the enactment of the current Commonwealth and Victorian legislation are: *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas). All are modelled very closely on the Commonwealth Act.

[2] This view of the purpose of the *ALA* was accepted in many early cases: see, eg, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 358 (Mason J); *Monash University v Berg* [1984] VR 383, 388 (Starke, Murphy and Marks JJ). Other cases have noted that the perceived inadequacies of the prerogative writs have to some extent been overcome by the increased availability of the equitable remedies of declaration and injunction: see, eg, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [57] (Gaudron J).

[3] Established respectively by *ALA* ss 3, 8 and 7.

they made little if any change to the substantive law. The Court of Appeal of Victoria recently explained that this procedural focus of the *ALA* indicated that the Act

> was not enacted to create new grounds of review or to make substantive changes to the general law. Instead, it was machinery legislation, intended to facilitate the prosecution of conventional judicial review proceedings on conventional grounds.[4]

The courts have accepted that this procedural focus of the *ALA* was a reformative one which was relevant to judicial interpretation of the Act. In *Western Health v Gallichio*, Pagone J reasoned:

> The provisions of the *Administrative Law Act* were designed to reform and improve the procedure for judicial review in circumstances where the common law was thought to have been defective. The terms and effect of the *Administrative Law Act* should be construed consistently with that purpose without the introduction of unnecessary constraints and procedural obstacles unless they be necessary to secure a policy objective revealed by its provisions.[5]

There are, however, many cases which suggest that the *ALA* has not achieved these goals of simplicity and procedural reform. In some instances the Act appears to have confused rather than clarified the law. Many of these problems arise from the ambiguous relationship between the *ALA* and the common law. Some provisions of the *ALA* reform the common law, some build upon the common law, and some are of general application and may therefore be used in proceedings commenced at common law or under the *ALA*.[6] In *Santos v Wadren Pty Ltd*, Smith J recently explained the effect of this arrangement in the following terms:

> The *ALA* creates a new procedure in its early sections — ss 3, 4, 5, 6 and 7. The expression 'judicial review' is not used in those early sections. They, like Order 56, provide a procedure by which this Court's common law supervisory jurisdiction can be exercised. The *ALA*, however, then goes on to set out provisions that are not confined by their language to that procedure and are of general application to facilitate any proceedings for judicial review whatever procedure is used.[7]

4 *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010) [54] (Maxwell P, Ashley JA and Byrne AJA).

5 [2009] VSC 134 (8 April 2009) [23].

6 It is possible to challenge administrative or ministerial decisions at common law by writ and statement of claim. This was done in *Love v Victoria* [2009] VSC 215 (23 June 2009). The plaintiff in that case sought a large award of damages for an allegedly invalid acquisition of land made for a freeway bypass. Cavanough J noted that the heart of the case depended on a challenge to the lawfulness of the acquisition, but the plaintiff did not proceed by way of judicial review: at [3], [13]. His Honour cautioned that the hearing should remain focused on the 'relevant statutory framework … [o]therwise there is a risk of becoming lost in the morass of facts and documents relied on by the plaintiff, and of forgetting the true, limited scope and purpose of any proceeding by way of judicial review': at [13]. These remarks and the subsequent application by Cavanough J of judicial review principles to determine key issues imply that his Honour believed the case ought to have proceeded by way of judicial review.

7 [2009] VSC 303 (30 July 2009) [77] (citations omitted).

In light of this novel blend of common law and statutory jurisdiction, Victorian courts have concluded that the *ALA* does not provide a 'self-contained and exhaustive' code for judicial review.[8] There is instead a porous interaction between the procedures established by the *ALA* and the common law. In some instances this apparent blurring between the common law and statutory avenues for judicial review might be desirable. An example is s 10 of the *ALA*, which changes the common law in an important way and does so without any significant difficulty. Section 10 provides that:

> Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

The immediate effect of this statutory definition of what constitutes 'the record' was to overcome a gap in the common law, where certiorari is available only to quash jurisdictional errors or errors of law which appear 'on the face of the record'. The restrictive common law definition of 'the record' includes the documents that initiated the proceedings in question and the order or determination under challenge, but not those documents that might be most informative for the purposes of detecting an error of law, such as the transcript of proceedings or the reasons given for the decision.[9] The practical consequence of s 10 of the *ALA* is that reasons provided by decision-makers are deemed to be part of the record and are therefore able to be examined for error in proceedings under the *ALA*.[10] In other words, s 10 enables a court to consider a wider range of documents when detecting error for the purposes of certiorari.

The scope of s 10 is widened by its express application to the statements of tribunals or inferior courts. This aspect of s 10 is at odds with the *ALA* more generally because inferior courts are expressly excluded from the definition of 'tribunals' to which the *ALA* applies.[11] The apparent tension between these two sections has been interpreted to mean that the decisions of inferior courts cannot be subject to the statutory form of judicial review established by the *ALA* but that they are subject to the expanded definition of the record in s 10. This expanded definition enables the reasons of an inferior court or other decision-maker to be

[8] *Keller v Bayside City Council* [1996] 1 VR 356, 375 (Batt J). See also *Western Health v Gallichio* [2009] VSC 134 (8 April 2009) [22] (Pagone J).

[9] This narrow interpretation of 'the record' has a long common law pedigree which was pointedly affirmed by the High Court in *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*'). The New South Wales Court of Appeal had attempted to expand the definition of the record in a series of cases beginning with *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503. *Craig* ended that expansion. The *Craig* case and its consequences are explained in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 232–7.

[10] Though it is clear that s 10 does not operate to incorporate all documents as part of the record. See, eg, *Sidebottom v County Court (Vic)* (2001) 117 A Crim R 574, 579 [8], where Hedigan J held that a hearing transcript was not part of the record.

[11] The definition of 'tribunal' in s 2 of the *ALA* excludes 'a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court'.

placed in issue in judicial proceedings at common law.[12] That outcome is arguably desirable because it enables a court determining a judicial review application at common law to be much better informed about the decision under review than would otherwise be the case.

There are other provisions of the *ALA* that blur the common law and statutory procedures for review with less apparent benefit. An example is the key remedial provision of the *ALA*, which is fashioned by reference to the common law judicial review jurisdiction of the Supreme Court. Section 7 enables the Court to exercise 'all or any of the jurisdiction or powers and grant all or any of the remedies which … might be exercised or granted in proceedings for relief or remedy' via the prerogative writs of certiorari, mandamus, prohibition or quo warranto, or the equitable remedies of declaration and injunction. The section replicates the powers of the Court in judicial review proceedings at common law but does not empower the Court to issue new statutory remedies,[13] or displace existing powers to issue remedies at common law.[14]

There are, however, some reasons why the remedial powers exercised by a court in statutory proceedings for review should not be shaped by reference to common law remedial powers. One is that the failure to create new statutory remedies arguably represents an opportunity lost by the parliamentary drafters to consider whether the remedies available at common law could be modified or improved. There is another, simpler, reason why the fashioning of remedies under the *ALA* by reference to those available at common law is undesirable. People who read the *ALA*, especially if they are not legally trained, would learn little about the remedial powers that the Act confers. If the common law is to provide the basis for the remedial powers available in any statutory procedure for review, the relevant statute in which they are adopted should at least reproduce those common law powers in language that is clear and understandable. This approach would enable most readers to gain a basic understanding of the statute according to its own terms, rather than by reference to an extensive and obscure body of common law contained elsewhere.

Useful guidance on this issue can be taken from the *ADJR Act* model. The remedial powers granted in the *ADJR Act* are clearly fashioned by reference to the powers available in the various common law and equitable writs, but they are expressed in plain English.[15] The *ADJR Act* does not, for example, grant courts the right to exercise the same powers as could be exercised via a writ of prohibition or mandamus but instead empowers courts to direct any of the parties 'to do,

[12] This interpretation was reached by J D Phillips J in *Hansford v Judge Neesham* (1994) 7 VAR 172, 179–80 and accepted by the Court of Appeal in *Lianos v Inner and Eastern Health Care Network* (2001) 3 VR 136, 142–3 [21] (Chernov JA). (The Court of Appeal in *Hansford v Judge Neesham* [1995] 2 VR 233 affirmed the decision of J D Phillips J on other grounds.) See also *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No 2]* [2009] VSC 426 (25 September 2009) [156] (Vickery J). In *Lianos v Inner and Eastern Health Care Network*, the Court of Appeal firmly rejected a submission that this aspect of s 10 had effect outside judicial review proceedings: (2001) 3 VR 136, 142–4 [21]–[22] (Chernov JA).

[13] *Monash University v Berg* [1984] VR 383, 388 (Starke, Murphy and Marks JJ).

[14] *Diep v Appeal Costs Board* (2003) 146 A Crim R 151, 156 [22] (Gillard J).

[15] See *ADJR Act* s 16.

or refrain from doing' any act that the court considers necessary to achieve justice between the parties.[16] This reproduction of the common law remedial powers captures the essence of those powers but also enables them to be more easily understood, particularly by non-lawyers. In my view, the *ALA*, or any Act that might replace it, should incorporate a provision of this nature.

In other instances, the blending of common law and statutory judicial review by the *ALA* has proven extremely problematic. The best example is the right to reasons created by the *ALA*. This right applies to decisions that fall within the scope of the *ALA*, but it does not require an applicant to commence a substantive application under the *ALA* in order to claim reasons.[17] That possibility is desirable because reasons may be informative to applicants in judicial review proceedings irrespective of whether the proceeding are commenced at common law or under a judicial review statute. The ability to gain reasons for a decision may also help a prospective applicant to decide whether review proceedings should be launched. The right to reasons could therefore provide a means either to encourage or dissuade applications, according to the merit of each case.[18] But the ability to use reasons obtained under the *ALA* in common law proceedings has given rise to a division of judicial opinion on whether those reasons may be held to be so inadequate as to constitute an error of law in common law proceedings. In other words, can a right to reasons conferred by the *ALA* give rise to a remedy under the common law?

Until recently there were two competing judicial answers to this question. According to one view, the *ALA* provided both a right to obtain reasons for a decision and a right to correct any perceived deficiencies in those reasons. In

16 Ibid s 16(2)(b).

17 A point acknowledged in *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010) [28] (Maxwell P, Ashley JA and Byrne AJA). This aspect of the *ALA* can be contrasted with the right to reasons for decisions subject to judicial review in New South Wales. That jurisdiction has no statutory form of judicial review but has introduced rules enabling a party who has commenced an application for judicial review to obtain reasons for the decision under challenge: Supreme Court of New South Wales, *Practice Note No SC CL 3 — Supreme Court Common Law Division — Administrative Law List*, 16 July 2007, cl 23. This limited right to gain reasons can be problematic because applicants may be unable to make an informed decision whether to commence proceedings without reasons for the decision. The right created by the New South Wales practice note is necessarily limited because it is made in exercise of a statutory power to make rules of court: see *Supreme Court Act 1970* (NSW) s 124. The terms of that power essentially enable the Supreme Court to make rules for proceedings within the Court, which would almost certainly not extend to support a practice note that purported to impose a requirement for decision-makers to provide reasons for decisions if proceedings have not been commenced.

18 This possibility is largely speculative because the voluminous literature on the desirability of providing reasons for administrative decisions contains no empirical research on this point. The empirical research on the impact of judicial review in Australia conducted by Robin Creyke and John McMillan has focussed on how it affects the behaviour of government agencies, how it is perceived by those agencies and how it might ultimately affect administrative outcomes: see Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law — An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163; Robin Creyke and John McMillan, 'Judicial Review Outcomes — An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82; Robin Creyke and John McMillan 'The Operation of Judicial Review in Australia' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) 161. The impact of the procedural aspects of judicial review upon applicants, such as the effect of any exercise of the right to reasons, remains unclear.

Sherlock v Lloyd,[19] Kyrou J considered the operation of s 8(4) of the *ALA*, which enables a court to order a tribunal to provide either a statement or a further statement of reasons that is 'adequate to enable a Court to see whether the decision does or does not involve any error of law'. Kyrou J held that allowing the adequacy of reasons provided under the *ALA* to be determined in common law judicial review proceedings would ignore 'the carefully structured remedies' included in the *ALA* to address inadequate reasons.[20] Section 8(4) provides that the court may order reasons or further reasons to be provided and to quash a decision where such orders are not complied with. Kyrou J explained the effect of this provision as follows:

> The concluding words of s 8(4), which enable the Court to quash a decision where an order for the provision of reasons or further reasons is not complied with on the basis of a deemed error of law, confirm that, save to this limited extent, s 8 does not alter the common law position as to the existence of inadequacy of reasons as a ground of review of the decision.[21]

Pagone J reached the opposite conclusion in *Western Health v Gallichio*, where his Honour concluded that the *ALA* imposed upon the bodies to which it applied an obligation to provide 'legally effective reasons'.[22] Pagone J reasoned that the *ALA* was intended to 'supplement and extend the rights at common law'.[23] It followed, according to this view, that the adequacy of reasons could be tested in proceedings commenced either within or outside the *ALA*.

The Court of Appeal recently favoured the view of Kyrou J and held that the provision of reasons under the *ALA* was 'separate and distinct from the making of the decision.'[24] The immediate effect of this reasoning was to resolve divergent judicial views in Victoria on the effect that a failure to provide either reasons or reasons that are held to be adequate at law might have upon the administrative decision of which judicial review was sought.[25] At the same time, however, the longstanding difference of judicial opinion on this issue draws attention to important problems with the *ALA*. One is the obvious irony that an Act that is intended to overcome many procedural problems of the common law has itself caused new problems. At a deeper level, the uncertainty about the effect of reasons provided under the *ALA* exemplifies a wider paradox in the Act,

19 [2008] VSC 450 (29 October 2008).

20 Ibid [34]. This reasoning was cited with approval in *Kuek v Victoria Legal Aid* [2009] VSC 43 (18 February 2009) [30] (Beach J).

21 *Sherlock v Lloyd* [2008] VSC 450 (29 October 2008) [25].

22 [2009] VSC 134 (8 April 2009) [19]. His Honour cited a large number of earlier cases in support of this proposition: at [17] n 8.

23 Ibid [22]. See also at [21], [23]–[24]. The reasoning of Pagone J was cited with approval in *Santos v Wadren* [2009] VSC 303 (30 July 2009) [77] (Smith J).

24 *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010) [43] (Maxwell P, Ashley JA and Byrne AJA).

25 The Court of Appeal stressed that its decision was limited to the scope and consequences of the duty to give reasons under the *ALA*: ibid [26]. In view of this clear limitation on the decision, other issues concerning reasons for administrative decisions remain unclear. An example is the more general questions of whether a statute may be interpreted to require officials to provide reasons for their decisions and what legal consequences might follow if this is not done. The Court of Appeal expressed doubt about the approach taken to this issue by the New South Wales Court of Appeal in *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372: ibid [22].

which is that the uncertain application of its provisions to non-statutory proceedings for judicial review has given rise to many technical interpretive problems about the scope and effect of the *ALA*.

B *Should the* ALA *Retain Its Existing Connections to the Common Law?*

The uncertain line between the *ALA* and the common law was not referred to in any detail when the Act was introduced into Parliament, and it does not appear to have ever been the subject of a detailed judicial or scholarly analysis. It has instead remained an almost shadowy part of the *ALA* which is sometimes noticed in passing but never examined in detail. The current blurring between common law and statutory review in the *ALA* conflates two issues. One is whether and how the common law procedures for judicial review should be reformed. The other is the form that any statutory procedure for judicial review should take. In my view, the two issues can and should as far as possible remain separate. There is no reason in principle why a judicial review statute cannot simultaneously establish a new procedure for review while also amending the common law. The more important question is whether this is the best way to legislate for judicial review. In my view, it is not, and the difficulties that the *ALA* has given rise to indicate why this is so.

There should be a clear distinction, if not a total separation, between statutory and common law judicial review. The immediate benefit of such a change would be to remove the many technical problems that have arisen by reason of the obscure relationship between the *ALA* and the common law. If the common law procedures for judicial review are thought to require reform, that should be done by legislation and rules of court which make clear that those reforms apply to the common law. A small number of the changes made by the *ALA* are clearly desirable and should be retained. One is that reasons provided by a decision-maker should be taken to form part of the record, which essentially expands the scope of material that may constitute the record. Another is the ability to use reasons provided under a statutory obligation to do so in common law proceedings for judicial review. These two features of the *ALA* can and should be preserved even if the *ALA* is not.

Reforms of this nature could be made by a separate statute or a separate division of a judicial review statute. In my view, the latter option should be viewed with great caution lest the mistakes of the *ALA* be repeated. The form of such change is less important than its substance. Any reform to judicial review in Victoria should include a more systematic review of the relationship between common law and statutory review than has occurred with the *ALA*. Any clarification of the relationship between common law and statutory judicial review in Victoria would require substantial amendments to the *ALA*, and perhaps even more. The division between statutory review and the common law might be impossible to unravel without repealing the *ALA*.

C *The Jurisdictional Formula of the* ALA — *'Decisions'*

The *ALA* enables statutory judicial review of a 'decision' of a 'tribunal'.[26] Section 2 of the *ALA* defines 'decision' as:

> a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision …

This definition is narrow because decisions are only one form of administrative or government behaviour that can affect people. Conduct that is preparatory to or somehow assists or informs a decision, such as commencing an investigation or preparing a report, can be as significant as a decision itself but it does not fall within the definition of 'decision' in the *ALA*.

The *ADJR Act* resolves this issue by enabling review of both decisions and conduct related to the making of decisions.[27] The corollary of this distinction is that the courts have interpreted a 'decision' in the context of the *ADJR Act* to mean a final or operative decision rather than any one of the smaller discrete steps taken on the way to that final step.[28] The *ALA* does not distinguish between decisions and conduct in the same way, but its definition of decision as one 'operating in law to determine a question affecting the rights' of people appears to import a requirement of finality or an effect that is similar to the interpretation given to decisions as opposed to conduct under the *ADJR Act*.

The obvious gap in this part of the *ALA* is that 'decision' is defined in a manner limited in much the same way as in the *ADJR Act* but without the equivalent means for applicants to seek review of conduct that may precede a decision.[29] This has led to many cases that have considered the precise point at which the action sought to be challenged is a reviewable decision rather than something falling short of that. This flaw in the *ALA* could be eliminated by the inclusion of 'conduct', that is, to extend the right of review under the Act to any 'decision or conduct'. Such a simple change might not be consistent with the remainder of the definition of 'decision', which is directed to actions that determine a question affecting rights. Accordingly, an extension of the *ALA*'s jurisdictional formula to decisions and conduct should be accompanied by amendments that widen the definition of decision.

If the definition were amended to no longer refer to decisions 'operating in law … affecting the rights of any person', but instead to encompass any 'deci-

[26] These two terms are drawn together in s 3 of the *ALA*, which creates a right for a 'person affected by a decision of a tribunal' to make an application for review under the Act.

[27] The grounds for review of decisions and conduct related to the making of decisions are specified respectively in *ADJR Act* ss 5–6.

[28] The key case on this issue remains *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. The distinction drawn in the *ADJR Act* between decisions and conduct and the effect of the *Bond* case on the application of each category is discussed in Aronson, Dyer and Groves, above n 9, 58–68.

[29] In *Australian Broadcasting Tribunal v Bond*, Mason CJ noted that there were many competing issues informing the interpretation of 'decision' for the purposes of the *ADJR Act*, one of which was the separate provisions in that Act applicable to 'conduct': (1990) 170 CLR 321, 336–8.

sion or conduct, or failure to make a decision or engage in conduct, affecting the rights, interests or legitimate expectations of a person' it would extend beyond rights in the relatively strict sense of the current definition.[30] That wider definition could easily encompass conduct related or preparatory to a decision. It would also align the definition of decision with the principles of natural justice, which lie at the heart of the current jurisdictional formula of the *ALA*.[31] A wider definition of decision would also accord with the scope of the definition of 'tribunal', which the next section explains has greatly expanded since the *ALA* was enacted.

D *The Jurisdictional Nexus of the* ALA *with Natural Justice*

The other key jurisdictional requirement of the *ALA* is that review can be sought of the decisions of a 'tribunal', which is defined as any person or body (which is not a court or tribunal presided over by a Supreme Court judge) that is required to observe one or more rules of natural justice.[32] The definition excludes the Victorian Civil and Administrative Tribunal ('VCAT'), which is headed by a Justice of the Supreme Court, though the practical effect of this exclusion is ameliorated by the existence elsewhere of a right of appeal from VCAT decisions to the Court of Appeal on a question of law.[33] Subject to that exclusion, the definition of 'tribunal' in the *ALA* turns on an obligation by a decision-maker to observe *any one* of the requirements of natural justice, which may include either the hearing rule or the rule against bias.[34]

The Court of Appeal of Victoria recently noted that the connection between the statutory definition of 'tribunal' and the rules of natural justice has the effect of

30 This approach would take account of the criticisms made by Kirby J of the reasoning of the majority in *Griffith University v Tang* (2005) 221 CLR 99. In that case, a majority of the High Court adopted a relatively narrow conception of the affectation of rights required for relief through judicial review: at 128–9 [80]–[82] (Gummow, Callinan and Heydon JJ). Kirby J made the point that this approach was at odds with the wider conception of affectation of rights that now applies to determine questions of standing in judicial review proceedings and also, at least in his Honour's view, with the broad remedial purpose of the *ADJR Act*: at 144 [135], 152 [152]. Kirby J favoured a test for such matters that was 'internally harmonious and consistent': at 152 [152]. The amended definition of decision offered in the text of this article would achieve such consistency.

31 This is because the proposed definition of decision or conduct would align closely with the principle by which the application of the rules of natural justice is determined. See below n 44.

32 *ALA* s 2 (definition of 'tribunal'). There is older authority suggesting that a statutory board or other such body may be a court for the purposes of s 2. See, eg, *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] 1 VR 716, 721, where Starke J held that a statutory board that heard workers' compensation claims was a court for the purposes of s 2. Starke J relied heavily on the complex legislative history and the various powers granted to the board, which makes it difficult to discern a more general principle as to the meaning of word 'court' for the purposes of s 2 of the *ALA*.

33 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1).

34 In most cases, disputes on whether a decision-maker is subject to one of the rules of natural justice are decided by examination of whether the decision-maker is subject to one or more features of the hearing rule. The other requirement of natural justice, which is the rule against bias, is rarely relied upon to satisfy the jurisdictional requirements of the *ALA* but it clearly can be. See, eg, *Lewenberg v Victoria Legal Aid* (2005) 22 VAR 354, 367 [70] (Gillard J).

'incorporating by reference the common law rules of natural justice.'[35] This connection to the common law means that the expansion of the scope of natural justice in recent times has greatly widened the scope of 'tribunal' since the *ALA* commenced. When the *ALA* was enacted in 1978 the duty to observe the rules of natural justice was fairly narrow. The key question at that time was a threshold one of whether a decision-maker was subject to a duty to observe the rules of natural justice.[36] In many cases this threshold question was answered in the negative.[37] A good Victorian illustration is *R v Classification Committee; Ex parte Finnerty* ('*Finnerty*'),[38] which was decided just before the *ALA* was enacted. Finnerty was a prisoner who challenged his security classification on the ground that he was not allowed to appear before the classification committee to put his case. Kaye J ruled that neither the relevant legislation nor the common law imposed a duty upon the committee to observe any of the rules of natural justice.[39] This conclusion was consistent with the limited application of natural justice at that time, according to which the doctrine clearly applied only to decisions affecting rights in a strict sense.[40]

The reach of natural justice has since expanded enormously. It now applies to any decision by a public official that may destroy, defeat or prejudice a person's rights, interests or legitimate expectations.[41] The many requirements of the hearing and bias rules, which in combination comprise the rules of natural justice, apply to a vast range of decisions made by public officials.[42] The *Finnerty* case would now be decided differently on the question of jurisdiction under the *ALA* because it is now accepted that classification and other decisions affecting prisoners are normally subject to at least one of the rules of natural justice.[43] This expansion of the obligation to observe the requirements of natural

35 *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010) [52] (Maxwell P, Ashley JA and Byrne AJA).

36 The description of this issue as a threshold question is taken from *Kioa v West* (1985) 159 CLR 550, 616 (Brennan J).

37 The wider issues surrounding the nature and scope of natural justice during this time are examined in D J Mullan, 'Fairness: The New Natural Justice?' (1975) 25 *University of Toronto Law Journal* 281; Martin Loughlin, 'Procedural Fairness: A Study of the Crisis in Administrative Law Theory' (1978) 28 *University of Toronto Law Journal* 215.

38 [1980] VR 561.

39 Ibid 566–70.

40 Natural justice could apply to other decisions, though the issue was beset with extremely technical and interpretive problems. For useful accounts of this area covering the time the *ALA* was enacted, see Mark Aronson and Nicola Franklin, *Review of Administrative Action* (Lawbook, 1987) 96–122; Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002) chs 1–4.

41 See, eg, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ), 591–2 (Brennan J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93 [126] (McHugh J). The question of whether such action must be taken in the exercise of statutory powers in order to attract these expanded requirements of natural justice is one I leave aside for present purposes.

42 The scope of the two principles of natural justice, which are the hearing rule and the rule against bias, is explained in Aronson, Dyer and Groves, above n 9, chs 7–9.

43 Cases in which courts have required prison officials to observe the rules of natural justice include *Graveson v Corrective Services Commission (Qld)* [2000] 1 Qd R 529 (decision on prisoner security classification); *Renton v Bradbury* [2001] QSC 167 (22 May 2001) (decision to transfer adult prisoners between prisons); *ID v Director General, Department of Juvenile Justice* (2008)

justice (or procedural fairness, as the doctrine is now often referred to[44]) has significantly widened the definition of 'tribunal' in the *ALA*.

Despite the expansion of the scope of natural justice, some technical questions about the scope of the definition of 'tribunal' remain. It is not clear whether decision-makers acting under contractual or other private law authority might be a tribunal for the purposes of the *ALA*. The influential early case of *Monash University v Berg* held that an arbitrator appointed to resolve a building dispute was not a tribunal because the appointment was based on a contractual agreement between the parties rather than any statutory or other source of public power.[45] In a case decided very soon afterwards, Nathan J approached the question of whether the *ALA* should apply to decision-makers acting under private authority with hesitation.[46] His Honour felt 'constrained' by *Monash University v Berg*, but reasoned that:

> The class of what is a public or semi-public tribunal must be considered organic, capable of growth, and not capable of close definition. The terms of the *Administrative Law Act 1978* are broad enough to encompass a large number of tribunals which have been established or might be established by way of statutory aegis.[47]

Although this reasoning suggests that the definition in the *ALA* of 'tribunal' might be an open one that extends beyond the traditional boundaries of judicial review to encompass bodies that are not fully based within government (such as those involving commercial partnerships or other relationships between the public and private sector), later cases suggest that the scope of the *ALA* will only extend to public authorities exercising public power.[48] According to this approach, public authorities are not amenable to the *ALA* when they engage in activities traditionally associated with private law, such as entering into contracts.[49] Similarly, bodies that have traditionally been regarded as private in character, such as sporting bodies or trustees, will not be amenable to the *ALA*.[50]

73 NSWLR 158 (decision to transfer juvenile prisoners to adult prisons). In many cases, the requirements of natural justice apply fairly weakly to prison officials but that itself would not prevent officials from being held to be a 'tribunal' for the purposes of the *ALA*, because the definition only requires a decision-maker to be subject to 'one or more' of the rules.

44 Several members of the High Court have explained that the procedural focus of the doctrine means that it is more appropriately referred to as 'procedural fairness' than 'natural justice'. See, eg, *Kioa v West* (1985) 159 CLR 550, 585 (Mason J), 601 (Wilson J); *A-G (NSW) v Quin* (1990) 170 CLR 1, 53 (Dawson J). Many judges and scholars still refer to natural justice.

45 [1984] VR 383, 387–8 (Starke, Murphy and Marks JJ).

46 See *Dominik v Eutrope* [1984] VR 636, 638.

47 Ibid.

48 Examples of such decision makers whose actions have been held to fall outside the scope of the *ALA* include *Monash University v Berg* [1984] VR 383 (an arbitrator who was granted authority by a contract between parties to the dispute); *Dominik v Eutrope* [1984] VR 636 (the trustee of a private superannuation fund); *Davidson v Australian Mensa Inc* (1996) 10 VAR 42 (a domestic tribunal to which membership and authority to resolve disputes between members arose from contractual agreements between its members).

49 See, eg, *Szwarc v Melbourne City Council* (1990) 70 LGRA 162, where it was held that the refusal of a local council to renew a commercial lease was not amenable to the *ALA*.

50 See, eg, *Davidson v Australian Mensa Inc* (1996) 10 VAR 42 (decisions of a domestic tribunal regulated by contract); *Borg v Smith* [1991] 2 VR 161 (decisions of superannuation trustees).

Professor Aronson and his co-authors conclude that the effect of such cases is that the coverage of the *ALA* is broadly similar to the common law, which restricts judicial review to the exercise of public power.[51]

A more technical question arises where the nature or extent of any obligation upon an initial decision-maker to act fairly is unclear. This uncertainty can be traced to *FAI Insurances Ltd v Winneke*, in which Brennan J suggested that the *ALA* does not extend to a hearing in which an official advised the ultimate decision-maker.[52] The point was central in that case because the 'adviser' was a Minister who was clearly the person who made the substantive decision in conjunction with Cabinet. The Governor in Council was vested with statutory authority to make the decision but clearly did so only nominally.[53] This issue might be equally relevant to other administrative arrangements in which a nominal decision-maker receives advice prepared by another and has little choice but to endorse that advice, but the absence of further such cases under the *ALA* suggests that the issue is not a significant one.

Another arguably unresolved technical issue concerning the definition of 'tribunal' is whether it extends to a decision-maker who may not be obliged to meet the requirements of fairness but is subject to a right of review which may attract that obligation.[54] There is some older authority that in such cases the original decision-maker is not a 'tribunal' for the purposes of the *ALA*.[55] However, the increased scope of the duty to observe the requirements of natural justice has almost certainly eradicated the possibility that such original decision-makers would not themselves be subject to the doctrine and therefore be a 'tribunal' for the purposes of the *ALA*.

If these minor issues remain live ones, and in my view that is open to question, they do not provide a significant problem for the basic jurisdictional formula of the *ALA*. There are several reasons why this formula, or a revised version of it, which is based upon a minimal obligation of a decision-maker to observe at least one rule of natural justice, might be desirable. Such a formula does not fix upon the identity of the decision-maker and instead focuses upon the obligations to

Where a domestic tribunal is incorporated into a statutory regulatory framework, it may become amenable to the *ALA*. See, eg, *Robbins v Harness Racing Board* [1984] VR 641; *Pullicino v Osborne* [1990] VR 881. The jurisdiction of the *ALA* will not be attracted simply because a statute acknowledges or somehow presumes the existence of the tribunal. It must also provide the tribunal with some of its authority to act: *Vowell v Steele* [1985] VR 133, 137–8 (Beach J).

51 Aronson, Dyer and Groves, above n 9, 26–7.

52 (1982) 151 CLR 342, 420. Other members of the High Court did not address this issue.

53 Counsel for the respondent submitted that '[t]he Governor in Council is simply an organ for giving formal effect to the decisions of Cabinet': ibid, 346 (D M Dawson QC) (during argument). Murphy J and Aickin J adopted this broadly stated proposition: at 374 (Murphy J), 382 (Aickin J). The remaining members of the High Court did not expressly adopt such a broadly expressed proposition but did accept that the effective decision was made by the Minister and that the Governor in Council acted upon the advice of the Ministers who constituted the Executive Council: at 349 (Gibbs CJ), 355 (Stephen J), 365 (Mason J).

54 It is also possible that an initial decision-maker who considers whether to reconsider a decision or refer the matter to internal review procedures may be subject to the rules of natural justice when doing so and therefore be a tribunal for the purposes of the *ALA*. See, eg, *Serban v Victoria Legal Aid* [1998] 2 VR 326.

55 See, eg, *Footscray Football Club Ltd v Commissioner of Pay-Roll Tax (Vic)* [1983] 1 VR 505.

which a decision-maker is subject, namely a duty to observe one or more of the rules of natural justice. According to this approach, it does not matter if the decision-maker holds a high office such as that of Governor.[56] The key instead is whether the decision-maker must meet any one of the basic elements of natural justice.[57] These features of the jurisdictional formula of the *ALA* could be clarified if the term 'tribunal' were replaced with 'official', defined as:

> a person or body authorised by statute, prerogative or other government power to make, alter or refuse to make or alter any decision or action and when doing so or refusing to do so is required to observe one or more of the rules of natural justice.

Importantly, the terms of this definition would not extend to all decisions of government. It would not include government officials when exercising power under contract and other commercial arrangements.[58] In such cases, any remedy against public officials lies in terms of the contract under which they act. The proposed definition would also not, as a general rule, encompass officials in the private sector who deal with government as part of so-called 'mixed administration' or 'contracted out' services, in which the private sector delivers services on behalf of or in conjunction with a government agency in accordance with a contract or public-private partnership.[59]

The *ADJR Act*, which enables review of decisions of an administrative character that are made under an enactment, has a quite different focus. In *Griffith University v Tang*, Gummow, Callinan and Heydon JJ noted that the *ADJR Act* formula 'directed attention away from the identity of the decision-makers, the Ministers and public servants … and to the source of power' under which a

[56] This conclusion is consistent with the principle that the identity or high status of a decision-maker does not itself provide a reason to exclude the actions of that person from review at common law: see *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *South Australia v O'Shea* (1987) 163 CLR 378; *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *A-G (NT) v Minister for Aboriginal Affairs* (1987) 16 FCR 267. The status of a decision-maker may, however, influence the intensity of review.

[57] It is for this reason that the *ALA* provided the vehicle for one of the cases which established that vice-regal decisions were amenable to supervisory review: see *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

[58] The express exclusion of decisions made under contract is consistent with the reasoning of the High Court in *Griffith University v Tang* (2005) 221 CLR 99, 109 [13] (Gleeson CJ), 128–9 [81]–[82] (Gummow, Callinan and Heydon JJ). These judgments suggested that a voluntary or private law relationship would not normally satisfy the jurisdictional requirements of the *AJDR Act*. While one can question whether the relationship in that case (between a student and a university) could truly be regarded as voluntary, the general principle that relationships based in contract and other private law arrangements should not be amenable to judicial review is compelling.

[59] It remains possible for such agreements to provide for the imposition of various avenues of public law scrutiny. It is also the case that such arrangements may be placed on a statutory footing through legislation that requires any agreement to make provision for the application of administrative law avenues of accountability. See, eg, *Corrections Act 1986* (Vic) ss 8C(1)(f)–(g), which require that agreements between the government and private corporations to provide privately managed prisons must include a nominated officer for the purposes of freedom of information and ombudsman legislation. There is no equivalent requirement for judicial review. Whether such a requirement is possible and desirable is a difficult issue to resolve.

decision-maker acts.[60] For present purposes two key points may be drawn from the different jurisdictional tests of the *ALA* and *ADJR Act*. The first is that uncertainty about natural justice is now normally restricted to a question of the precise requirements of the doctrine in a particular instance rather than whether the doctrine applies. The scope of the *ALA* depends on the latter issue — whether the doctrine applies — rather than the former. For this reason, the jurisdictional formula of the *ALA* is now almost always a straightforward one.[61] The jurisdictional requirements of the *ADJR Act* do not provide a simpler alternative. In particular, the *ADJR Act* requirement that the decision or conduct be made 'under an enactment' has raised difficult questions of interpretation.[62]

A second point about the jurisdictional formula of the *ALA* and how it compares to that of the *ADJR Act* is that a formula anchored upon a requirement to observe *one* or more of the rules of natural justice is easily defended at the doctrinal level. Put simply, if decision-makers must observe a single requirement of fairness such as the duty to provide notice, or to hear or to decide without bias, they are subject to review under the *ALA*.[63] The connection drawn in the *ALA* formula between the basic procedural obligations of decision-makers is a straightforward one which also sits comfortably with the increasing focus of Australian judicial review doctrine on process.[64] A separate but related reason to retain some form of the jurisdictional formula of the *ALA* is the sheer simplicity of the current test. The requirement that decision-makers must be subject to one or more of the rules of natural justice necessitates a threshold consideration of the requirements of the doctrine in each case; but that exercise is not a difficult one in light of the enormous expansion of the duty to observe natural justice in recent times.[65] The relative ease of this jurisdictional formula would be enhanced

60 (2005) 221 CLR 99, 113 [29].

61 Support for this proposition can be drawn from the lack of recent cases considering the threshold question of whether the requirements of natural justice are applicable to a decision allegedly subject to judicial review. The absence of such cases is almost certainly due to the increasingly strict approach of the High Court to legislative attempts to exclude the rules of natural justice. See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] where French CJ, Gummow, Hayne, Crennan and Kiefel JJ rejected a submission that legislation which introduced a detailed procedural scheme could be interpreted as impliedly excluding the common law hearing rule. Their Honours explained that 'fundamental principles' such as the hearing rule would normally be expected to be overturned by a legislature with an intention expressed 'with irresistible clearness'. Such remarks confirm both the importance of natural justice and the strict standard to which legislative attempts to exclude the doctrine are held. It is useful to note that a fairly stringent approach to the exclusion of natural justice was also taken in many early cases concerning the *ALA*. See, eg, *Currie v Road Traffic Authority* [1986] VR 401, 406 (Southwell J).

62 Much of this uncertainty can be traced to *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 and *Griffith University v Tang* (2005) 221 CLR 99. Both cases were the subject of considerable criticism on the ground that they appeared to narrow the scope of the *ADJR Act*. See, eg, Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22; Anthony E Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: "Decisions under an Enactment"' (2006) 13 *Australian Journal of Administrative Law* 169.

63 This statement assumes that the decision-maker is a tribunal for the purposes of the *ALA*.

64 A trend explained in Greg Weeks, 'The Expanding Role of Process in Judicial Review' (2008) 15 *Australian Journal of Administrative Law* 100.

65 Support for this conclusion can be drawn from the statement of Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653, where his Honour explained that

if, as suggested above, it was applied to a decision or conduct, or a failure to do either, that 'affected the rights, interests or legitimate expectations of a person'.

E *Time Limits to Commence Proceedings under the* ALA

Section 4(1) of the *ALA* provides that an application for review must be made 'not later than thirty days after the giving of notification of the decision or the reasons [for the decision] (whichever is the later)'. This requirement is a significant practical limitation on the utility of the *ALA*. This provision is inflexible and does not grant the Court any power to extend the time in which proceedings can be commenced, no matter what the reason for delay.[66] Other aspects of the time limits applicable to proceedings under the *ALA* are less rigid and are instead uncertain. This inflexible time limit contrasts sharply with the discretionary power available in other judicial review statutes and at common law, by which courts can extend the time in which to commence judicial review proceedings if the applicant satisfies the court that there are special circumstances which justify an extension.[67] The principles devised for such powers in other jurisdictions suggest that the addition of such a power would be a useful and flexible addition to the jurisdiction created by the *ALA*.[68]

The language of s 4(1) makes clear that time begins to run either when a decision is notified or when reasons are provided, rather than when they are sought. The latter leaves an applicant in a difficult position. In the absence of reasons for a decision, it may be difficult to decide whether to commence

the law governing procedural fairness had progressed to 'a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as applying generally to governmental executive decision-making'. This passage, which was endorsed by a majority of the High Court in *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ), implies that the threshold test of whether natural justice applies has largely become obsolete.

66 In *Keller v Bayside City Council* [1996] 1 VR 356, 362, 375, Batt J held that s 4(1) went 'to jurisdiction'. A similar view was taken in *Quality Packaging Service Pty Ltd v City of Brunswick* [1990] VR 829, 832 (Beach J). In *Kuek v Victoria Legal Aid* [1999] 2 VR 331, 336 [13], Tadgell JA, with whom Winneke P and Ormiston JA agreed, pointedly declined to adopt such language. His Honour instead reasoned that the *ALA* conferred a statutory jurisdiction upon the Supreme Court and the entitlement to commence proceedings in this jurisdiction was subject to conditions. Tadgell JA continued: 'One such condition is that the application be made within a prescribed time, which the court has no power to enlarge. The point is really no more complex than that.' Gillard J reached a similar view in *Diep v Appeals Cost Board* (2003) 146 A Crim R 151, 158 [37]. His Honour did note, however, that the slip rule could be invoked to cure defects in the commencement of a proceeding, such as the failure to join an appropriate party: at 158–60 [39]–[46]. In my view, the slip rule would only be useful to amend proceedings if they have been commenced within the required time.

67 The relevant provisions in other judicial review statutes are *ADJR Act* s 11(1)(c); *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 10; *Judicial Review Act 1991* (Qld) s 26; *Judicial Review Act 2000* (Tas) s 23. In Victoria, the power in common law judicial proceedings is contained in *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 56.02(3). This power has been considered in *Denysenko v Dessau* [1996] 2 VR 221; *Lovejoy v Myer Stores Ltd [No 2]* [1999] VSC 271 (4 August 1999); *Lednar v Magistrates' Court* (2000) 117 A Crim R 396; *Mann v Medical Practitioners Board (Vic)* (2004) 21 VAR 429; and *Mokbel v DPP (Vic)* [2005] VSC 476 (13 December 2005). These and other cases suggest that the power to extend time in common law judicial review proceedings is a broad and flexible one.

68 The principles governing this power are explained in Enid Campbell and Matthew Groves, 'Time Limitations on Applications for Judicial Review' (2004) 32 *Federal Law Review* 29.

proceedings, but the time limit in which to do so will run even though reasons have not been provided. At the same time, however, if reasons are provided at a later point the 30-day time limit to commence proceedings will begin to run anew from when reasons are provided.[69] While time may be deemed to commence running when reasons are provided, it is not halted or otherwise affected by an application for reasons or a failure to provide them.[70] This arrangement is illogical. A decision-maker can effectively extend the time in which proceedings may be commenced by providing reasons with delay. That should not be possible. At the same time, time will begin to run against an applicant once a decision is notified if reasons are sought but ultimately not provided. This means that an applicant who waits for reasons may be time-barred. That also should not be possible.

In my view, the time limit to commence proceedings should be reformed in several ways. First, it could be enlarged to 60 days. This would align the statutory time limit to the one applicable to judicial proceedings at common law in Victoria.[71] The existence of two different time limits for judicial review within a single jurisdiction is anomalous and should be abolished for reasons of consistency if nothing else. Any statutory procedure for judicial review should adopt the longer time limit available at common law so as to provide a longer and more reasonable time period than is currently available under the *ALA*.[72] Second, any statutory avenue of judicial review should also provide the Supreme Court with a clear power to extend time to commence proceedings where there are 'special circumstances'.[73] Such a discretion would further the remedial aim of any statutory mechanisms of judicial review by ensuring that people who are affected by administrative decisions and wish to question the lawfulness of those decisions are not prevented from doing so by inflexible procedural rules.

69 A possibility acknowledged in *Kuek v Victoria Legal Aid* [1999] 2 VR 331, 335 [9]–[10] (Tadgell JA).

70 Ibid 335 [9].

71 See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 56.02(1).

72 Uniformity could also be achieved if the time limit for judicial review at common law were amended to align with the shorter time limit that exists under the *ALA*. In my view, that 30-day time limit is too short to allow applicants sufficient time to consider their position and seek legal advice on whether to commence judicial review proceedings.

73 The issues paper that preceded Queensland's adoption of a statute closely modelled on the *ADJR Act* suggested that extensions of time to commence proceedings for judicial review should be possible where an applicant can demonstrate an arguable case for relief and where there is no substantial prejudice to the respondent or third party: Electoral and Administrative Review Commission, *Judicial Review of Administrative Decisions and Actions*, Issues Paper No 4 (1990) [51]. This suggestion was not adopted, perhaps because such issues typically arise when a court considers whether there are special circumstances that warrant the grant of an extension of time.

F *Standing under the* ALA

Standing rules limit access to the courts in public law proceedings.[74] The *ALA* unified and simplified standing by introducing a formula that enables 'any person affected' by a decision to which the Act applies to seek review of that decision.[75] This formula cast aside the many different and technical distinctions that existed between the standing tests of the various prerogatives and equitable writs of common law judicial review.[76] Section 2 of the *ALA* defines 'a person affected' to be

> a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the [impugned] tribunal …

The requirement that a person must be affected 'to a substantial degree' has been interpreted to mean that the interest relied upon must be more than a trifling one.[77] This suggests that the standing requirement of the *ALA* is essentially the same as that of the common law.[78] This approach is consistent with the decision in *Australian Institute of Marine & Power Engineers v Secretary, Department of Transport*.[79] In that case, Gummow J undertook a detailed examination of the common law and statutory tests and concluded that, whilst the wider legislative context would always be important to determining the precise meaning of any statutory standing formula, the interpretation of the *ADJR Act* formula of 'a person aggrieved' had been strongly influenced by common law principles.[80] His Honour noted the apparent convergence of the various common law standing tests and concluded that there was 'a measure of broad agreement as to *locus standi* both for legal and equitable remedies'.[81] Gummow J reasoned that 'it

74 In *Hussein v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2006) 90 ALD 285, 294 [46], Graham J of the Federal Court explained that standing rules are

> designed to ensure that applicants only litigate their own business. For an applicant to have standing demands a connection between the applicant's interests and the relief sought. As a general rule the court will not recognise busybodies who interfere in things that do not concern them.

75 The phrase is used in *ALA* ss 3, 8 and 11 and is defined in s 2 (definition of 'person affected in relation to a decision').

76 See, eg, Aronson, Dyer and Groves, above n 9, 784–5.

77 *Charlton v Members of Teachers Tribunal* [1981] VR 831, 854 (McGarvie J).

78 See, eg, *Geelong Community for Good Life Inc v Environmental Protection Authority* (2008) 20 VR 338, 341 [7] (Cavanough J). In that case, Cavanough J treated the *ALA* and common law standing tests as one and the same.

79 (1986) 13 FCR 124.

80 Ibid 130–3. The phrase 'a person aggrieved' is adopted in *ADJR Act* ss 5–7 and defined in s 3(4).

81 *Australian Institute of Marine & Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124, 132. An example of this convergence can be drawn from the cases of *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. In these cases the High Court adopted an identical standing test for declarations and injunctions, which essentially unified the standing test for the two writs.

would be a strange result if the *ADJR Act* posited, by use of the concept of grievance, some narrower criterion'.[82]

This reasoning highlights an important thread in the modern evolution of standing principles, which is that the apparent loosening of standing requirements by judicial review statutes, particularly the *ADJR Act*, has both influenced and been influenced by the common law. It would be illogical to interpret statutory tests that adopted the nomenclature of the common law, such as 'affected' or 'aggrieved', more narrowly than the common law from which those terms are taken. For this reason, the suggestion by Gummow J that a statutory standing formula which incorporates common law terms or concepts such as 'aggrieved' or 'affected' should not be read more narrowly when placed into a statutory formula applies as much to the *ALA* formula as it does to the *ADJR Act*.

The reasoning of Gummow J also draws attention to another important aspect of standing. Australian law is beset with many statutory standing formulae that are slightly but not substantially different.[83] These various statutory phrasings have not given rise to radically different interpretations. There are many cases in which the courts have held that statutory tests are 'at least' as generous as common law tests, though precisely how or how far they might relax the common law remains unclear.[84] It is, however, clear that a level of unity has arisen in the interpretation of these many slightly different standing tests at common law and in statute. If that is so, one might question whether there is any reason to replace the *ALA* standing formula with the *ADJR Act* formula of 'a person aggrieved'. One reason for such a change is sheer consistency. The growing unity in the interpretation of the various standing tests that exist in Australian law could be confirmed by the enactment, where possible, of a single test. Adoption in Victoria of the *ADJR Act* formula would be a useful step in that direction.

G *Deficiencies in the Standing Provisions of the* ALA

While the basic standing test in the *ALA* appears sound, and even if the precise language of the test could be aligned with the *ADJR Act*, two aspects of standing in judicial review proceedings in Victoria could be usefully reformed. One is the rules governing representative groups or associations, which often seek to

[82] *Australian Institute of Marine & Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124, 132.

[83] Sometimes a single statute can contain more than one standing formula. See, eg, *Designs Act 1906* (Cth) ss 28, 39, which, while now repealed, respectively adopted tests of a 'person interested' and a 'person affected'.

[84] An early example of this approach to the *ADJR Act* standing test is in *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, 79 (Ellicott J):

> The words 'a person who is aggrieved' should not in my view be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary and undesirable to discuss the full import of the phrase.

The extent to which the relatively liberal approach established in modern judicial review cases can be transposed to other areas remains unsettled. See, eg, *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 8–9 (Black CJ).

challenge environmental decisions. Although standing rules have relaxed in recent times, representative associations often still struggle to establish standing. This problem is explicable by the common law principle that the formation or incorporation of a group or association with objects relevant to the decision sought to be challenged does not itself create interests sufficient to accord standing to that group or association.[85] It is now clear that representative groups may possess standing to seek judicial review of decisions if the objects and activities of their organisations establish a sufficient connection to the decision sought to be challenged.[86] The point is often a difficult one that usually depends on the circumstances of each case.

There has been a small but steady stream of environmental law cases in which local or regional groups have failed to establish standing because their objects or activities, while broadly relevant to the decision sought to be challenged, have not tipped the balance in favour of standing.[87] The apparent inconsistency between many cases has led one judge to query whether some decisions at the state level 'may have run ahead of both High Court authority, and of principle.'[88] Kirby J, in dissent, has suggested that the High Court should review the issue with a view to devising a principle for standing in environmental cases brought by groups whose members come largely from the region affected by the issue in litigation.[89] Some lower court judges have even attempted to devise such a test.[90] Neither issue has been taken up by a majority of the High Court.

Any reform to judicial review in Victoria should include a provision addressing these problems. A useful model is the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*'), which provides that representative bodies are '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 organization or association.'[91] This test has many advantages. One is simplicity. The *AAT Act* provision equates the

[85] See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 531 (Gibbs J), 539 (Stephen J); *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 67–8 (Lockhart J), 81–2 (Beaumont J).

[86] An influential case is *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492 ('*North Coast*'), in which the Federal Court, in examining the activities of an environmental group that sought standing, provided a useful set of factors that might indicate standing: at 512–13 (Sackville J). Subsequent cases have, however, cautioned against attempts to parrot the factors considered in the *North Coast* case. See, eg, *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (14 June 2000) [20], in which Chesterman J stated that lengthy submissions comparing the activities of an environmental group with those of the group in the *North Coast* case was a 'barren exercise'.

[87] See, eg, *Friends of Elliston — Environment & Conservation Inc v South Australia* (2007) 96 SASR 246, 269–70 (Bleby J); *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 333–4 (Collier J).

[88] *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138, 143 [6] (Wheeler JA).

[89] *South West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management [No 1]* (1998) 154 ALR 405, 409.

[90] See, eg, *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (1997) 18 WAR 126, 134, where Murray J proposed that regional or local environmental groups should possess a 'special proximity of interest which associates the plaintiff with the particular subject matter of the dispute'.

[91] *AAT Act* s 27(2).

objects or purposes of the body with 'affectation', which removes the need for the body to assemble and lead significant evidence beyond its objectives.[92] This means that the time and effort taken by the parties and the AAT in proceedings is directed to the substantive issues of the case rather than the question of standing. Another important advantage of the *AAT Act* provision is to align the standing for individuals and associations,[93] which is consistent with the broader convergence of standing rules. The introduction of a general test for all representative bodies or associations would ensure that a separate body of principles does not evolve in a particular area of decision-making, such as environmental matters.[94] The *AAT Act* provision does not require a representative body to be incorporated in order to take advantage of the standing test, which emphasises that the focus of the provision is on the substantive activities of the body rather than on the legal form of the body. The *AAT Act* provision also includes a protection against its cynical use by providing that bodies which were formed or objectives which were adopted after the decision was made cannot take advantage of the standing formula.[95]

A second way that standing in judicial review could be usefully reformed in Victoria is by introducing provisions for the joinder of interested parties. The *ALA* contains no provisions for joinder applications. The *ADJR Act*, in contrast, does not include a right for 'a person interested in a decision' to be joined to applications but it does provide the court with a discretion to join a party, either unconditionally or subject to conditions that the court thinks fit.[96] Joinder can raise slightly different considerations to standing because the considerations relevant to determining the sufficiency of an interest to commence and maintain proceedings may be different to those governing the joinder of a party to a proceeding that has already been commenced. Joinder of a party expands the litigation to which the party is joined. It is for this reason that courts require a party seeking to be joined to prove that it can adduce evidence or submissions that are relevant and would not otherwise be placed before the court.[97] It is not sufficient for a party seeking to be joined to hold an interest that will satisfy standing principles. More is required. Subject to this rule, the Federal Court has held that the standing and joinder requirements of the *ADJR Act* are 'concomitant' and should therefore be interpreted with 'a similar approach'.[98] If the

92 Another aspect to this procedural simplicity is that *AAT Act* s 27(2) expressly provides that an association or body need not be incorporated.

93 The tests for individuals and associations each grant standing to a party whose 'interests are affected': ibid ss 27(1)–(2).

94 The arguments for and against separate standing rules for environmental litigation are considered in Matthew Groves, 'Standing in Environmental Law Proceedings' (2011) 37 *Monash University Law Review* (forthcoming).

95 See *AAT Act* s 27(3).

96 *ADJR Act* s 12.

97 See, eg, *OneSteel Manufacturing Pty Ltd v Environment Protection Authority* (2005) 92 SASR 67, 74 [20] (Debelle J). Courts will similarly take into account whether, in all the circumstances of the case, it is appropriate to join the parties: see, eg, *Pitt v Environment Resources and Development Court* (1995) 66 SASR 274, 276 (Doyle CJ).

98 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 527 (Davies, Wilcox and Gummow JJ).

standing test of the *ALA* is to be reformed, it would make sense to introduce an express procedure for joinder which adopts the same test for standing but which, like the *ADJR Act* provision, enables the court to order joinder subject to conditions. A reformed standing provision should also include a clear discretion for the court to determine applications for joinder so that the court could apply the requirement, developed in the case law, that a party be able to demonstrate that it can add new and relevant material to the proceedings.

In my view, the standing requirement for judicial review should be reformed rather than abolished. The introduction of open standing, which would allow any person or body to commence judicial review proceedings, would be a radical reform and one which would arguably take account of the evolution of standing in the period since the *ALA* commenced. The *ALA* was enacted just before a period in which standing rules were greatly relaxed. Sir Gerard Brennan has noted that the trend in standing cases around that time was 'all one way, that is, towards relaxing earlier restrictions on standing'.[99] That trend reached its logical conclusion in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* ('*Bateman's Bay*'), where Gaudron, Gummow and Kirby JJ queried whether any requirement of standing could be discarded and whether access to the courts could instead be regulated by other means, such as the principle of justiciability or the exercise by courts of powers to dismiss cases found to be vexatious, oppressive or an abuse of process.[100]

The reasoning in *Bateman's Bay* implicitly supports unrestricted or open standing in public law litigation, which is at odds with the longstanding fear expressed in many cases that there are 'busybodies' willing to commence public law litigation.[101] While there is no empirical evidence to confirm that the much feared busybody exists,[102] open standing raises many questions. Why would a

99 Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 18, 24. A similar view has been taken in the Victorian context in *Kuek v Victoria Legal Aid* [2009] VSC 43 (18 February 2009) [20] (Beach J). That case involved an application under the *ALA* to review a statutory decision on legal aid which was subject to a statutory appeal. The standing test in the statutory right of appeal differed slightly from that of the *ALA* but Beach J did not identify any significant difference between the two.

100 (1998) 194 CLR 247, 263.

101 Like so many catchy legal terms, the term 'mere busybody' originated with Lord Denning: *A-G (Gambia) v N'Jie* [1961] AC 617, 634. It should be noted, however, that Lord Denning was also at the forefront of attempts to liberalise standing, notably in the cases of *A-G (UK) ex rel McWhirter v Independent Broadcasting Authority* [1973] 1 QB 629, 648–9 (where Lord Denning MR accepted that the court could allow a private citizen to commence public law proceedings where the Attorney-General had either refused to grant leave to proceed in a case where it should be granted or had wrongly delayed granting leave to proceed) and *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550, 559 (where Lord Denning MR stated the interest held by a citizen for the purposes of standing in very wide terms).

102 A survey of administrative law cases spanning 27 years found no evidence of the much feared busybody: Roger Douglas, 'Uses of Standing Rules 1980–2006' (2006) 14 *Australian Journal of Administrative Law* 22. But judicial fear of the busybody is well-entrenched. See, eg, *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1, 45, where Merkel J cautioned that, in a native title case, an expansive approach to standing could harm the reconciliation process because 'the variety of ideological or conscientious interests or groups that may be genuinely and deeply committed to supporting or opposing native title claims' was such that granting 'such

person or body who lacked an interest in or connection to a matter sufficient to support standing in accordance with current doctrine wish to challenge a decision? Should open standing be allowed for matters of wide public concern? If so, how could such concepts be defined? It is for these other reasons that the various reviews of standing in recent times have supported the retention of some form of standing.[103] The continued support for some form of standing has led many to conclude that reform to standing may be possible but that 'the door to the proposition of open standing is firmly closed.'[104] If standing requirements have been relaxed but not abolished — and further significant movement seems unlikely in other Australian jurisdictions — there seems no compelling reason for Victoria to take the further step of adopting open standing.

H *Reasons for Decisions and the* ALA

There is no right at common law to reasons for administrative decisions in Australia.[105] The lack of any such right places applicants for judicial review at a disadvantage. In the absence of reasons for a decision it is difficult to know why a decision was made and whether it can and should be challenged. The *ALA* sought to overcome this problem by introducing a right to reasons for decisions to which it applies.[106] The Supreme Court is granted the power to enforce this right and can also require further reasons from decision-makers whose initial statement of reasons is considered inadequate.[107] The nature and scope of these provisions has attracted a surprising level of judicial attention, particularly the legal effect of reasons which are provided under the *ALA* but have been held to be inadequate at common law. As was explained above, the Court of Appeal of Victoria recently confirmed that any remedy for the refusal to provide either any reasons or adequate reasons under the *ALA* lay within the Act itself.[108]

The right to reasons conferred by the *ALA* is flawed in two significant ways. One is that a decision-maker may refuse to provide reasons if this would be

interests or groups the standing of a party … is a recipe for promoting, rather than resolving, differences.'

103 The Australian Law Reform Commission ('ALRC') has examined standing twice since the *ALA* was enacted: Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985); Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996). In each instance the recommendations of the ALRC for reform were rejected by the federal government of the day.

104 *Lockwood Security Products Pty Ltd v Australian Lock Co Pty Ltd* (2005) 216 ALR 652, 662 [61] (Goldberg J), citing *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 526 (Gibbs J). This decision was reversed on other grounds by the Full Court of the Federal Court, but that Court took no issue with Goldberg J's assessment of standing: *Assa Abloy Australia Pty Ltd v Australian Lock Co Pty Ltd* (2005) 147 FCR 126. The reasoning of Goldberg J is consistent with an influential early case on standing under the *ADJR Act*, where Ellicott J, while concluding that the standing test under the *ADJR Act* should not be read narrowly, cautioned that it 'does not mean that any member of the public can seek an order of review': *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64, 79.

105 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656. Although this case has been much criticised, it has not been revisited by the High Court.

106 *ALA* s 8. Requests may be made orally or in writing: s 8(2).

107 Ibid s 8(4).

108 See *Sherlock v Lloyd* [2010] VSCA 122 (28 May 2010). See above Part II(B).

against the interests of the person primarily affected by the decision or, more generally, 'against public policy' to do so.[109] While the former exemption could be defended on a case by case basis, the latter cannot. An exemption on the basis of 'public policy' is undesirable because it has an uncertain scope and lacks any clear guiding criteria. In *Lewenberg v Victoria Legal Aid*, one of the few cases where a decision-maker has resisted the production of reasons on the ground that it would be contrary to public policy, Gillard J held that the production of reasons would normally involve some time and expense and that these issues alone would not make the production of reasons contrary to public policy.[110] His Honour reasoned that the production of reasons would normally require an official to devise a simple record of a deliberative process that had already occurred and so it would 'not involve added expense of any substance.'[111] Gillard J did, however, accept that the production of reasons might be contrary to public policy when 'the cost was so prohibitive that it could not have been in the contemplation of Parliament'.[112]

The approach of Gillard J is sensible but it provides no clear indication as to when the cost of reasons might become so great that it can be said to fall outside the contemplation of the legislature. It also provides no guidance as to when or why the production of reasons might be contrary to public policy for reasons other than their cost. The difficulty lies in the vague criterion of public policy which, in my view, is fundamentally flawed. The right to reasons is an important one. If exemptions to this right are to exist, they should operate by reference to a transparent and rational formula. This could take the form of a more coherent formula for exemptions or an express statutory list, such as a schedule of exemptions, which is the approach taken in the *ADJR Act*.[113]

Another flaw in the right to reasons is the requirement that reasons must be provided 'within a reasonable time'.[114] An obligation to provide reasons should not be framed in such uncertain terms. If reasons were to be provided within a specified time, it would clarify the rights of people who might seek reasons and the obligation of officials to provide them. A separate but related issue is the effect of a failure to provide reasons. It was explained above that the time in which proceedings must be commenced begins to run either when a decision is notified or when reasons are provided (whichever is the later).[115] Time runs if a decision is notified but the decision-maker ultimately fails to provide reasons, which is particularly undesirable when a decision-maker is required to provide reasons within the nebulous period of a 'reasonable time'. A person affected by a decision may request and expect reasons which are ultimately not provided,

109 See *ALA* s 8(5).
110 (2005) 22 VAR 354, 369–70 [74].
111 Ibid 369 [73].
112 Ibid 369 [74].
113 *ADJR Act* sch 2 contains a list of statutes and classes of decisions to which the right to gain reasons for decisions under s 13 of the Act does not apply.
114 *ALA* s 8(3).
115 Ibid s 4(1). See above Part II(E).

which would mean that the time period to commence proceedings may expire during the time that an applicant awaits reasons.

The right to reasons should be amended to expressly provide that reasons may be claimed within 30 days after notice of a decision is received and must be provided within 30 days of receipt of a request. A related amendment should be made to provide that a failure to provide reasons within 30 days is deemed to be a refusal to provide reasons, and that an applicant has a further 30 days either to apply to the court for a statement of reasons or to commence an application for review.

I *The Grounds of Review under the* ALA

Although various provisions of the *ALA* are applicable to proceedings for judicial review at common law, or may extend to decision-makers in the absence of any application for judicial review, the Act makes no modification to the actual grounds of judicial review. The *ALA* does not codify or even mention the grounds of review. By contrast, a key feature of the *ADJR Act* model is its codification of the grounds of review.[116] Some commentators have suggested that this codification of the grounds of review may have also ossified the grounds of review.[117] While that possibility may be a contestable one, it is quite clear that the *ADJR Act* has not provided a foundation for Australian courts to develop new principles of judicial review.[118] Many leading cases under the *ADJR Act* have confirmed that the grounds of review codified in that Act are declaratory of the common law grounds,[119] and none have established new grounds.

The failure of the *ALA* to codify or address the grounds of review has several consequences relevant for present purposes. One is that the grounds of review applied by Victorian courts do not vary between applications commenced at common law or under the *ALA*. Another is that, whether or not one accepts that the codification of the grounds of review in the *ADJR Act* has impeded the evolution of new principles of review, that criticism cannot be levelled at the *ALA*. If the grounds of review have not been codified they surely have not been ossified.

The *ALA* might also serve to cast doubt upon these criticisms of codification, because its lack of codified grounds appears to have had no discernible effect on the substantive grounds of review in Victoria. More particularly, Victorian courts

116 *ADJR Act* ss 5–6.

117 A point considered in detail in Matthew Groves, 'Should We Follow the Gospel of the *ADJR Act*?' (2010) 34 *Melbourne University Law Review* (forthcoming).

118 The *ADJR Act* includes two grounds that could clearly allow the adoption of new principles of review developed either at common law or under the *ADJR Act* itself. These are ss 5(1)(j) and 6(1)(j) (otherwise contrary to law) and ss 5(2)(j) and 6(2)(j) (abuse of power). Each ground is rarely invoked and neither has received any detailed judicial consideration in the several decades they have existed.

119 See, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–42 (Mason J) (the ground of failing to take account of a relevant consideration); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 358 (Mason CJ) (the ground of no evidence).

have not devised new principles of review or significant variations to existing ones.[120] On the rare occasions that Victorian courts have considered the possible adoption of new principles of review, they have appeared plainly reluctant to do so.[121] This caution may be due to the more general hesitance of intermediate appellate courts in Australia to adopt significant advances in established legal doctrine, particularly in light of recent decisions of the High Court which appear to discourage such ventures.[122] To the extent that general principles may be extrapolated from the *ALA*, the static nature of Victorian administrative law lends support to the proposition that codification of the grounds of judicial review may not itself exert any significant effect on the substantive law. One may therefore question whether the *ALA* or any Act that might replace it should include codified grounds of review. The answer to that question depends very much on what one expects from a judicial review statute. If the function of such a statute is to clarify the procedure of judicial review, as seems plainly true of the *ALA*, it follows that the statute should remain silent on the grounds of review. If the function of such a statute is to effect changes to the substantive law, then it is arguable that the statute should contain new or modified grounds of review. If that possibility is to be explored, it should occur in an entirely new Victorian judicial review statute.

J *Remedies under the* ALA

A key feature of the *ALA* is the introduction of a simplified single remedy in the form of an order to review. The order to review is not directly defined in the *ALA*, but it is established in s 3, which enables any person affected by a decision of a tribunal to apply for the order. The order calls upon the decision-maker and any person affected by the decision to show 'why the same should not be reviewed'.[123] Proceedings for judicial review at common law would normally have to be commenced by application for a specific writ and could not easily be amended if it subsequently became apparent that the case required a different, more appropriate writ. The single order to review created by the *ALA* removed the need for applicants to make this difficult choice at the start of a proceeding. The practical importance of this reform has declined since the various common

120 Early cases appear to suggest that the Act was interpreted in a cautious fashion from its very beginning. See the assessment in L Glick, 'Get behind Me Satan; Or Some Recent Decisions on the *Administrative Law Act 1978*' (1980) 12 *Melbourne University Law Review* 417.

121 See, eg, *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 424 (Hollingworth J). In that case, Hollingworth J pointedly declined to decide whether proportionality was a recognised ground of judicial review in Victoria. Her Honour suggested that the issue should be decided by a higher court.

122 Although the judges of intermediate courts rarely voice such concerns openly, an exception is seen in Keith Mason, 'President Mason's Farewell Speech' (2008) 82 *Australian Law Journal* 768, 769, where the retiring President of the New South Wales Court of Appeal lamented a recent decision of the High Court which he suggested had been 'read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law.' This assertion, if accepted, would explain why intermediate courts hesitate to devise new principles of judicial review. President Mason did not name the High Court decision in question but there is no doubt that it was *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

123 The procedures governing the grant of an order are contained in *ALA* ss 4–6.

law writs were replaced by a single order that can be sought by originating motion.[124] The obvious point is that these subsequent reforms to the common law form of judicial review have removed some of the technicalities that the *ALA* was designed to overcome. It could be argued that this change to the common law procedure was influenced by the similar change made by the *ALA* and therefore illustrates the value of the Act.

III CONCLUDING OBSERVATIONS

The analysis in this article suggests that the *ALA* introduced several useful procedural reforms, such as a single and simple standing test, a right to reasons for decisions and a unified remedy, but that the Act also contains many defects. Several of these defects could easily be reformed. The right to reasons should be amended to introduce a clear time within which reasons must be provided. A specified time would be clearer than the current 'reasonable time'. The exemption to the duty to provide reasons should also be clarified. The possibility that reasons may be refused because it would be 'against public policy' to provide them creates an uncertain exemption that should be abolished. Any exemption from the duty to provide reasons must be clear, principled and as narrow as possible. An exemption should only be introduced if there are overwhelming reasons to warrant it.

The time limit to commence proceedings under the *ALA* should also be reformed. It should be aligned with the period applicable to proceedings at common law to ensure that applicants who seek to commence proceedings by way of statute are not required to do so in a lesser period than would be the case with proceedings at common law. Any statutory form of review should include an express power enabling the court to extend the time to commence proceedings. This power should allow the grant of an extension of time to proceed where there are special circumstances to do so. The adoption of a power in such terms would enable Victorian courts exercising statutory judicial review jurisdiction to apply the principles governing extensions of time that they have devised in their common law jurisdiction, and which accord with those applied in other Australian jurisdictions.

The existing formula of the *ALA* which grants standing to a 'person affected' is not substantially different to that used in other judicial or merits review statutes and has not given rise to any significant difficulties. Adoption of the *ADJR Act* test of 'a person aggrieved' would almost certainly not alter the law in any material way. However, if the various Australian formulae for standing are interpreted in the same manner, as appears to be the case, they should arguably also be expressed in the same language. The existing Victorian requirements would also be enhanced if the standing test for associations and groups were clarified by an express formula. A useful model is the provision in the Com-

[124] *Supreme Court Act 1986* (Vic) s 3(6) replaced the old common law judgments and prerogative writs with a single order or judgment. The latest version of the originating motion, by which the new order or judgment may be sought, is contained in *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 56.01.

monwealth *AAT Act*, which provides that an association or group will have standing if its objects or purposes relate to the decision sought to be challenged. This creates a simple and sensible approach to the standing of groups and associations. In this model the clause which prevents a group or association from claiming standing if it has formed or adopted the relevant part of its objects or purposes after the decision was made offers useful protection against any abuse of the provision. An amendment separate from but related to standing would be the introduction of an express provision enabling the court to join interested parties subject to any conditions the court thinks appropriate. Such reforms would simplify standing and joinder in judicial review proceedings in Victoria. They would also clarify the status of groups and associations and do so in a manner likely to prevent abuse.

The jurisdictional formula of the *ALA* is a more difficult issue. The adoption of a formula based on the obligation to observe the rules of natural justice is unique. The scope of this formula has widened over time with the corresponding growth of the duty to observe the rules of natural justice, but this indirect expansion of the jurisdictional formula of the *ALA* has been entirely inadvertent. It is difficult to understand precisely why this formula was adopted, but it clearly has some advantages when compared to the *ADJR Act* formula. It extends beyond decisions made under an enactment and it is not limited to decisions of an administrative character. This aspect of the *ALA* formula bypasses many technical problems that have arisen with the *ADJR Act* formula. The scope of the *ALA* would certainly be clarified (and widened) if it was amended to apply to any 'decision or conduct, or failure to make a decision or engage in conduct, of an official that affected the rights, interests or legitimate expectations of a person'. Such an amendment should be accompanied by an amendment to the jurisdictional formula of the Act which makes clear that the decisions or conduct, or failure to do either, to which the Act would apply are those which affect 'rights, interests or legitimate expectations', to amplify the decisions or conduct to which the Act would apply.

Another difficult feature of the *ALA* is the relationship of many of its provisions to the common law. The uncertain divide between statutory and common law review in Victoria has generated many cases that consider, and perhaps even turn upon, this difficult issue. The continuing stream of such cases indicates that the *ALA* has failed in its primary goal of simplifying and updating the law. In my view, the reason for this failure is clear. If a statutory vehicle for judicial review is primarily designed to provide a clear and simple alternative to the common law, it should be separated from the common law rather than interwoven with it. Accordingly, the procedure established by the *ALA* or any judicial review statute should be separate from the common law as far possible.

Can and should the *ALA* be amended to clarify the relationship between statutory and common law procedures for judicial review? In my view, it would be extremely difficult to introduce such changes without completely reforming the *ALA*. If comprehensive reform is adopted it should be by the introduction of a new judicial review statute rather than through extensive amendments of a statute that has caused as many problems as it has solved. Any attempt to

radically reform the *ALA* would run the risk of repeating this very same problem of creating rather than curing defects in the law. Accordingly, the better solution is to repeal rather than reform the *ALA*. Statutory judicial review in Victoria should begin anew. That conclusion invites the question of whether any statute to replace the *ALA* should be based upon the federal model of the *ADJR Act*. In my view, any possible use of the *ADJR Act* model should be informed by the lessons of the *ALA* so that a modified form of the *ADJR Act* adopted in Victoria could incorporate the effective parts of the existing Victorian scheme to improve upon the federal model.[125]

[125] For a further elaboration of this view, see Matthew Groves, 'Should We Follow the Gospel of the *ADJR Act*?' (2010) 34 *Melbourne University Law Review* (forthcoming).