

# JUDICIAL ATTITUDES TO JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF JUSTIFICATIONS OFFERED FOR RESTRICTING THE SCOPE OF JUDICIAL REVIEW IN AUSTRALIA, CANADA AND ENGLAND

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*[Legislative reform of judicial review in Canada and Australia has encountered unexpected difficulties. Judicial attitudes appear to have been a factor in this. These attitudes, however, defy simple classification according to realist, functional or 'green light' critiques of judicial values. The history of legislative reform in Ontario and Australia appears far more complex. Other factors, particularly the precision (or otherwise) of the drafting of the legislative provisions, appear far more significant. Experiences in both Ontario and Australia also point to the continuing vitality of the traditional common law and equitable remedies. Judicial attitudes to judicial review appear to be an important source of this continuing vitality.]*

## CONTENTS

I	Introduction.....	1
II	Statutory Reform of Judicial Review in Canada and Australia .....	4
	A Ontario.....	4
	B Australia.....	15
	C Case Study: Judicial Review of Government Tendering Decisions.....	23
	D Concluding Observations on the Interpretation of the <i>ADJR Act</i> and Related Legislation.....	27
	1 Broader Policy Issues .....	27
	2 Practical Considerations Arising from the Drafting of the <i>ADJR Act</i> .....	28
III	Judicial Attitudes to Declaratory Relief — Australia and England .....	30
IV	Conclusions.....	32

## I INTRODUCTION

Referring to academic commentary<sup>1</sup> on statutory reforms to judicial review remedies in Ontario in the 1970s, Professor Carol Harlow noted an apparent

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tendency to revert to the legalistic practice of deciding cases with important implications for the substantive law of judicial review, on technical, procedural points. The effect has been that an Act [Ontario's *Judicial Review Procedure Act*, SO 1971, c 48] intended for the simplification of administrative law procedures has been used to restrict and complicate the law of judicial review ...<sup>2</sup>

Contrast this assessment of the effectiveness of attempted statutory reforms to judicial review in Canada with Professor Michael Taggart's recent assessment of the High Court of Australia's decision in *Griffith University v Tang* ('*Tang*'):<sup>3</sup>

It beggars belief how a reform like the [*Administrative Decisions (Judicial Review) Act 1977* (Cth)] (and its State equivalents) which was intended 'to simplify and clarify the grounds and [the] remedies for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests' can be interpreted to frustrate that intention in *Tang*. You now have back many of the evils these reforms were meant to eradicate!<sup>4</sup>

Even if one does not agree with every point of criticism offered by Professor Taggart,<sup>5</sup> I think it must be conceded that the High Court's interpretations of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and the *Queensland Judicial Review Act 1991* (Qld) (which was itself largely inspired by the Commonwealth Act) in cases such as *Tang*, *NEAT Domestic Trading Pty Ltd v AWB Ltd* ('*NEAT*')<sup>6</sup> and *Australian Broadcasting Tribunal v Bond*<sup>7</sup> stand in sharp contrast to the optimistic tone of the reports of the Kerr<sup>8</sup> and Ellicott<sup>9</sup> Committees that recommended the reforms to administrative law that these Acts were designed to implement.

Notwithstanding the negative assessment referred to by Professor Harlow, the legislation in Ontario is now counted as a successful exercise in reforming administrative law in Canada.<sup>10</sup> The restrictive position taken by judges in early

<sup>1</sup> See, eg, J M Evans, 'Judicial Review in Ontario — Recent Developments in the Remedies — Some Problems of Pouring Old Wine into New Bottles' (1977) 55 *Canadian Bar Review* 148, 168–9. Professor Evans subsequently authored the 4<sup>th</sup> edition of *De Smith's Judicial Review of Administrative Action* (Stevens & Sons, 4<sup>th</sup> ed, 1980). He is now a member of the Canadian Federal Court of Appeal.

<sup>2</sup> Carol Harlow, "'Public" and "Private" Law: Definition without Distinction' (1980) 43 *Modern Law Review* 241, 252.

<sup>3</sup> (2005) 221 CLR 99.

<sup>4</sup> Michael Taggart, "'Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 20, quoting Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122, 123.

<sup>5</sup> For a defence of the High Court's decisions in *Tang* and *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, see P A Keane, 'Judicial Review: The Courts and the Academy' (2008) 82 *Australian Law Journal* 623.

<sup>6</sup> (2003) 216 CLR 277.

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

<sup>8</sup> Commonwealth, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) ('*Kerr Committee Report*').

<sup>9</sup> Commonwealth, *Prerogative Writ Procedures: Report of Committee of Review*, Parl Paper No 56 (1973) ('*Ellicott Committee Report*').

<sup>10</sup> David J Mullan, *Administrative Law* (Irwin Law, 2001) 438. Jones and de Villars liken Ontario's enactment of the *Judicial Review Procedure Act*, SO 1971, c 48 to the *Judicature Act* reforms of the 19<sup>th</sup> century (*Supreme Court of Judicature Act 1873* (Imp) 36 & 37 Vict, c 66; *Supreme Court*

cases addressing the scope and operation of Ontario's judicial review legislation has been reversed in subsequent cases. This article will examine possible reasons for the initially restrictive attitudes of judges in Ontario towards the statutory reforms in that Province and the subsequent change in approach. It will compare and contrast the possible reasons for restrictive interpretations given by the High Court of Australia to the Australian legislation. This article will then turn to consider judicial approaches to declaratory relief. Whereas 19<sup>th</sup> century English decisions resisted changes to the rules governing the availability of 'naked' declaratory relief, such relief is, arguably, the most important remedy in Australia today for reviewing the legality of governmental or public conduct. The article will conclude by examining why it is that English and Australian courts appear to have been prepared, eventually, to adopt a relatively liberal approach to judicial review by way of declaratory relief. What is it about declaratory relief that has seen such relief successfully relied upon in cases where statutory relief (at least in Australia) would, in all likelihood, have been restricted?

The focus of the analysis will be generally restricted to the preconditions for judicial review of the legality of public decision-making. The term 'judicial review' is used in this paper to encompass review of the legality of public decision-making via the prerogative and constitutional writs (and orders in the nature of those remedies), declaratory and injunctive relief, and the *ADJR Act* and legislation modelled upon it.<sup>11</sup>

Whilst the focus is principally upon the preconditions for judicial review of administrative action there will, however, be occasions when it will be necessary to consider briefly the substantive grounds of judicial review and attempts to distinguish review of *legality* from review of the *merits* of public decision-making.<sup>12</sup> Broader constitutional issues will be touched upon but I will concentrate on judicial review of exercises of executive power.<sup>13</sup> Although I have

*of Judicature Act 1875* (Imp) 38 & 39 Vict, c 77). They devote one paragraph of their text (which runs for more than 800 pages) to the legislation in Ontario: David Phillip Jones and Anne S de Villars, *Principles of Administrative Law* (Carswell, 5<sup>th</sup> ed, 2009) 597.

<sup>11</sup> Cf *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 145 (Gleeson CJ, Gummow, Kirby and Hayne JJ) where their Honours noted a distinction between 'the availability in public law of equitable remedies' and 'judicial review by mandamus, prohibition and certiorari'.

<sup>12</sup> Chief Justice Keane, while Solicitor-General for Queensland, noted the difficulties 'in deciding on which side of the "legality/merits" line particular cases fall. Particular circumstances, no doubt, throw up particular problems.' He went on to note that such difficulties do not mean that the distinction is impossible to maintain — 'while the line may not always be a bright one, it is there': Pat Keane, 'Judicial Power and the Limits of Judicial Control' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 295, 298. For a brief account of the historical development of the legality/merits distinction in Australia, see Peter Cane, 'The Making of Australian Administrative Law' (2003) 24 *Australian Bar Review* 114, 122–4. See also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4<sup>th</sup> ed, 2009) 163–73.

<sup>13</sup> For a recent consideration of the constitutional writs set out in s 75(v) of the *Commonwealth Constitution*, see Walter Sofronoff, 'Constitutional Writs' (2007) 14 *Australian Journal of Administrative Law* 145. For a discussion of the relevance of the separation of powers doctrine in explaining differences between Australia and Canada, see Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 217, 232–3.

attempted a comparative analysis,<sup>14</sup> the implications of such a comparison for Australian administrative law are my principal concern.<sup>15</sup> Critical perspectives on administrative law are noted but more traditional accounts of the discipline are also relied upon.

## II STATUTORY REFORM OF JUDICIAL REVIEW IN CANADA AND AUSTRALIA

### A Ontario

The statutory reforms in Ontario to which Professor Harlow referred<sup>16</sup> were based on recommendations contained in a 1968 Royal Commission report entitled ‘Inquiry into Civil Rights’.<sup>17</sup> In the first volume of his first report,<sup>18</sup> the Royal Commissioner, J C McRuer, former Chief Justice of the High Court of Justice of Ontario, identified familiar problems<sup>19</sup> with the traditional judicial

<sup>14</sup> For a comparative analysis of Canadian and New Zealand administrative law, see David J Mullan, ‘Substantive Fairness Review: Heed the Amber Light!’ (1988) 18 *Victoria University of Wellington Law Review* 293. For a more comprehensive comparative analysis of recent developments in English law and the influence of European law, with a particular focus on administrative law, see Justice Susan Kiefel, ‘English, European and Australian Law: Convergence or Divergence?’ (2005) 79 *Australian Law Journal* 220. Justice Kiefel offers the following observations on the potential benefits of a comparative approach, at 227:

A comparative approach to the law of different systems has a number of uses. It is essential in the process of standardisation of areas of law and it may be useful to assist domestic law in areas where difficulty has been experienced in identifying guiding principles or legal rules. I would add a third possible benefit. In my view the process of comparison itself serves to elucidate what concepts and values truly shape our own laws.

For a review of the British and United States influences on the development of Australian administrative law, see Cane, ‘The Making of Australian Administrative Law’, above n 12, 114–19. For a more general assessment of comparative legal methodologies in the context of administrative law, see Cheryl Saunders, ‘Apples, Oranges and Comparative Administrative Law’ [2006] *Acta Juridica* 423.

<sup>15</sup> Thus less will be said about constitutional and statutory protection of human rights than would be the case if a Canadian focus predominated. On the impact of human rights obligations under Canadian law on Canadian administrative law, see David Mullan, ‘The Canadian Charter of Rights and Freedoms: A “Direct Driver” of Judicial Review of Administrative Action in Canada?’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State — Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 123. For an introduction to Canadian administrative law written for an Australian audience, see Matthew Groves, ‘The Differing and Disappearing Standards of Judicial Review in Canada’ (2009) 16 *Australian Journal of Administrative Law* 211.

<sup>16</sup> Harlow, ‘“Public” and “Private” Law’, above n 2, 252.

<sup>17</sup> Ontario, Royal Commission Inquiry into Civil Rights, *Report Number One* (1968) vol 1 (‘McRuer Report’).

<sup>18</sup> The Royal Commission produced a total of three reports. The final report was published in 1971. See generally David J Mullan, ‘Willis v McRuer: A Long-Overdue Replay with the Possibility of a Penalty Shoot-Out’ (2005) 55 *University of Toronto Law Journal* 535.

<sup>19</sup> *McRuer Report*, above n 17, 322–3, quoting Kenneth Culp Davis, *Administrative Law Treatise* (West Publishing, 1958) vol 1, 388, who criticised the methods of judicial review in state jurisdictions within the United States:

An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shift-

review remedies and recommended statutory reform that would expand aspects of the common law grounds of review<sup>20</sup> and simplify procedures.<sup>21</sup>

Notwithstanding some forthright academic criticism,<sup>22</sup> the Commission's recommendations were generally well received and Ontario enacted the *Judicial Review Procedure Act*, SO 1971, c 48 and the *Statutory Powers Procedure Act*, SO 1971, c 47 in 1971, substantially implementing Commissioner McRuer's recommendations.

In terms of procedures for seeking judicial review in Ontario, the *Judicial Review Procedure Act*, RSO 1990, c J.1 (*JRP Act*) provides for a simplified application procedure for seeking orders 'in the nature of' the prerogative writs of mandamus, prohibition or certiorari.<sup>23</sup> Section 2(1) of the Act also provides a simplified procedure for seeking injunctive or declaratory relief when such relief is sought 'in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.'<sup>24</sup> Professor J M Evans explained the *JRP Act*'s

ing, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.

Commenting on the prerogative writs in England in 1961 Professor Davis observed, '[m]y own view is that either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again': Kenneth Culp Davis, 'The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61 *Columbia Law Review* 201, 204.

<sup>20</sup> *McRuer Report*, above n 17, 310–11, recommended that 'error of law on the face of the record' be reviewable by way of all remedies, not just certiorari, and that review be available of decisions where there was a 'lack of such relevant evidence as a reasoning mind might accept to support a conclusion based upon the findings of fact made by tribunals.' The *McRuer Report* did not recommend the codification of all of the common law grounds of review: at 315.

<sup>21</sup> *Ibid* 326 recommended that  
statutory provision should be made for a procedure by way of a single form of summary application to the Supreme Court, for review of the refusal to exercise, or of the proposed or purported exercise of, a statutory power under which any relief may be granted which would be available under any of the present remedies ...

<sup>22</sup> John Willis, 'The McRuer Report: Lawyers' Values and Civil Servants' Values' (1968) 18 *University of Toronto Law Journal* 351.

<sup>23</sup> *JRP Act* s 2(1) provides:

On an application by way of originating notice, which may be styled 'Notice of Application for Judicial Review', the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

<sup>24</sup> *Ibid* s 1 provides the following definition of 'statutory power':

- 'statutory power' means a power or right conferred by or under a statute,
- (a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
  - (b) to exercise a statutory power of decision,
  - (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
  - (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; ('compétence légale')

reference to ‘statutory power’ in the context of declaratory and injunctive relief in the following way:

Since the Act concerns remedies in the area of public law it was necessary to impose some such limitation upon remedies [ie declarations and injunctions] that are also widely used in private law, but unnecessary in relation to the prerogative orders which are, of course, only applicable to the discharge of public functions.<sup>25</sup>

Notwithstanding the relatively clear statutory language, courts in Ontario in at least four early decisions<sup>26</sup> involving applications under the *JRP Act* appeared to restrict the availability of orders in the nature of the prerogative writs to cases involving ‘statutory power’. The first decision of the Divisional Court of Ontario<sup>27</sup> that dealt with the statutory reforms was *Re Robertson and Niagara South Board of Education*.<sup>28</sup> In that case, judicial review was sought in relation to a decision of the Niagara South Board of Education to close a secondary school. The decision-maker was a regional board made up of representatives from towns that included the town of Pelham where the school to be closed was located. The applicants for review were Pelham ratepayers who had children attending the school. The majority in the Divisional Court held that the Court’s jurisdiction to review the decision depended on the existence of a ‘statutory power of decision’.<sup>29</sup>

For the purposes of the current analysis it is not necessary to describe all of the issues considered by the majority in concluding that the *JRP Act* did not avail the applicants. It does appear relevant, for present purposes, to note one observation of Wright J, who used the language of the pre-*Ridge v Baldwin*<sup>30</sup> restrictions on review for denials of natural justice in cases of *administrative* decision-making as opposed to *judicial* or *quasi-judicial* decision-making:

We are ... of [the] opinion that the right or privilege of the applicants to have their children attend a particular school is not a legal right or privilege and is

For the purposes of paragraph (b) the following additional definition is provided:  
‘statutory power of decision’ means a power or right conferred by or under a statute to make a decision deciding or prescribing,

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
- (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. (‘compétence légale de décision’).

<sup>25</sup> Evans, above n 1, 151.

<sup>26</sup> *Re Robertson and Niagara South Board of Education* (1973) 1 OR (2d) 548; *Re Florence Nightingale Home and Scarborough Planning Board* [1973] 1 OR 615; *Re Raney and the Queen in Right of Ontario* (1974) 4 OR (2d) 249; *Re Maurice Rollins Construction Ltd and Township of South Fredericksburgh* (1975) 11 OR (2d) 418. Evans refers to other Ontario decisions that appeared to adopt a less restrictive approach: *ibid* 157–9.

<sup>27</sup> The Divisional Court was itself a recommendation of *McRuer Report*, above n 17, 330.

<sup>28</sup> (1973) 1 OR (2d) 548.

<sup>29</sup> *Ibid* 550 (Wright J). Wells CJHC concurred with Wright J: at 549. Holland J dissented; his Honour agreed that the decision did not involve a ‘statutory power of decision’, but held that the Court had an ‘inherent power to review decisions of administrative tribunals’: at 554.

<sup>30</sup> [1964] AC 40.

not subject to judicial review under the Ontario statutes as they stand. The decision to close the school was an administrative decision and was not rendered judicial or quasi-judicial because it was openly opposed by the personal applicants and their committee, or the Town of Pelham, or by a substantial number of the residents of that town.<sup>31</sup>

A similar statement appears in another of the restrictive cases, *Re Raney and the Queen in Right of Ontario*, a decision of the Ontario Court of Appeal.<sup>32</sup>

Professor Evans has suggested that the restrictive interpretation of the *JRP Act* in *Robertson* may have reflected confusion surrounding the preconditions for judicial review generally and the applicability of particular statutory procedural requirements.<sup>33</sup> In exploring other possible reasons for this initially restrictive approach to legislative reforms it is worth saying something more about the *McRuer Report* and the criticism it received.

The most outspoken critic of the report was Professor John Willis, who at the time of the release of the *McRuer Report* held a chair at the University of Toronto. Professor Willis has been described as ‘one of Canada’s most famous administrative lawyers’.<sup>34</sup> Brief substantiation of this claim is, I think, important when assessing the weight given in Canada to his criticism of the *McRuer Report*. Willis was born in England and read classics and jurisprudence at New College, Oxford, graduating with a ‘double first’.<sup>35</sup> His contemporaries included R O Wilberforce, Q M Hogg and H L A Hart. Willis subsequently received a Harkness Fellowship to study at Harvard Law School under the supervision of Felix Frankfurter from 1930–32. Willis then took up an academic position in Canada and it was in Canada that he stayed and taught until the end of his long academic career.<sup>36</sup> He also served for six years on the Ontario Securities Commission.<sup>37</sup>

In a note published in 1968 and written, by his own admission, ‘in a mood of irritated dissent’,<sup>38</sup> Willis explained his criticism of the *McRuer Report*. Whilst

<sup>31</sup> *Re Robertson and Niagara South Board of Education* (1973) 1 OR (2d) 548, 551. It was not until the decision in *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 SCR 311 that the Canadian Supreme Court appeared to embrace the House of Lords approach in *Ridge v Baldwin*: see Mullan, *Administrative Law*, above n 10, 158–60.

<sup>32</sup> (1974) 4 OR (2d) 249, 250 (Schroeder JA).

<sup>33</sup> Evans, above n 1, 152.

<sup>34</sup> Mullan, *Administrative Law*, above n 10, 150. For an assessment of Professor Willis’ contributions to Canadian administrative law from a non-Canadian, see Michael Taggart, ‘Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law’ (2005) 43 *Osgoode Hall Law Journal* 223. Former Chief Justice of Canada Bora Laskin once described himself as an ‘unabashed admirer’ of Willis: Bora Laskin, ‘Foreword’ (1983) 7 *Dalhousie Law Journal* x, x. See also Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 166–76.

<sup>35</sup> R C B Risk, ‘In Memoriam: John Willis’ (1997) 47 *University of Toronto Law Journal* 301, 301; Taggart, ‘Prolegomenon’, above n 34, 237–8.

<sup>36</sup> Taggart, ‘Prolegomenon’, above n 34, 238, 240–1.

<sup>37</sup> John Willis, ‘Canadian Administrative Law in Retrospect’ (1974) 24 *University of Toronto Law Journal* 225, 241–3. For a consideration of the possible connection between such appointments and scepticism regarding the value of judicial review in Canada, see Mullan, ‘Substantive Fairness Review’, above n 14, 304–5.

<sup>38</sup> Willis, ‘The McRuer Report’, above n 22, 351.

he supported the Commission's recommendations regarding procedural reforms of judicial review remedies, Willis 'wholly disapprove[d]' of the 'extension of the scope of judicial review'.<sup>39</sup> Willis offered a number of related criticisms but the following passages capture the essence of his position:

what I dislike about the administrative law part of the report is, first of all, its approach. We are told a great deal about the dreadful things that, as the law now stands, civil servants might do to the citizen but are given no actual instances of them actually having done so. We can see why the citizen, and still more his lawyer looking for loopholes, will like the recommendations but the civil service point of view is never adequately stated.<sup>40</sup>

Willis described the approach in the report as 'ideological' but considered that the Commission itself was 'only partly to blame' for this. He discussed the terms of reference for the Commission, which he believed reflected 'the exigencies of partisan politics',<sup>41</sup> and which in his view were slanted against the government and civil servants in favour of individual freedoms:

consider what these terms of reference assume. It is the government — and not the predatory real-estate developers, suppliers of goods and services, salesmen of mining shares etc who the government, by its action, tries to control — that is suspected of encroaching on 'the freedom of the individual.' It is the powers conferred on paper by the statutes and regulations, and not what the civil servants actually do under them, that are to be examined. It is the statutory powers of civil servants, and not some attitudes of some civil servants to the citizen — still less the attitude of the citizen himself to 'authority' or to what his 'fundamental freedoms' are — that may need changing. Note further the composition of the team that produced the report. All of them — the commissioner himself, his two assistants and his two consultants — were lawyers. And consider the normal lawyer's biases. Because he acts for individuals he necessarily empathizes with the individual. Because he is steeped in the common law he views with alarm any departures from the eighteenth-century constitution which he finds in the law reports. Because he lacks experience in the facts of governmental life he has little interest in what actually happens there. Because he is familiar with law as a shield to be used in the defence of his clients he overestimates the importance of legal safeguards and underestimates the importance of the, to him, less familiar but more efficacious ones of fairminded civil servants, a vigilant press, and a 'watch that government' atmosphere in the general public.<sup>42</sup>

Willis was articulating a form of what Harlow and Rawlings subsequently identified as 'green light' theory in administrative law.<sup>43</sup> According to Harlow and Rawlings, green light theorists reflect aspects of legal realist and functionalist traditions in the United States — traditions that had a direct influence on

<sup>39</sup> Ibid 359.

<sup>40</sup> Ibid 352.

<sup>41</sup> Ibid 352–3.

<sup>42</sup> Ibid 353.

<sup>43</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009) ch 1, especially at 33. Cf Loughlin, above n 34, chs 4, 7–8.

Professor Willis.<sup>44</sup> According to Harlow and Rawlings, arrayed against ‘green light’ theorists are ‘red light’ theorists who share Dicey’s distrust of the state and concern for the protection of the individual. Prominently counted amongst the ranks of the ‘red light’ group was Lord Hewart, whose views published in 1929<sup>45</sup> prompted the establishment of the Donoughmore Committee in the United Kingdom. According to Harlow and Rawlings:

Lord Hewart reserved his most savage ridicule for the concept of ‘administrative justice’, in his mind a ‘grotesque misnomer’, renamed by him ‘administrative lawlessness’. ‘The exercise of arbitrary power is neither law nor justice, administrative or at all.’<sup>46</sup>

Red light theories are associated with ‘formalism’ and ‘legalism’.<sup>47</sup> In the second edition of their book, *Law and Administration*, Harlow and Rawlings associate formalism with ‘[h]air-splitting distinctions and terminological contortions’.<sup>48</sup> They also suggest that formalist reasoning is at least sometimes ‘used to cover reasons for a decision which a functionalist or realist would answer overtly, realistically and with due regard to policy’.<sup>49</sup> In the third edition of *Law and Administration*, Harlow and Rawlings, however, recognise that ‘[f]ormalism and conceptual reasoning are essential building blocks of a legal system, which structure judicial decision-making and help to maintain consistency. This in turn helps to underpin the rule of law.’<sup>50</sup> This more positive

<sup>44</sup> See John Willis, ‘Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional’ (1935) 1 *University of Toronto Law Journal* 53, 75–81. Cf Peter Bayne, ‘Mr Justice Evatt’s Theory of Administrative Law: Adjusting State Regulation to the Liberal Theory of the Individual and the State’ (1991) 9(1) *Law in Context* 1.

<sup>45</sup> Lord Hewart, *The New Despotism* (Ernest Benn, 1929).

<sup>46</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Butterworths, 2<sup>nd</sup> ed, 1997) 31–2, quoting *ibid* 44.

<sup>47</sup> These terms have been used to describe members of the High Court of Australia in recent years: see, eg, Taggart, ‘Australian Exceptionalism’, above n 4, 7. As to what exactly is meant by the terms, Taggart offered the following description of ‘formalism’ (citations omitted):

Formalism is a catch-all term: a ‘shorthand for a number of different ideas’ including a highly technical approach to problems; the employment of formal, conceptual and logical analysis, often related to literalism and sometimes originalism; a belief that law is an inductive science of principles drawn from the cases, rather than the application of broad, overarching principles to particular disputes; a downplaying of the role of principle, policy, values and justice in adjudication; and in extreme forms a denial of judicial law-making.

See also Johan Steyn, ‘Does Legal Formalism Hold Sway in England?’ (1996) 49 *Current Legal Problems* 43, especially 51–2; cf W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 38–55; Christopher Forsyth, ‘Showing the Fly the Way Out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law’ (2007) 66 *Cambridge Law Journal* 325.

<sup>48</sup> Harlow and Rawlings, *Law and Administration* (2<sup>nd</sup> ed), above n 46, 31.

<sup>49</sup> *Ibid* 35. Cf Steyn, above n 47, 55–7.

<sup>50</sup> Harlow and Rawlings, *Law and Administration* (3<sup>rd</sup> ed), above n 43, 4 (citations omitted). Similar observations appeared in the second edition: Harlow and Rawlings, *Law and Administration* (2<sup>nd</sup> ed), above n 46, 35. The risk of ‘hair splitting’ and ‘contortions’ also appears to confront functionalist legal reasoning. See, eg, the departure, in 2008, by the Supreme Court of Canada from its three-tiered ‘pragmatic and functional analysis’ in determining the degree of deference, if any, to be applied to judicial review of government decision-making to a new two-tiered ‘standard of review’ analysis: *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 226–7 [62]–[64] (Bastarache and LeBel JJ for McLachlin CJ, Bastarache, LeBel, Fish and Abella JJ) (*‘Dunsmuir’*). Under the former approach, courts would, in certain cases, subject tribunal decision-making to a ‘somewhat

assessment would no doubt be welcomed by those committed to legalism. Whether those same people would be comfortable with the identification of legalism with formalism can, however, be doubted.<sup>51</sup>

Leaving these broader issues to one side, it is reasonably safe to assume that Professor Willis would have counted Commissioner McRuer as also being amongst the ranks of the red light theorists. It is not clear, however, whether Commissioner McRuer himself would have been comfortable with that designation. In chapter 19 of the *McRuer Report* the following passage appears:

Whatever justification there may have been in the past for the contention that the courts restrict statutory programmes through lack of sympathy for their objectives, there is little current justification for this contention; and if the recommendations contained in this Report are adopted, whatever ground for complaint there may be should be removed. It is thirty-five years since Lord Hewart wrote *The New Despotism*. Since then there has been a wide development of welfare legislation and state supervision in which judges when practising lawyers have had considerable experience.<sup>52</sup>

This nicely illustrates a more nuanced and complex position that is also recognised and considered by Harlow and Rawlings.<sup>53</sup> The financial and broader economic carnage of late 2008 and early 2009 has provided a powerful reminder to those inclined to a red light perspective, for whatever reason, that the days of the nightwatchman state are gone and that government regulation is not all necessarily negative.<sup>54</sup> Conversely, green light theorists also generally recognise the capacity of the state to act capriciously and the need for constraints on exercises of government power.<sup>55</sup>

probing examination': see, eg, at 216 [37] (Bastarache and LeBel JJ for McLachlin CJ, Bastarache, LeBel, Fish and Abella JJ). For a consideration of *Dunsmuir*, see Jones and de Villars, above n 10, 522–32, 560; Groves, 'The Differing and Disappearing Standards of Judicial Review in Canada', above n 15.

<sup>51</sup> See, eg, Justice Gummow's extrajudicial writings in which he contrasts the role of equity and the 'remedial formalism' of the common law: Gummow, above n 47, 38–55. For Justice Gummow's views on legalism in a public law context, see at 73–8. Commenting on Sir Owen Dixon's reference to the need for 'strict and complete legalism', Justice Gummow noted that Dixon was a significant equity lawyer who well appreciated that 'legalism' may include a preference of substance to form. Nevertheless, Dixon expressed his opposition to deliberate departures from long accepted legal principle 'in the name of justice or of social necessity or of social convenience'...

at 74, quoting Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 472. See also Aronson, Dyer and Groves, above n 12, 16.

<sup>52</sup> *McRuer Report*, above n 17, 306.

<sup>53</sup> Chapter 4 of the second edition of Harlow and Rawlings, *Law and Administration* (2<sup>nd</sup> ed), above n 46, is entitled 'Forever Amber?'. See also Harlow and Rawlings, *Law and Administration* (3<sup>rd</sup> ed), above n 43, 44–8.

<sup>54</sup> On administrative law and governmental responses to the global financial crisis, see Mark Aronson, 'The Great Depression, This Depression, and Administrative Law' (2009) 37 *Federal Law Review* 165.

<sup>55</sup> Aronson, Dyer and Groves, above n 12, 4 observe that the point of the red light and green light categories 'was not to make us choose between red and green, but to make us aware of the relevance of political and economic context.' In 1999 Professor Taggart suggested that, with the advent of economic rationalism and 'the New Public Management', '[i]t may be that the traffic light metaphor has outlived its usefulness': Michael Taggart, 'Reinvented Government, Traffic Lights and the Convergence of Public and Private Law. Review of Harlow and Rawlings: *Law and Administration*' [1999] *Public Law* 124, 126, 128. See also Peter Cane, 'Theory and Values

This more nuanced and complex position is illustrated by the early decisions interpreting the statutory reforms in Ontario. A report by a group of distinguished *lawyers*, derided for their insensitivity to the needs of government, prompted the *legislature* in Ontario to enact reforms intended to improve the procedures governing judicial review and expanding the grounds of judicial review. The *judges* in Ontario then read down the legislation and effectively provided *more*, not less, scope for executive action free from judicial intervention. How can we make sense of this?

Reference was made earlier to the invocation by the Ontario Divisional Court of the now infamous ‘formalist’ distinction between administrative decision-making on the one hand, and judicial and quasi-judicial decision-making on the other. The continued employment of this distinction, notwithstanding the legislative reforms,<sup>56</sup> by the judges in Ontario may reflect judicial unease with the application of adversarial adjudicative procedures to administrative decision-making in the context of multiple individual and collective rights and interests.

The distinction between judicial/quasi-judicial and administrative decision-making was allegedly based on Lord Atkin’s reference in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* to a ‘duty to act judicially’<sup>57</sup> in the context of the availability of the prerogative writs of certiorari and prohibition. The imposition of this ‘superadded’<sup>58</sup> requirement (which bedevilled natural justice until *Ridge v Baldwin*) has been explained in the following manner by Aronson, Dyer and Groves:

in the first half of the 20<sup>th</sup> century, the courts, particularly in England, appeared to doubt their competence to determine the appropriateness of adjudicative procedure. It appears that the advent of the two world wars and the need for reconstruction in their wake made the courts reluctant to take responsibility for the imposition of procedures which had the potential to impair the national interest. They began to look for a *lis inter partes* and a ‘super-added duty to act judicially’, in effect requiring a clear indication from the legislature that adjudicative procedure was necessary.<sup>59</sup>

It is doubtful whether this restrictive period in terms of judicial review can be explained, as Lord Reid suggests in *Ridge v Baldwin*,<sup>60</sup> simply as a case of Lord Atkin’s words being misconstrued in subsequent cases. The suggestion by Jabbari appears more convincing:

in Public Law’ in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe — Essays in Honour of Carol Harlow* (Oxford University Press, 2003) 3, 9–14.

<sup>56</sup> Judicial unease with expansion of natural justice hearing obligations appears to have extended to the interpretation of the *Statutory Powers Procedure Act*, SO 1971, c 47, now in force as the *Statutory Powers Procedure Act*, RSO 1990, c S-22: see Mullan, *Administrative Law*, above n 10, 215–16.

<sup>57</sup> [1924] 1 KB 171, 205.

<sup>58</sup> *R v Legislative Committee of the Church Assembly; Ex parte Haynes-Smith* [1928] 1 KB 411, 415 (Lord Hewart CJ).

<sup>59</sup> Aronson, Dyer and Groves, above n 12, 415–16 (citations omitted). See also Martin Loughlin, ‘Procedural Fairness: A Study of the Crisis in Administrative Law Theory’ (1978) 28 *University of Toronto Law Journal* 215, 217–23, 236, 240.

<sup>60</sup> [1964] AC 40, 74.

the judicial/administrative filter was not a mere accident of doctrinal interpretation — it was the court's method of refraining from using adjudicative procedures where they were thought by judges to be inappropriate to complex administrative decision-making.<sup>61</sup>

What makes this assertion all the more remarkable is that the judge generally credited with creating this 'superadded' requirement was none other than Lord Hewart, in his decision in *R v Legislative Committee of the Church Assembly; Ex parte Haynes-Smith*.<sup>62</sup> That decision was reported in 1928, the year before *The New Despotism*<sup>63</sup> was published! It also does not appear possible to explain away this apparent contradiction in the positions of Lord Hewart by referring to the malleability of the 'judicial/administrative filter'.<sup>64</sup> The imposition of the 'superadded' requirement appears to have been calculated to reduce, and did reduce, the scope of judicial review. In other words, it led to less judicial interference in administrative decision-making.<sup>65</sup> This was after all one of the main criticisms of the 'superadded' requirement. These historical developments appear relevant to understanding the initially restrictive approach of the courts in Ontario.

The restrictive judicial interpretation of the statutory reforms in Canada that is described above has not, however, survived. In 1992 it was effectively abandoned by the courts in Ontario.<sup>66</sup> The making of orders in the nature of the prerogative writs is no longer taken to depend on some link with statutory power. In place of the initially restrictive judicial approach, a much more liberal interpretation of the legislation has now been adopted. Most remarkably, orders in the nature of the prerogative writs have been issued in Ontario against non-governmental bodies.<sup>67</sup>

The reforms in Ontario influenced developments in other Canadian provinces, at the federal level in Canada and also outside of Canada.<sup>68</sup> Professor Mullan offered the following assessment of the Ontario legislation in 2001:

Probably the most reliable indicator of the success of any exercise in legislative reform is the extent to which it passes the test of time without the need for its

<sup>61</sup> David Jabbari, 'Critical Theory in Administrative Law' (1994) 14 *Oxford Journal of Legal Studies* 189, 206–7. Cf Martin Loughlin, 'Why the History of English Administrative Law Is Not Written' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer — Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 151, 172–3.

<sup>62</sup> [1928] 1 KB 411, 415.

<sup>63</sup> Hewart, above n 45.

<sup>64</sup> Cf Lord Denning MR's observations in *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56, 69–70.

<sup>65</sup> See generally Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) 78.

<sup>66</sup> *Bezaire v Windsor Roman Catholic Separate School Board* (1992) 9 OR (3d) 737, 745–7 (Hartt, Montgomery and Webber JJ) ('*Bezaire*'). Given that there was no textual support for the interpolation of a requirement of 'statutory power' in relation to orders in the nature of the prerogative writs in Ontario, the decision in *Bezaire* can be considered to be more faithful to the text of the *JRP Act* than the earlier cases.

<sup>67</sup> Mullan, *Administrative Law*, above n 10, 441. Note that some of these cases predate *Bezaire*.

<sup>68</sup> Mullan, *Administrative Law*, above n 10, 433. The Ontario legislation influenced developments in New Zealand.

parameters having to be established by resort to litigation. ... Ontario's *Judicial Review Procedure Act* ... has been a success and, in particular, remedial technicalities seldom intrude in Ontario judicial review litigation so as to prevent the Divisional Court going immediately to the merits of an application for judicial review.<sup>69</sup>

Before leaving the position in Ontario, it is worth reflecting briefly on one feature of the Ontario legislation. It was noted earlier that, in relation to injunctive and declaratory relief, the *JRP Act* links a court's power to issue such relief to the existence of 'statutory power'.<sup>70</sup> This has created difficulties in relation to non-statutory executive powers, and powers on the borderline between what might be considered 'public' and 'private'.

One of the features of declaratory and injunctive relief generally is the way in which it can render classifications of 'public' and 'private' less significant.<sup>71</sup> A Canadian text explains the point in terms that have relevance to recent Australian litigation on university decision-making:

in the case of a challenge to a procedurally unfair expulsion from membership in a body having its own incorporating or constitutive statute (such as many Canadian universities), there may be doubts as to whether this is a matter of private or public law but, subject to certain reservations, those doubts can be rendered irrelevant by the commencement of proceedings for declaratory and/or injunctive relief.<sup>72</sup>

In the case of *non-statutory* executive powers, Ontario's *JRP Act* plainly does not allow for the issue of declaratory or injunctive relief.<sup>73</sup> Indeed it is possible that this aspect of the legislation in Ontario contributed to the more liberal approach, referred to above, that has been taken by the courts in relation to orders in the nature of the prerogative writs in Ontario.

The English Law Commission in its 1976 *Report on Remedies in Administrative Law*<sup>74</sup> specifically considered the relevant statutory provision in Ontario and recommended against its adoption in England. Referring to cases such as *R v Criminal Injuries Compensation Board; Ex parte Lain*,<sup>75</sup> in which prerogative relief was issued in respect of *non-statutory* executive decision-making, the

<sup>69</sup> Ibid 438. Professor Mullan's reference to 'merits' is to the substantive grounds of judicial review rather than the actual merits of an administrative decision. Professor Mullan also acknowledges some 'hiccoughs' and one exception to this rosy assessment. The hiccoughs identified include the narrow interpretation of the legislation referred to above.

<sup>70</sup> *JRP Act* s 2(1).

<sup>71</sup> This feature appears to reflect the so-called 'classic model of judicial review' that had 'no developed distinction between public and private law': Mark Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?' (2004) 15 *Public Law Review* 202, 217, quoting Carol Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in Ian Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon, 1995) 79, 85.

<sup>72</sup> David J Mullan, *Evans, Janisch, Mullan and Risk: Administrative Law: Cases, Text, and Materials* (Emond Montgomery Publications, 5<sup>th</sup> ed, 2003) 1094.

<sup>73</sup> A difficulty noted in Mullan, *Administrative Law*, above n 10, 439.

<sup>74</sup> Law Commission, *Report on Remedies in Administrative Law*, Law Com No 73 (1976) ('*English Law Commission Report*').

<sup>75</sup> [1967] 2 QB 864.

Law Commission concluded that the approach taken in Ontario's *Judicial Review Procedure Act*, SO 1971, c 48 was 'inappropriate to English administrative law, where it is clear that judicial review is not limited to bodies exercising statutory powers.'<sup>76</sup> This assessment was one of the factors that led the Law Commission to recommend that:

as regards a declaration or an injunction to be granted under an application for judicial review, the Court should be directed to have regard to the nature of the matters in respect of which, and the nature of the persons or bodies against whom, relief may be granted by way of the prerogative orders and (in view of the special case of the declaration as to subordinate legislation and the developing scope of the prerogative orders themselves) to the justice and convenience of the case in the light of all its circumstances.<sup>77</sup>

This recommendation was substantially implemented with the inclusion of a new O 53 in the *Rules of the Supreme Court 1965* (UK) SI 1965/1776 in England in 1977<sup>78</sup> and subsequently with the enactment of s 31 of the *Supreme Court Act 1981* (UK) c 54. The Law Commission's recommendations also indirectly influenced the position in Australian jurisdictions that have adopted reforms based on O 53 and s 31. Thus, for example, ss 43 and 47 of the *Judicial Review Act 1991* (Qld) reflect the English Law Commission's views on this particular aspect of the reforms in Ontario.<sup>79</sup>

This problematic feature of the legislation in Ontario should, however, be contrasted with the overall positive assessment of the legislation referred to above. By way of summary, the history of the statutory reforms in Ontario can be divided into various stages. Fears that the reforms recommended by the McRuer Commission would lead to increased judicial interference in executive decision-making were expressed forthrightly by Professor Willis but were not sufficient to prevent the legislature in Ontario substantially implementing the Commission's recommendations. The courts in Ontario, paradoxically in the light of the concerns of Professor Willis, exhibited sensitivity in relation to the scope of judicial review and a reluctance to expand the availability of judicial review remedies. Judicial attitudes in Ontario defied classification according to 'green light' or 'red light' theories. Eventually, however, restrictive interpretations of the statutory reforms were abandoned. The statutory reforms in Ontario are now

<sup>76</sup> *English Law Commission Report*, above n 74, 20 [45].

<sup>77</sup> *Ibid* 21 [45].

<sup>78</sup> Amended by *Rules of the Supreme Court (Amendment No 3) 1977* (UK) SI 1977/1955, r 5. See now *Civil Procedure Rules 1998* (UK) SI 1998/3132, r 54.

<sup>79</sup> Whilst the Queensland Electoral and Administrative Review Commission recommended that aspects of the English system be followed in Queensland, it specifically recommended against establishing a leave requirement for judicial review proceedings: Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions*, Report No 90/R5 (1990) 84 [9.15]. The Commission also sought to avoid the procedural exclusivity that the House of Lords subsequently demanded in *O'Reilly v Mackman* [1983] 2 AC 237: at 144 [13.6]. Rule 3558 of the *Court Procedures Rules 2006* (ACT) is also based on the English provisions, as was r 98.01 of the *Supreme Court Rules 1987* (SA), but there is no equivalent provision in the *Supreme Court Civil Rules 2006* (SA).

considered successful, principally because litigation testing the technical parameters of the legislation has seldom been required.

### B Australia

In light of the experience in Ontario, what might be said of the statutory reforms to judicial review in Australia, in particular the enactment in 1977 of the *ADJR Act*? At the outset it should probably be acknowledged that, according to the criteria identified by Professor Mullan for determining whether a legislative reform has been successful,<sup>80</sup> it is difficult to avoid the conclusion that the *ADJR Act* has been a failure. Litigation on the parameters of the *ADJR Act* and related legislation is common in Australia and remedial technicalities appear inescapable.<sup>81</sup>

One can certainly argue that Professor Mullan's criteria are not the only possible criteria of success. Kirby J has referred to the increase in the number of judicial review applications following the enactment of the *ADJR Act*<sup>82</sup> and empirical research suggests that successful judicial review applicants have considered the outcome of their review to have been ultimately worthwhile.<sup>83</sup> It is also difficult to assess the 'success' of only part of a more comprehensive raft of statutory reforms which included the establishment of a general administrative appeals tribunal,<sup>84</sup> an administrative review council,<sup>85</sup> an ombudsman,<sup>86</sup> the enactment of freedom of information legislation<sup>87</sup> and the creation of a statutory right to reasons for administrative decisions.<sup>88</sup>

Nonetheless, the complex case law that has developed on the availability of judicial review via the *ADJR Act* and related legislation remains as a significant entry on the 'failure' side of the ledger. Kirby J has also added concerns about the 'codification' of the grounds of review and whether the *ADJR Act* has 'retarded' or 'arrested'<sup>89</sup> the development of the common law grounds of review.<sup>90</sup> It is suggested that comparison with the developments in Ontario may offer some insights as to why things have developed as they have in Australia.

<sup>80</sup> Mullan, *Administrative Law*, above n 10, 438.

<sup>81</sup> See, eg, the decisions of the High Court of Australia in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *NEAT* (2003) 216 CLR 277; *Tang* (2005) 221 CLR 99.

<sup>82</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94.

<sup>83</sup> Robin Creyke and John McMillan, 'Judicial Review Outcomes — An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 87. For a general discussion of empirical studies of administrative law's effects, see Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 323–33.

<sup>84</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 5.

<sup>85</sup> *Ibid* pt V.

<sup>86</sup> *Ombudsman Act 1976* (Cth) s 4.

<sup>87</sup> *Freedom of Information Act 1982* (Cth).

<sup>88</sup> *ADJR Act* s 13; *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

<sup>89</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157], 97 [166].

<sup>90</sup> For an extensive review of the literature and authorities on the relationship between the interpretation of legislation and the development of (i) the common law and (ii) equity, see Gummow, above n 47, 1–37, 55–70.

Attention will first be turned to the provenance of the *ADJR Act* and to the Kerr and Ellicott Committees. A couple of preliminary observations and comparisons can be made regarding the almost parallel developments in Ontario.

The Kerr and Ellicott Committees' reports, completed in 1971 and 1973 respectively, did not expressly refer to the 1968 *McRuer Report* or the reforms in Ontario. There are a number of possible reasons for this.<sup>91</sup> The Kerr Committee considered administrative review in the United States but understandably focused almost exclusively on the federal position in that crowded federation.<sup>92</sup> Perhaps provincial reforms in Canada were not referred to in order to ensure consistency. It is possible, however, that the reforms in Ontario were considered indirectly by the Kerr Committee through the consideration of reform proposals in New Zealand.<sup>93</sup>

The reports differ in a number of interesting respects. The *Kerr Committee Report* appears more concerned to accommodate the legitimate interests of the executive branch and to ensure 'efficiency in administration' and 'democratic procedures'.<sup>94</sup> For example, the Kerr Committee's recommendations for a new administrative appeals tribunal emphasised the importance of the presence of non-legal members in all cases heard by the tribunal.<sup>95</sup> The interpretation of the separation of powers doctrine by the High Court of Australia<sup>96</sup> and the greater emphasis in Australia (compared with Canada)<sup>97</sup> on distinguishing issues of legality from the merits of administrative decision-making also appear significant. It seems safe to assume that Professor Willis, the outspoken critic of the *McRuer Report*, would have been more supportive of the *Kerr Committee Report*.<sup>98</sup> Indeed Aronson, Dyer and Groves have observed, referring directly to

<sup>91</sup> For example, the McRuer Royal Commission had much broader terms of reference than the Kerr or Ellicott Committees.

<sup>92</sup> The position in individual states within the United States was only the subject of passing reference in one paragraph of *Kerr Committee Report*, above n 8, 100 [340].

<sup>93</sup> *Ibid* 50 [162]. See Harry Whitmore, 'The Role of the Lawyer in Administrative Justice' (1970) 33 *Modern Law Review* 481, 482. Professor Whitmore was a member of the Kerr Committee. In an article published after the tabling of the *Kerr Committee Report*, Professor Whitmore referred to the reforms in Ontario: Harry Whitmore, 'Administrative Law in the Commonwealth: Some Proposals for Reform' (1972) 5 *Federal Law Review* 7, 14, 22.

<sup>94</sup> *Kerr Committee Report*, above n 8, 105 [355], generally ch 19. Cf *McRuer Report*, above n 17, ch 19. See also *Kerr Committee Report*, above n 8, 3-4 [12], 13 [33], 83-4 [284]-[286], 86-7 [292]; Whitmore, 'Administrative Law in the Commonwealth', above n 93, 11-12.

<sup>95</sup> *Kerr Committee Report*, above n 8, 115 [390].

<sup>96</sup> Cane, 'The Making of Australian Administrative Law', above n 12, 122-4.

<sup>97</sup> The constitutional focus in Canada, influenced by *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') and statutory bills of rights at both federal and provincial levels together with the consequences of s 96 of the *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 (which gives the federal government the role of selecting provincial judges and which makes the transfer of adjudication from provincial courts to provincial tribunals an important political and legal issue), appears to be significantly different to that in Australia: see, eg, Mullan, *Administrative Law*, above n 10, ch 2.

<sup>98</sup> In reflections published in 1998 on the reforms of the 1970s, Sir Anthony Mason referred to 'feelings of disappointment' about how the reforms have operated in the following years. He referred to his belief in the early 1970s 'that we would bridge the cultural gap that divides the administrator from the lawyer. At the end of two decades, I do not think that this belief has been vindicated': Sir Anthony Mason, 'Reflections on the Development of Australian Administrative

the ‘green light’ and ‘red light’ designations discussed earlier, that ‘[c]olour coding has always been difficult in the Australian context.’<sup>99</sup>

Turning specifically to judicial review of the legality of administrative action, the reports differ in their recommendations regarding the common law grounds of review. As suggested above, the Kerr Committee recommended that each of the grounds should be ‘codified’ in legislation. The Ellicott Committee confirmed this recommendation. This confirmation came notwithstanding a visit to Australia in 1972 by Professor H W R Wade, then Professor of English Law at Oxford. The *Ellicott Committee Report* records that on that visit Professor Wade held discussions with Mr Ellicott QC and officers of the Attorney-General’s Department during which, according to the *Report*, he ‘expressed the view that it was unwise to specify particular grounds for review because this could have the effect of excluding the possibility of judicial development of additional grounds.’<sup>100</sup> The *Ellicott Committee Report* goes on to note that if an attempt was to be made to codify the grounds in legislation then Professor Wade suggested that these should include an open-ended ground such as ‘contrary to law’.<sup>101</sup> By way of contrast, we have seen that, following the recommendations of the *McRuer Report*, the *JRP Act* in Ontario sets out only two expanded grounds of review<sup>102</sup> with the rest of the common law grounds being left largely uncoded. The only major qualifications are the procedural requirements specified in the *Statutory Powers Procedure Act*, RSO 1990, c S-22.

As noted above, the codification of the grounds of review in Australia has prompted concerns, as anticipated by Professor Wade, that the common law grounds of review have not developed as they have in other common law jurisdictions. This concern has been the subject of debate in Australia.<sup>103</sup> It will be suggested below that, in addition to this concern, the codification of the grounds may have had another consequence in terms of the approaches Australian courts have taken to the scope of review under the *ADJR Act* and related legislation. Before examining this issue, it is convenient now to address what

Law’ in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Centre for International and Public Law, 1998) 122, 122.

<sup>99</sup> Aronson, Dyer and Groves, above n 12, 4. They note that ‘[b]oth sides of politics [in Australia] endorsed the introduction of the so-called Commonwealth administrative law package of legislation’.

<sup>100</sup> *Ellicott Committee Report*, above n 9, 9 [41].

<sup>101</sup> *Ibid.*

<sup>102</sup> *JRP Act* s 2(1).

<sup>103</sup> See Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’, above n 71, 214–16, responding to Kirby J’s observations in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94 [157], 97 [166]. For a comparative perspective on problems of attempted codification of rules and principles of judicial review, see Saunders, above n 14, 438–41; Timothy H Jones, ‘Judicial Review and Codification’ (2000) 20 *Legal Studies* 517. Professor Williams has suggested that when Lord Diplock referred to ‘illegality’, ‘illogicality’ and ‘procedural impropriety’ in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, he was seeking to ‘pre-empt any legislative classification of the grounds of review’: D G T Williams, ‘Justiciability and the Control of Discretionary Power’ in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986) 103, 105.

appears to be the most significant factor in explaining the different experiences in Australia and in Ontario.

In the above discussion of the initially restrictive approach taken by the courts in Ontario, it was noted that the mechanism employed by the legislature in the *JRP Act* to mark out that which was reviewable via injunctive and declaratory relief had contributed to the taking of this restrictive approach. The legislature may not have anticipated the way in which the courts read the ‘statutory power’ requirement for injunctive and declaratory relief as also being a prerequisite for obtaining orders in the nature of the prerogative writs. The legislature in Ontario, however, plainly anticipated and intended that the ‘statutory power’ requirement would restrict the availability of injunctive and declaratory relief. The legislature provided a detailed definition of the words ‘statutory power’ that sought to mark out the preconditions for judicial review with greater clarity than had been the case at common law.<sup>104</sup>

The Australian Parliament’s efforts to set out the prerequisites for judicial review under the *ADJR Act* appear unflattering by comparison. The equivalent requirement in the *ADJR Act*, namely that decisions of an administrative character must be ‘under an enactment’, was not the subject of any extended statutory definition. The words ‘under an enactment’ were, by comparison, simply inadequate for the complex task that they were required to perform in the *ADJR Act*.<sup>105</sup>

The Kerr and Ellicott Committees made only passing references to the need for some form of connection between decision-making and enactments. In *Tang*, Gummow, Callinan and Heydon JJ contrasted the Kerr Committee’s recommendation that legislation be enacted that would authorise judicial review on legal grounds ‘of decisions, including in appropriate cases reports and recommenda-

<sup>104</sup> *JRP Act* s 1 (definition of ‘statutory power’). Cf the definition of ‘enactment’ in s 3 of the *ADJR Act*.

<sup>105</sup> It is not entirely clear why the words were chosen. No doubt the terms of ss 75–6 of the *Commonwealth Constitution* had some influence: see the discussion of this constitutional context in *Kerr Committee Report*, above n 8, ch 4. The terms of reference for the Kerr Committee may also have had an impact. On the changes to the terms of reference, see 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, 171. Keane, ‘Judicial Review’, above n 5, 632 has pointed to ‘the absence [in the academic criticisms of *Tang*] of a compelling explanation of how the phrase “under an enactment” can be read otherwise than as suggested by the Federal Court jurisprudence without at the same time depriving it of effect as a limit upon the scope of the Act.’ His Honour also refers to the ‘evident fact that the legislature has, over the decade since 1997, shown itself to be content with the interpretation of the *ADJR Act* adopted by the Federal Court’: at 632. The uncertainty surrounding Parliament’s intention regarding the phrase is perhaps best exemplified by contrasting the interpretation of the phrase adopted by the Federal Court in the 1990s with the interpretation given to the phrase by Ellicott J in *Burns v Australian National University* (1982) 40 ALR 707, 715–20. And whilst the federal Parliament has seen fit not to act upon the recommendations of the Administrative Review Council (see especially Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 29–31, 109–10 (*Administrative Review Council Report No 32*’)) regarding the phrase, the Queensland Parliament did decide to act upon these recommendations with the incorporation of s 4(b) of the *Judicial Review Act 1991* (Qld), a provision inspired in part by s 75(v) of the *Commonwealth Constitution* and s 39B(1) of the *Judiciary Act 1903* (Cth). These provisions focus on the identity of the decision-maker rather than the source of the decision-making power.

tions, of Ministers, public servants, administrative tribunals ... but not decisions of the Governor-General<sup>106</sup> with the manner in which the Parliament chose to implement this recommendation:

the adoption in the *AD(JR) Act* of the phrase ‘a decision of an administrative character made ... under an enactment’ directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision-makers. In contrast, s 75(v) of the *Constitution* fixes upon the phrase ‘officer of the Commonwealth’. The resultant uncertainties generated by the case law on the *AD(JR) Act* have continued for more than twenty-five years.<sup>107</sup>

The methods employed by Gummow, Callinan and Heydon JJ to resolve this uncertainty in *Tang* have drawn significant criticism, from both judicial and academic sources.<sup>108</sup> It is not proposed to revisit all of these criticisms here. Instead my focus will turn to Gummow, Callinan and Heydon JJ’s consideration of government contracting, which, on its face, appears to be a surprising inclusion in a judgment on an application for judicial review of university disciplinary decisions affecting a student, when neither the student nor the university raised issues of contract and a university is plainly not ‘government’.<sup>109</sup> The reason for focusing on this issue is that it serves as a useful vehicle for teasing out the concerns expressed by members of the High Court and other courts regarding the scope of judicial review under the *ADJR Act* and related legislation, and broader policy implications. Plainly, like the judges in the early cases in Ontario, all of the judges in *Tang* were concerned about overreach in the scope of legislation based on the *ADJR Act*.<sup>110</sup>

Whilst the very earliest cases on the scope of review under the *ADJR Act* grappled with the difficulties created by the ‘under an enactment’ requirement,<sup>111</sup> the magnitude of the problem was perhaps most dramatically presented before the Full Court of the Federal Court in *General Newspapers Pty Ltd v Telstra Corporation* (‘*Telstra*’)<sup>112</sup> in 1993. The applicants for judicial review of decisions of a government-owned corporation argued that the enactment, under which the decisions (to enter into contracts with competitors of the applicants)

<sup>106</sup> *Kerr Committee Report*, above n 8, 113 [390].

<sup>107</sup> (2005) 221 CLR 99, 112–13 [28]–[29].

<sup>108</sup> Mark Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’ (2007) 35 *Federal Law Review* 1, 2–3 observes that ‘there have been over 25 articles and comments [on *NEAT* and *Tang*] ... the great bulk of them extremely critical of the majorities’ reasoning, both in doctrinal and policy terms.’ To this list must now also be added Professor Taggart’s criticism: Taggart, ‘Australian Exceptionalism’, above n 4. For the views of a member of the judiciary on this academic commentary, see Keane, ‘Judicial Review’, above n 5.

<sup>109</sup> See Taggart, ‘Australian Exceptionalism’, above n 4, 21.

<sup>110</sup> Kirby J, whilst emphasising the need to construe the remedial legislation generously, also acknowledged the need to read the words ‘under an enactment’ as words of limitation: *Tang* (2005) 221 CLR 99, 148 [148]–[149].

<sup>111</sup> See, eg, *Burns v Australian National University* (1982) 40 ALR 707, revd (1982) 43 ALR 25. See also Keane, ‘Judicial Review’, above n 5, 624.

<sup>112</sup> (1993) 45 FCR 164.

were made, was s 161 of the *Corporations Law*.<sup>113</sup> Section 161 conferred on corporations the legal capacities of natural persons.<sup>114</sup> If such provisions were sufficient to satisfy the ‘under an enactment’ requirement, then the scope of the *ADJR Act* would indeed be very broad. The Court held that the *ADJR Act* had no application and that the validity of the decisions was purely a matter of contract law.<sup>115</sup>

Canadian courts have confronted a comparable dilemma and have similarly concluded that bare statutory incorporation and empowerment is not enough under the relevant federal judicial review legislation.<sup>116</sup> Something more is required. English courts have also, it appears, taken a similar approach.<sup>117</sup> The critical question is exactly what more is required.

The joint judgment in *Tang* addressed this in a manner that appears to have added unnecessarily to the uncertainty in this area. Gummow, Callinan and Heydon JJ asked the following question:

What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?<sup>118</sup>

It was their Honours’ answer to this question that has prompted much of the later criticism:

The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*,<sup>119</sup> does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?<sup>120</sup>

<sup>113</sup> *Corporations Act 1989* (Cth) s 82, as repealed by *Corporations (Repeals, Consequential and Transitional) Act 2001* (Cth) sch 1 pt 1 para 2.

<sup>114</sup> See now *Corporations Act 2001* (Cth) s 124(1).

<sup>115</sup> *Telstra* (1993) 45 FCR 164, 173 (Davies and Einfeld JJ).

<sup>116</sup> Under *Federal Courts Act*, RSC 1985, c F-7, s 18(1)(a) the Federal Court of Canada has power to review decisions of a ‘federal board, commission or other tribunal’. These words are defined in s 2 of the Act as:

any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

Professor Mullan, citing *A-G (Canada) v Lavell* [1974] SCR 1349, 1379 (Laskin J), concludes that the ‘mere fact of incorporation under federal legislation (whether public or private) does not bring the entity in question within the Federal Court’s review jurisdiction’: Mullan, *Administrative Law*, above n 10, 426.

<sup>117</sup> S H Bailey, ‘Judicial Review of Contracting Decisions’ [2007] *Public Law* 444.

<sup>118</sup> *Tang* (2005) 221 CLR 99, 128 [79].

<sup>119</sup> *Australian National University v Lewins* (1996) 68 FCR 87, 103.

<sup>120</sup> *Tang* (2005) 221 CLR 99, 128 [80] (citations omitted). The joint judgment summarised the relevant requirements in the following manner, at 130–1 [89]:

A critical issue in understanding this answer is the precise meaning intended by the use of the words ‘obligations’ and ‘duties’. Professor Aronson has argued convincingly that the focus of Gummow, Callinan and Heydon JJ was not simply upon the applicant for review. An alleged ‘breach of a legal restriction upon [a government party’s] capacity or powers’ was also within the contemplation of the joint judgement.<sup>121</sup> Other critics<sup>122</sup> of the joint judgment have assumed that their Honours in this passage meant to exclude decisions that only impacted on an *applicant’s interests*.<sup>123</sup> If this was their Honours’ intention then the answer given to the question posed in the joint judgment could be critiqued not for what it includes (Dicey, for example, would have applauded the focus on the rights of individuals) but what the answer, on this interpretation, excludes.

The *ADJR Act* is not just about decisions affecting rights, duties and obligations of individuals. That the Act is about more than this is demonstrated by features of the *Kerr Committee Report* and the jurisprudence surrounding the common law and equitable remedies that were considered by the Kerr and Ellicott Committees when recommending the reform legislation. Consider the following statement by the Kerr Committee:

The objective fact, in the modern world, is that administrators have great power to affect the rights and liberties of citizens *and, as well, important duties to perform in the public interest*.<sup>124</sup>

In a similar vein, although offered in a different context, is the following observation of Brett LJ in relation to common law prerogative relief:

the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed.<sup>125</sup>

The determination of whether a decision is ‘made ... under an enactment’ involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be ‘made ... under an enactment’ if both these criteria are met.

<sup>121</sup> Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 17. Cf Keane, ‘Judicial Review’, above n 5, 630–1.

<sup>122</sup> Whilst Professor Aronson defends the joint judgment against criticism on this point he is critical of other aspects of the joint judgment. For example, he concludes that ‘[t]he characterisation of Ms Tang’s relationship with her former university as merely consensual [was] nothing short of breath-taking’: Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 23. For a response to this assessment see Keane, ‘Judicial Review’, above n 5, 629.

<sup>123</sup> See, eg, Cassimatis, ‘Statutory Judicial Review’, above n 105, 178–83; Christos Mantziaris and Leighton McDonald, ‘Federal Judicial Review Jurisdiction after *Griffith University v Tang*’ (2006) 17 *Public Law Review* 22, 30–41. Kirby J, in his dissent in *Tang* (2005) 221 CLR 99, 154 [155], also appears to have interpreted the joint judgment in this way.

<sup>124</sup> *Kerr Committee Report*, above n 8, 106 [361] (emphasis added).

<sup>125</sup> *Worthington v Jeffries* (1875) LR 10 CP 379, 382 (Brett J for Brett, Grove and Denman JJ). Amongst the various passages that Brett J relied upon to support this conclusion were the following observations from Matthew Bacon, *A New Abridgement of the Law* (A Strahan, 7<sup>th</sup> ed, 1832) vol 6, 564:

As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care

It is also essential to consider equity's concern to avoid the misapplication of public funds. In *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*, Gaudron, Gummow and Kirby JJ made the following observation under the heading 'Equity and public law':

In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration. There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction.<sup>126</sup>

The Kerr and Ellicott Committees plainly had these features of the traditional remedies in mind and the focus of the Committees was not just on the rights and interests of individuals.<sup>127</sup> In *Corporation of the City of Enfield v Development Assessment Commission*, Gaudron J described such broader concerns when her Honour referred to 'accountability' in the context of the *ADJR Act*:

The potential for executive and administrative decisions to affect adversely the rights, interests and legitimate expectations of the individual is now well recognised. So, too, is the inadequacy of the prerogative writs as general remedies to compel the executive government and administrative bodies to operate within the limits of their powers. The introduction of comprehensive statutory schemes such as that embodied in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) owes much to the recognition of these two basic factors. The other factor that informs comprehensive statutory schemes for the review of executive and administrative decisions is what is sometimes referred to as 'accountability'. In this context, 'accountability' can be taken to refer to the need for the executive government and administrative bodies to comply with the law and, in particular, to observe relevant limitations on the exercise of their powers.<sup>128</sup>

of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed, which issues out of the superior courts of common law to restrain inferior courts. ... The object of prohibition in general is the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject ...

*Worthington v Jeffries* (1875) LR 10 CP 379, 381. See also Sofronoff, above n 13, 147, quoting the views of Willes J in *City of London v Cox* (1867) LR 2 HL 239, 254.

<sup>126</sup> (1998) 194 CLR 247, 257 [25] (citations omitted). See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 628–9 [97]–[98] (Gummow J).

<sup>127</sup> Professor Chayes has contrasted traditional private law litigation with the development of distinctive public law litigation in the United States: Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281.

<sup>128</sup> (2000) 199 CLR 135, 156–7 [54]–[55] (citations omitted). Cf Brennan J's discussion of the distinction between judicial review of the exercise of statutory *functions* and judicial review of the exercise of statutory *powers* in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 585–6. The distinction between functions and powers appears central to s 9 of the *Judicial Review Act 1991* (Qld). See also the discussion by Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 108, 18–19, of a passage in Brennan J's judgment in *A-G (NSW) v Quin* (1990) 170 CLR 1, 36. In addition to protection of individuals and accountability, other 'public law values' underlying judicial review have been identified: see, eg, Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006) 30–2 ('Administrative Review Council Report No 47'); Aronson, 'Is the *ADJR Act* Hampering the Development of Australian Administrative Law?', above n 71, 216–19. See also Justice Robert French, 'Adminis-

The Commonwealth Parliament, unlike the Ontario Parliament, employed a statutory criterion for controlling the scope of judicial review that was ill-adapted to achieving Parliament's purpose. The courts have no choice but to confront this problem. Gummow, Callinan and Heydon JJ did so in *Tang*. They did not, however, do so by excluding obligations and duties owed by decision-makers. They have been interpreted by some critics and at least one judge of the Federal Court<sup>129</sup> as having intended such an exclusion. The following passage in *Tang*, however, indicates that this cannot have been their intention: 'The respondent [Ms Tang] enjoyed no relevant legal rights and the University had no obligations under the University Act with respect to the course of action the latter adopted towards the former.'<sup>130</sup>

### C Case Study: Judicial Review of Government Tendering Decisions

To demonstrate the practical implications of this point it is useful to turn to what Gummow, Callinan and Heydon JJ said in *Tang* on the issue of government contracting, an issue on the borderline of public and private law. Their Honours did not exclude the applicability of the *ADJR Act* in relation to all tendering decisions. They observed that:

a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, *without more*, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party's rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.<sup>131</sup>

If it is accepted, as I think it must be, that the test proposed in the joint judgment in *Tang* also encompassed legal obligations imposed on a *decision-maker*, then the 'more' referred to in the above passage may be found in statutory obligations imposed on the decision-maker regarding the process to be followed

trative Law in Australia: Themes and Values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 23–33; Murray Gleeson, 'Outcome, Process and the Rule of Law' (2006) 65(3) *Australian Journal of Public Administration* 5, 11–12.

<sup>129</sup> *Guss v Federal Commissioner of Taxation* (2006) 152 FCR 88, 100–1 (Edmonds J). Gyles and Greenwood JJ disagreed with Edmonds J's interpretation: at 92 (Gyles J), 103–6 (Greenwood J). Special leave to appeal to the High Court was refused: Transcript of Proceedings, *Guss v Deputy Federal Commissioner of Taxation* [2006] HCATrans 628 (10 November 2006).

<sup>130</sup> (2005) 221 CLR 99, 132 [96] (Gummow, Callinan and Heydon JJ) (emphasis added). For a discussion of this aspect of *Tang*, see Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 108, 17–19. There also appears to be no need for reciprocity or mutuality between the *duties* of a decision-maker and the *rights* of the person seeking judicial review of the decision-maker's activities: see *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 631, 638 (Gummow J), 660–1 (Hayne J).

<sup>131</sup> *Tang* (2005) 221 CLR 99, 129 [82] (emphasis added). The absence of any reference to obligations owed by the government decision-maker in this passage is noteworthy.

prior to the entry into a contract. This interpretation of the joint judgment would bring it fully into line with the Federal Court's decision in *Telstra* where the Full Court suggested two exceptions to the non-application of the *ADJR Act* to contractual decision-making:

It is unnecessary to consider the exceptional case where it may be proper to bring a proceeding under the *ADJR Act* because an act or thing, such as a contract, may have been entered into for an ulterior purpose, such as private gain, and the validity of the act is challenged by reference to the statute under the general aegis of which the act or thing is done. If the challenge to validity is made by reference to a federal enactment, then the challenge may be appropriate, even in relation to a contract, because the statute affects the force and effect of that which was done. Nor do we suggest that there may not be instances under the *ADJR Act* where relief could include the setting aside or the declaring void of a contract. The facts in *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR 1, where a tender was conducted under the provisions of an instrument issued under the *Customs Act 1901* (Cth), are an example of a circumstance in which the challenge to the tender process was made by reference to the provisions of a statutory scheme. The question of relief did not have to be considered as the application was dismissed.<sup>132</sup>

Doubts have been raised about these dicta in the light of *Tang*.<sup>133</sup> It is submitted that the dicta can be reconciled with the joint judgment in *Tang*.<sup>134</sup> Such reconciliation will ensure a complementary approach in Australia to that taken to the reviewability, according to principles of public law, of government procurement decisions in Canada<sup>135</sup> and in England.<sup>136</sup> The public quality of procurement regulation is illustrated by procurement policies that seek to advance particular governmental policies (such as regional development), the imposition of statutory duties and obligations on procuring entities in relation to procurement procedures, the assumption of international legal obligations to impose procurement standards on national procurement processes and to provide remedies when those standards have not been complied with and, at core, the

<sup>132</sup> (1993) 45 FCR 164, 173 (Davies and Einfeld JJ). Gleeson CJ in *Tang* (2005) 221 CLR 99, 110 [18] appears to endorse the approach taken in *Telstra*.

<sup>133</sup> Aronson, Dyer and Groves, above n 12, 152; Mantziaris and McDonald, above n 123, 42–3. See also the criticism in Margaret Allars, 'Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises' (1995) 6 *Public Law Review* 44, 60–6.

<sup>134</sup> Cf *Bilborough v Federal Commissioner of Taxation* (2007) 162 FCR 160, 166 (Kiefel J). On its face, the first exception appears to bear some similarity to the approach of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 391 (Lord Templeman for Lords Templeman, Goff, Mustill, Slynn and Woolf). See also Michael Taggart, 'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351. It is submitted that the approach suggested here would not have altered the result in cases such as *JJ Richards & Sons Pty Ltd v Bowen Shire Council* [2008] 2 Qd R 342. It is conceded, however, that the approach advocated here runs together issues of jurisdiction to engage in judicial review with issues related to the applicability of particular grounds of review.

<sup>135</sup> See, eg, *Shell Canada Products Ltd v City of Vancouver* [1994] 1 SCR 231, 272–5 (Sopinka J for La Forest, Sopinka, Cory, Iacobucci and Major JJ).

<sup>136</sup> See, eg, Bailey, above n 117; Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4<sup>th</sup> ed, 2009) 85–97.

expenditure of public funds.<sup>137</sup> Procurement decisions that do not follow *statutory* procedures appear to be reviewable in Australia, Canada and England.

Much more controversial, at least in Australia, is whether government procurement decisions made contrary to *non-statutory* procedures, for example, set out in or required by state purchasing policies,<sup>138</sup> are subject to judicial review. *Tang* appears to rule out the operation of the *ADJR Act* and related legislation in most cases. Reliance on traditional remedies also faces formidable obstacles in cases involving non-statutory procedures,<sup>139</sup> but the shape of an alternative argument can be briefly sketched.

The first step is to accept what Brennan J conceded in *Attorney-General (NSW) v Quin*, namely that the duty of the courts ‘extends to judicial review of administrative action alleged to go beyond the power conferred ... by the prerogative or alleged to be otherwise in disconformity with the law.’<sup>140</sup> It is submitted that, in principle, this must be accepted. It has also been accepted in Canada<sup>141</sup> and in England.<sup>142</sup>

One question that then arises relates to the standards that the courts are required to apply in order to fulfil this duty.<sup>143</sup> I believe that at least part of the

<sup>137</sup> See, eg, *Shell Canada Products Ltd v City of Vancouver* [1994] 1 SCR 231, 239–41 (McLachlin J for Lamer CJ, L’Heureux-Dubé, Gonthier and McLachlin JJ), 272–5 (Sopinka J for La Forest, Sopinka, Cory, Iacobucci and Major JJ). The exclusive application of private law in all cases of procurement would fly in the face of these factors suggesting the relevance of public law principles. Private law remedies for unsuccessful tenderers are relatively limited and those which Australian law recognises can be readily excluded: see Anthony E Cassimatis, ‘Government Procurement Following the *Australia US Free Trade Agreement* — Is Australia Complying with its Obligations to Provide Remedies to Unsuccessful Tenderers?’ (2008) 30 *Sydney Law Review* 412, 426–8.

<sup>138</sup> The position in relation to the federal *Commonwealth Procurement Guidelines* (Department of Finance and Deregulation, Australian Government, *Commonwealth Procurement Guidelines* (2008)) has been recently changed. See ss 44 and 64 of the *Financial Management and Accountability Act 1997* (Cth) and reg 7 of the *Financial Management and Accountability Regulations 1997* (Cth).

<sup>139</sup> *Tang* (2005) 221 CLR 99, 131–2 (Gummow, Callinan and Heydon JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 27–8 (McHugh and Gummow JJ); *Australian National University v Lewins* (1996) 68 FCR 87, 96–7 (Kiefel J), 103–4 (Lehane J); Keane, ‘Judicial Review’, above n 5, 629–30. For an account of European influences on changes in English law in this area, see Kiefel, above n 14, 223–4. Justice Kiefel also discusses the possible impact of those changes in Australia: at 230–2.

<sup>140</sup> (1990) 170 CLR 1, 35. But see, eg, 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, 27.

<sup>141</sup> See, eg, *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215, 230–3 (Laskin JA for Laskin, Goudge and Feldman JJA) (Ontario Court of Appeal); Lorne Sossin, ‘The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v Chrétien*’ (2002) 47 *McGill Law Journal* 435. *Federal Courts Act*, RSC 1985, c F-7, s 18(1)(a), when read with s 2(1) (definition of ‘federal board, commission or other tribunal’) allows judicial review in relation to ‘a prerogative of the Crown’. But see *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215, 238–9 (Laskin JA for Laskin, Goudge and Feldman JJA).

<sup>142</sup> See, eg, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; Harlow and Rawlings, *Law and Administration* (3<sup>rd</sup> ed), above n 43, 9–16. See generally Adam Tomkins, ‘The Struggle to Delimit Executive Power in Britain’ in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, 2006) 16.

<sup>143</sup> This is an extremely difficult question. Keane, ‘Judicial Power’, above n 12, 304, invokes the notion of ‘the presumed intention of the Crown to act fairly and rationally’ to explain the basis

answer to this question is reasonably clear: the duty of the courts is to apply the relevant<sup>144</sup> common law grounds of review that may be invoked via the traditional remedies used in public law.<sup>145</sup> An unsuccessful tenderer may be able to invoke these remedies.

The making of representations by a public body to particular prospective tenderers that particular procedures will be followed in procurement should and, I would submit, can give rise to common law procedural obligations.<sup>146</sup> This type of argument does not require the substantive protection of expectations.<sup>147</sup> The public body may depart from its published tender procedures provided it hears affected tenderers before doing so. The Supreme Court of Canada, which has also stopped short of enforcing substantive legitimate expectations, appears to have recognised the existence of procedural obligations of the kind suggested.<sup>148</sup>

for judicial review 'of decisions made in exercise of the prerogative'. For a discussion of the issues surrounding this question, see Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 108, 4, 20–4. See also Aronson, Dyer and Groves, above n 12, 156–63; Robin Creyke and John McMillan, 'Soft Law v Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State — Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377. Note also *Judicial Review Act 1991* (Qld) ss 4(b) and 9, and Professor Aronson's discussion of possible juridical bases for review via s 4(b): Aronson, 'Private Bodies, Public Power and Soft Law in the High Court', above n 108, 21. His preference is the basis deriving from the common law of judicial review: at 21–2.

<sup>144</sup> This may be a restricted range of judicial review grounds. Compare the Privy Council's approach in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 391 (Lord Templeman for Lords Templeman, Goff, Mustill, Slynn and Woolf).

<sup>145</sup> See, eg, Peter Bayne, 'The Common Law Basis of Judicial Review' (1993) 67 *Australian Law Journal* 781. For recent judicial consideration of the issue, see *Stewart v Ronalds* (2009) 259 ALR 86, 101–3 [64]–[75] (Allsop P), 108–9 [111]–[114] (Hodgson JA), 114–15 [131]–[137] (Handley AJA). Acceptance of a common law basis for judicial review does not require one to accept a power to review the merits of an administrative decision. Cf Selway, above n 13, 229, 233, 236. See, in the context of tendering, Nicholas Seddon, *Government Contracts — Federal, State and Local* (Federation Press, 4<sup>th</sup> ed, 2009) ch 7.

<sup>146</sup> A 'matter' would therefore exist for the purposes of ch III of the *Commonwealth Constitution*: see, eg, *Re Judiciary Act 1903–1920* (1921) 29 CLR 257, 266 (emphasis added) where Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ held that 'a matter under the judicature provisions of the *Constitution* must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law.' See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 150, 154–5 (Latham CJ), 159 (Starke J); *Abebe v Commonwealth* (1999) 197 CLR 510, 523–8 (Gleeson CJ and McHugh J), 555 (Gaudron J), 585–8 (Kirby J); Mantziaris and McDonald, above n 123, 30–6; Graeme Hill, 'Griffith University v Tang — Comparison with *NEAT Domestic*, and the Relevance of Constitutional Factors' (2005) 47 *AIAL Forum* 6, 11–13; Taggart, 'Australian Exceptionalism', above n 4, 19–20.

<sup>147</sup> Although it must be noted that this argument is in conflict with the way in which substantive enforcement of expectations was understood by Gummow, Callinan and Heydon JJ in *Tang* (2005) 221 CLR 99, 132 [92]. The argument relies on the approach of Mason CJ in *A-G (NSW) v Quin* (1990) 170 CLR 1, 24. See also the judgment of Dawson J in that case: at 60. Cf *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 494 (Stephen J), 494 (Mason J), 507–9, 511–12 (Aickin J); *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 264, 269 (Gibbs J). See generally Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470.

<sup>148</sup> For the Supreme Court of Canada's approach to legitimate expectations, see *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281, 299–307 (Binnie J for McLachlin CJ and Binnie J); *Reference Re Canada Assistance Plan (BC)* [1991] 2 SCR 525, 557–8 (Sopinka J for Lamer CJ, La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ) (emphasis added) where the following observation was made:

Recognition of an estoppel<sup>149</sup> would go much further than what is here proposed. This type of argument does not involve the courts trenching upon the merits of public decision-making. It is the legality of what has been done that is tested, not the merits. The decision-maker may have to start again, but it is the public decision-maker who will ultimately decide. The separation of powers is secure. Problems will arise if contracts have already been entered, but injunctive and declaratory relief in judicial review proceedings have proved themselves capable of balancing the interests of third parties.<sup>150</sup> The public decision-maker is free to stipulate in advance that no expectations are to arise from advertised procurement procedures. This at least has the salutary effect of ensuring that all parties (and interested third parties both in Australia and overseas) are clear on the basic rules (or lack thereof) of the procurement process.<sup>151</sup>

#### D Concluding Observations on the Interpretation of the ADJR Act and Related Legislation

##### 1 Broader Policy Issues

Critics of the High Court's decisions in *NEAT* and *Tang* have argued that the High Court did not openly confront the broader issues relevant to determining the scope of judicial review.<sup>152</sup> Mantziaris and McDonald have offered the following assessment:

In our view, the criteria for evaluating any proposed test for characterising whether decisions are 'made ... under an enactment' must include the capacity of the test to frankly acknowledge the policy questions which attend the public/private distinction. In particular, the test must raise the issue of whether or

There is no support in Canadian ... cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, *it can create a right to make representations or to be consulted*. It does not fetter the decision following the representations or consultation.

<sup>149</sup> See *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 207–18 (Gummow J); *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181; *JL Holdings Pty Ltd v Queensland* (1998) 85 FCR 1, 51–9 (Kiefel J); Joshua Thomson, 'Estoppel by Representation in Administrative Law' (1998) 26 *Federal Law Review* 83; Sir Anthony Mason, 'The Place of Estoppel in Public Law' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 160; Seddon, above n 145, 266–72, 375–80; Groves, 'Substantive Legitimate Expectations', above n 147, 490, 501–4. For the Canadian Supreme Court's approach to estoppel in public law, see *Mount Sinai* [2001] 2 SCR 281, 307–13 (Binnie J for McLachlin CJ and Binnie J). A collateral contract would also go much further: see *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; Seddon, above n 145, 324–75.

<sup>150</sup> See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388–93 (McHugh, Gummow, Kirby and Hayne JJ). Cf *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454, 457–60 (Mason CJ, Deane and Gaudron JJ); *Tonkin v Cooma-Monaro Shire Council* (2006) 145 LGERA 48, 57–64 (Ipp JA).

<sup>151</sup> See also Matthew Groves, 'Is *Teoh's Case* Still Good Law?' (2007) 14 *Australian Journal of Administrative Law* 126, 132–3.

<sup>152</sup> Cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336–7 (Mason CJ).

not judicial review of particular ‘private’ exercises of power by a public authority is appropriate.<sup>153</sup>

Professors Aronson<sup>154</sup> and Taggart<sup>155</sup> have offered similar criticisms. The need to openly address these issues grows with the increasing pervasiveness of new methods of public administration (such as self-regulation and co-regulation)<sup>156</sup> and the increasing use of ‘soft law’ instruments.<sup>157</sup>

The joint judgment in *Tang*, to the extent that it suggested *why* administrative decisions were made reviewable by the *ADJR Act*, referred to effects on rights, duties and obligations.<sup>158</sup> There was no sustained discussion of the notion of public law duties or obligations owed by decision-makers. We have seen that historically the courts have been prepared to offer greater guidance on such issues.

It has been argued by some that the courts could go further in articulating the underlying theory of judicial review,<sup>159</sup> although the value of such articulation has also been questioned.<sup>160</sup> To have expressly articulated the concerns that courts exercising common law and equitable jurisdiction have been prepared to give expression to in the past may not have avoided the criticisms levelled in relation to *Tang*, but it would at least have avoided some of the misunderstandings that have attended the reception of the joint judgment in *Tang*.

## 2 *Practical Considerations Arising from the Drafting of the ADJR Act*

Reference was made earlier to the codification of the grounds of review in the *ADJR Act* and the contrasting approach taken in Ontario. It was suggested that, in addition to the claim that codification may have arrested the development of the common law grounds of judicial review, it was also possible that codification may have contributed to a more restrictive approach to the preconditions for judicial review under the *ADJR Act* and related legislation. The argument can be illustrated by the facts in *Hawker Pacific Pty Ltd v Freeland*.<sup>161</sup> In that case, an

<sup>153</sup> Mantziaris and McDonald, above n 123, 47. Cf Keane, ‘Judicial Review’, above n 5, 634–5.

<sup>154</sup> Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 22–4.

<sup>155</sup> Taggart, ‘Australian Exceptionalism’, above n 4, 21–4.

<sup>156</sup> Mantziaris and McDonald, above n 123, 43–4, 48.

<sup>157</sup> See, eg, Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 20–2; Taggart, ‘Australian Exceptionalism’, above n 4, 23–4; Creyke and McMillan, above n 143.

<sup>158</sup> (2005) 221 CLR 99, 128 (Gummow, Callinan and Heydon JJ).

<sup>159</sup> See, eg, Stephen Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common Law or *Constitution*?’ (2000) 28 *Federal Law Review* 303; Selway, above n 13. For a more general defence of ‘top-down’ reasoning with particular attention to constitutional litigation and the employment of such reasoning by Sir Owen Dixon and other members of the High Court, see Justice Keith Mason, ‘What Is Wrong with Top-Down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574. The most recent criticism of top-down reasoning in the High Court of Australia appears to be that in *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 662–3 [77]–[78] (Gummow, Hayne, Crennan and Kiefel JJ). Gageler argues that Brennan J in *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 engaged in ‘top down reasoning at the highest level’: Gageler, above n 159, 307.

<sup>160</sup> Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’, above n 71, 216–19.

<sup>161</sup> (1983) 52 ALR 185.

unsuccessful tenderer sought to review, under the *ADJR Act*, a decision by a government decision-maker to award a contract for the supply of five aircraft to a competitor following a tender process. Regulations issued under the *Audit Act 1901* (Cth) regulated in general terms aspects of the tender process. The applicant for judicial review sought to rely on these regulations as the ‘enactment’ for the purposes of the *ADJR Act*. The substantive complaint against the government decision-maker did not, however, appear to rely on the regulations. Rather, it seemed that the regulations were simply being employed to enliven the Federal Court’s power to engage in judicial review under the *ADJR Act*. The assumption on the part of the applicant appears to have been that once the *ADJR Act* applied, all of the grounds set out in the Act would be available.<sup>162</sup>

If this was the assumption of the applicant then it was unfounded. The applicability of individual grounds of review under the *ADJR Act* is not automatic just because the Act itself applies in respect of a particular decision.<sup>163</sup> This point was expressly affirmed by the High Court in *Kioa v West*.<sup>164</sup> The structure of the Act and the notion that the grounds have been ‘codified’ nonetheless appear to encourage this misreading of the Act.

It is contended that some of the judicial reluctance to accept that the *ADJR Act* applies in relation to tendering may be related to this tendency for the Act to encourage ‘ambit claims’ in relation to the grounds of review. It is difficult to substantiate such a contention. It appears significant, however, that where those tendering decisions have been the subject of successful judicial review, injunctive and declaratory relief (available without the benefit of codified grounds) has been relied upon.<sup>165</sup> Courts appear less inclined to apply restrictively the prerequisites for injunctive and declaratory relief.

A consistent feature of those cases in which the courts have been prepared to consider judicial review of government contractual decisions (regardless of the particular remedies sought) has been judicial recognition of a more limited catalogue of relevant grounds of review.<sup>166</sup> The presence of codified grounds in the *ADJR Act* and related legislation may have contributed, albeit in an indirect way, to judicial concerns about overreach in the operation of the legislation. The

<sup>162</sup> It is not clear from the report which precise grounds the applicant intended to rely upon. See *Hawker Pacific Pty Ltd v Freeland* (1983) 52 ALR 185, 186, where Fox J simply notes that ‘[t]he applicant complained that the aircraft which the [successful tenderer] contracted to supply did not accord in all respects with the specifications in the invitation to register an interest, nor with that [successful tenderer’s] tender.’

<sup>163</sup> See, eg, Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 9.

<sup>164</sup> (1985) 159 CLR 550, 566–7 (Gibbs CJ), 576–7 (Mason J), 593–5 (Wilson J), 625 (Brennan J), 630 (Deane J).

<sup>165</sup> See, eg, *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328; Seddon, above n 145, 430–47. Cf *Maxwell Contracting Pty Ltd v Gold Coast City Council* [1983] 2 Qd R 533, 535–9 (Derrington J).

<sup>166</sup> In addition to those cases in which injunctive and declaratory relief were sought in relation to procedural non-compliance, see, eg, *Telstra* (1993) 45 FCR 164, 173 (Davies and Einfield JJ); *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 391 (Lord Templeman for Lords Templeman, Goff, Mustill, Slynn and Woolf).

continuing common law source of these grounds of review set out in the legislation suggests that such concerns may not be warranted.<sup>167</sup>

The final section of this paper will look more closely at declaratory relief. It will consider another overseas attempt at legislative reform of remedies that are of particular importance to administrative law.

### III JUDICIAL ATTITUDES TO DECLARATORY RELIEF — AUSTRALIA AND ENGLAND

The McRuer Commission did not support expansion in the availability of injunctive and declaratory relief as public law remedies in Ontario: ‘We reject suggestions that actions for a declaration or an injunction be made the appropriate remedy in all cases. Such actions are long, expensive and may be used as a delaying tactic, interfering with governmental action.’<sup>168</sup> This contrasts with the general endorsement by the High Court of Australia of declaratory relief as an appropriate mechanism to review the legality of public decision-making. Endorsing the language used by Gibbs J in *Forster v Jododex Australia Pty Ltd*,<sup>169</sup> four members of the High Court in *Ainsworth v Criminal Justice Commission* observed that ‘[i]t is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which “[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise.”’<sup>170</sup>

Gibbs J, however, acknowledged that judicial attitudes in Australia and England have not always been so disposed in favour of declaratory relief.<sup>171</sup> In Australia, the New South Wales Supreme Court resisted the expansive employment of declaratory relief in its equitable jurisdiction.<sup>172</sup> The hostility within the

<sup>167</sup> The issue dealt with in this part of the article is therefore not an argument against codifying the grounds of judicial review. The point is simply that the type of codification found in the *ADJR Act* and related legislation does not, in itself, significantly expand the applicability of the common law grounds and therefore is no reason to read down the jurisdictional prerequisites for judicial review under the legislation. For a consideration of arguments for and against codification of the grounds of judicial review, see Jones, above n 103. Amongst the arguments for codification, Jones includes the ‘educative function [of codification] for both administrators and the public’: at 520. He concludes, however, with a negative assessment of codification ‘[i]f it is sought to foster the further development of the principles of judicial review’: at 536.

<sup>168</sup> *McRuer Report*, above n 17, 328. On the general availability of declaratory relief in a public law context in Canada, see Lazar Sarna, *The Law of Declaratory Judgments* (Carswell, 3<sup>rd</sup> ed, 2007) chs 6–8.

<sup>169</sup> (1972) 127 CLR 421, 437.

<sup>170</sup> (1992) 175 CLR 564, 581–2 (Mason CJ, Dawson, Toohey and Gaudron JJ), quoting *ibid*. On the use of declaratory relief in public law litigation in Australia, see Neil J Young, ‘Declarations and Other Remedies in Administrative Law’ (2004) 12 *Australian Journal of Administrative Law* 35. On the use of declaratory relief in a public law context in the United Kingdom, see Lord Woolf and Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2002) 1–41; Lewis, above n 136, ch 7.

<sup>171</sup> See *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 433–5.

<sup>172</sup> See, eg, *Tooth & Co Ltd v Coombes* (1925) 42 WN (NSW) 93. Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court’, above n 108, 16 has noted Gibbs ACJ’s view expressed in *Sankey v Whitlam* regarding the rules of court that allow courts to make ‘declarations of right’. According to Gibbs ACJ ‘[t]he word “right” ... is used in a sense that is wide and loose’: *Sankey v Whitlam* (1978) 142 CLR 1, 23. Professor Aronson, however, also noted a potentially more

Court of Chancery in 19<sup>th</sup> century England is well documented.<sup>173</sup> In *Clough v Ratcliffe*, Knight Bruce V-C expressed his concerns about bills seeking declaratory relief without also seeking consequential relief in the following manner: ‘Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this Court.’<sup>174</sup>

Legislative reforms in England in 1850<sup>175</sup> and 1852<sup>176</sup> were unsuccessful in achieving significant expansion in the availability of declaratory relief in the Court of Chancery. It was not until the third attempt at reform in 1883<sup>177</sup> that the availability of declaratory relief significantly expanded. In New South Wales, resistance to the expansion of the availability of declaratory relief continued into the 1960s.<sup>178</sup>

What explanations have been offered for this judicial resistance? Justice Young (writing extrajudicially) and Professor de Smith both identified judicial conservatism as a cause.<sup>179</sup> However, if such assessments are accepted it must be acknowledged that this resistance cannot simply be explained by reference to some form of functionalist or ‘green light’ theory. The restriction on the availability of declaratory relief impacted on attempts to rely on declarations in *both* public and private law litigation.<sup>180</sup>

A review of the relevant 19<sup>th</sup> century English authorities does reveal at least one concern that still has resonance with courts today. A number of the early cases emphasise the inappropriateness of issuing declaratory relief in respect of circumstances that might never eventuate.<sup>181</sup> A similar concern was recognised by the High Court of Australia in 1992.<sup>182</sup>

restrictive approach in *Direct Factory Outlets Pty Ltd v Westfield Management Ltd* (2003) 132 FCR 428, 433–4 (Cooper J); Aronson, ‘Private Bodies, Public Power and Soft Law in the High Court, above n 108, 17 n 74.

<sup>173</sup> See, eg, P W Young, *Declaratory Orders* (Butterworths, 2<sup>nd</sup> ed, 1984) 23–6; Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith’s Judicial Review* (Sweet & Maxwell, 6<sup>th</sup> ed, 2007) 806–8.

<sup>174</sup> (1847) 1 De G & SM 164, 178–9; 63 ER 1016, 1023.

<sup>175</sup> *Chancery Act 1850* (UK) 13 & 14 Vict, c 35, s 14.

<sup>176</sup> *Chancery Procedure Act 1852* (UK) 15 & 16 Vict, c 86, s 50.

<sup>177</sup> *Rules of the Supreme Court 1883* (UK) O 25 r 5.

<sup>178</sup> *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 433–9 (Gibbs J); Young, above n 173, 28–30.

<sup>179</sup> Professor de Smith described the 19<sup>th</sup> century court as being in a ‘torpor of unimaginative conservatism’ in the first edition of *Judicial Review of Administrative Action* (Stevens & Sons, 1959) 370. This view was repeated in the 6<sup>th</sup> edition of that text: Woolf, Jowell and Le Sueur, above n 173, 808. Young, above n 173, 24, 28 refers to the conservatism of the 19<sup>th</sup> century English lawyers and of 20<sup>th</sup> century New South Wales lawyers. Cf Woolf and Woolf, above n 170, 11.

<sup>180</sup> A number of the relevant decisions in the 19<sup>th</sup> century involved the law of succession. See, eg, *Garlick v Lawson* (1853) 10 Hare App I xiv; 68 ER 1121; *Bright v Tyndall* (1876) 4 Ch D 189; *Hampton v Holman* (1877) 5 Ch D 183.

<sup>181</sup> See, eg, *Garlick v Lawson* (1853) 10 Hare App I xiv, xv; 68 ER 1121, 1122 (Page Wood V-C); *Bright v Tyndall* (1876) 4 Ch D 189, 196–9 (Malins V-C).

<sup>182</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

Other concerns, however, now appear to have been overcome. In *Langdale v Briggs*, Turner LJ, whilst acknowledging the convenience of bare declaratory ‘measures’, considered that legislative guidance was required:

the Legislature alone can fence the measure with the protections which will obviously be required, and such a measure, if adopted, ought not to be confined to mere equitable rights.<sup>183</sup>

It was, however, the courts themselves that eventually ‘fenced’ the remedy. The discretionary character of the relief appears to have been one feature that assisted in this process.<sup>184</sup> The discipline of costs was another.<sup>185</sup> Lessons learnt from Scots law also appear to have had a role.<sup>186</sup> In public law, bare declarations, embraced by the Court of Appeal in *Dyson v Attorney-General (UK)*,<sup>187</sup> were particularly well suited to enforcing obligations and duties of decision-makers.<sup>188</sup>

The simplicity of declaratory relief when compared to the *ADJR Act* (and related legislation) is stark. Without the codification of grounds and armed only with a hypothetical questions filter and a broad discretion, declaratory relief best exemplifies the reform outcomes that were sought via the *ADJR Act*.

#### IV CONCLUSIONS

I have examined some of the challenges confronting the courts in Ontario and in Australia as they have attempted to accommodate legislative reforms of judicial review with common law rules and principles that are themselves in a state of flux. Over the last century these common law rules and principles have gone through profound changes in both countries reflecting equally profound changes occurring in the other branches of their respective governments. The tensions that these changes have created have broader political dimensions that critical administrative law scholarship has focused upon. Whilst offering valuable insights, this scholarship cannot fully explain the Australian and Canadian experiences. We have seen, for example, that the criticism that Professor Willis levelled at the McRuer Commission in Ontario regarding the impact of judicial review on administrative efficiency can be contrasted with the Kerr Committee’s recommendations and the attitudes of Australian judges.<sup>189</sup>

The traditional search by the courts for coherence and consistency, both internally within the rules and principles of administrative law, and externally between administrative law and other areas of legal regulation, must now occur in an environment of increased legislative activity. The Australian experience has not been an entirely happy one. One can argue about criteria of success and

<sup>183</sup> (1856) 8 De G M & G 391, 427; 44 ER 441, 455.

<sup>184</sup> See, eg, *Dyson v A-G (UK)* [1911] 1 KB 410, 417 (Cozens-Hardy MR), 423 (Farwell LJ).

<sup>185</sup> *Ibid* 423 (Farwell LJ).

<sup>186</sup> Woolf, Jowell and Le Sueur, above n 173, 806; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437–8 (Gibbs J).

<sup>187</sup> [1911] 1 KB 410.

<sup>188</sup> Note the distinctly ‘red light’ hue of the observation by Farwell LJ that ‘the Courts are the only defence of the liberty of the subject against departmental aggression’: *ibid* 424.

<sup>189</sup> See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336–7 (Mason CJ).

failure, but comparisons with Canada<sup>190</sup> and England<sup>191</sup> suggest that legislative reform that is not carefully designed can have unintended consequences.

The *ADJR Act* was enacted in a spirit of great optimism. It has, however, some fundamental design flaws that undermine its potential. These are not irremediable<sup>192</sup> and they require remedy if we are to avoid the return of the ‘evils’ that the legislative reforms were designed to eradicate. The experience in Ontario, notwithstanding its early hiccoughs, does offer some guidance as to how some of the difficulties currently being experienced in Australia might be avoided.

Paradoxically, it has been in relation to the traditional remedies that vitality and flexibility have been most evident. The pattern for this judicial vitality and flexibility was set early with the — initially resisted — developments in the availability of declaratory relief in England. It is evident in the vitality, at least from the perspective of applicants for judicial review, of the orders in the nature of the writs in Ontario. It is also evident in judicial attitudes to declaratory relief in Australia. Without legislative reform, the *ADJR Act* and related legislation will confront applicants for judicial review with complications and risks that no longer bedevil the traditional remedies.

The traditional remedies must, however, still confront broader issues of the appropriate scope of judicial review in the light of different conceptions of public and private and in increasingly complex regulatory environments.<sup>193</sup> Legalism remains an essential tool in addressing these issues. Administrative law’s commitments to legality (which includes transparency), rationality and fairness<sup>194</sup> are also, however, essential.

<sup>190</sup> See, eg, the English Law Commission’s criticism of the manner in which the Ontario reforms dealt with declaratory and injunctive relief: see above n 76 and accompanying text.

<sup>191</sup> See, eg, the legislative attempts to address naked declaratory relief in England in the 1850s. See above n 175 and accompanying text.

<sup>192</sup> Aronson, ‘Is the *ADJR Act* Hampering the Development of Australian Administrative Law?’, above n 71, 212, has suggested, in place of the *ADJR Act*’s requirement of decisions ‘under an enactment’, a requirement of ‘decisions, conduct, acts or omissions in breach of Commonwealth law imposing restraints on or requirements for the exercise of public power’. See also *Administrative Review Council Report No 47*, above n 128, 25–7, which referred to and endorsed a number of reform proposals that would expand upon the phrase ‘under an enactment’. Similar recommendations were made, all to no avail, in Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1982); *Administrative Review Council Report No 32*, above n 105.

<sup>193</sup> *Contra* Keane, ‘Judicial Review’, above n 5, 634–5.

<sup>194</sup> Cf French, above n 128, 23–33.