



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 26 – Part II

**The Judicial Review of
Administrative Decisions**

WORKING PAPER

JUNE 1981

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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PREFACE

The Law Reform Commission of Western Australia has been asked to consider and report on the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions by way of the supervisory jurisdiction of the Supreme Court and by way of appeal.

The Commission has published a working paper and survey on the existing appellate arrangements in Western Australia,¹ and hopes shortly to submit a report. A second part of the project, namely, the review of administrative decisions by way of the supervisory jurisdiction of the Supreme Court, is dealt with in this working paper. This paper does not necessarily represent the final views of the Commission.

Comments, with reasons where appropriate, on individual issues raised in the working paper, or the paper as a whole or on any other aspects coming within the terms of reference, are invited. The Commission requests that they be submitted by 30 October 1981.

Unless advised to the contrary, the Commission will assume that comments received on this working paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

A notice has been placed in *The West Australian* offering to send, without charge, a copy of the working paper to anyone interested in it and inviting comments thereon.

The research material on which the working paper is based will, upon request, be made available at the offices of the Commission.

This working paper is based on material available to the Commission in Perth on 12 June 1981.

¹ Working Paper and Survey, *Review of Administrative Decisions, Part I - Appeals* (November 1978)

GLOSSARY OF TERMS¹

CERTIORARI	The writ of certiorari is a prerogative writ which may be issued by the Supreme Court ordering a decision-maker to bring the official record of a decision into the Court so that the decision may be quashed.
DECLARATION OR DECLARATORY JUDGMENT	A statement by the Supreme Court declaring the legal rights and duties of the parties before the Court.
ERROR OF THE LAW ON THE FACE OF THE RECORD	Error of law on the face of the record is a ground for obtaining relief by way of certiorari. An error must be both one of law and appear on the face of the record of the decision-maker.
INJUNCTION	An order of the Supreme Court by which a person is required either to do (mandatory injunction), or refrain from doing (prohibitory injunction), a particular act.
INTERROGATORIES	Interrogatories are written questions which any party to a civil action may serve on the other party. The recipient of the questions is required to answer them in writing.
JUDICIAL REVIEW	The examination by the Supreme Court of the lawfulness of an administrative decision.
JURISDICTIONAL ERROR	An error of law or fact which takes a decision-maker beyond the power conferred by Parliament.
MANDAMUS	A writ of mandamus is a prerogative writ which may be issued by the Supreme Court to command a decision-maker to perform a public duty imposed on him.

¹ The descriptions are intended to assist the layman. For those who seek a more detailed description see Jowitt's *Dictionary of English Law* (2nd ed 1977) and Stroud's *Judicial Dictionary* (4th ed 1971).

PROHIBITION

A writ of prohibition is a prerogative writ which may be issued by the Supreme Court to restrain a decision-maker from making a decision or to prohibit action being taken to give effect to or to enforce a decision.

STANDING

In this Working Paper standing refers to the rules relating to the entitlement of a person to apply to the Supreme Court for the judicial review of an administrative decision.

ULTRA VIRES

A decision may be ultra vires if the decision-maker has exceeded his authority or acted beyond power. A statute or subordinate legislation, such as a regulation, may be ultra vires if it is beyond the power of the Parliament or other body by which it was enacted or prescribed.

PART I: THE SCOPE OF THIS PART OF THE PROJECT

CHAPTER 1 - INTRODUCTION

1. TERMS OF REFERENCE

1.1 Under the terms of reference, the Commission is required to consider and recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court. The terms of reference do not apply to administrative decisions made by or on behalf of the Commonwealth Government and its organs.¹

1.2 The Commission has decided to deal with the matters raised by the terms of reference in a number of parts. The first part of the project is concerned with the law relating to existing statutory rights of appeal from administrative decisions. The Commission has published a working paper and survey on this part of the project,² and hopes shortly to submit a report. The second part of the project, the subject of this Paper, is concerned with the supervisory jurisdiction of the Supreme Court. The Commission does not regard these two parts as covering all of the matters raised by the terms of reference. It will consider, as a third part of the project, whether or not there are any circumstances in which a right of appeal should be created where none exists at present. There are also other matters, such as a code of procedure relating to administrative decisions, which may require separate treatment.

2. THE SOURCES OF POWER TO MAKE ADMINISTRATIVE DECISIONS

1.3 The Commission has interpreted the term "administrative decisions" as referring to all decisions made by the various State organs in Western Australia but not to decisions made by private or "domestic" bodies, such as professional or trade associations and sporting clubs. The organs of the State of Western Australia include the Governor, the Cabinet, ministers, courts, commissions, tribunals, local authorities and public servants.³ The various persons or

¹ These decisions may be reviewed by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977-1980* (Cth); paras 6.32 to 6.50 below. In certain cases there is also an appeal to the Commonwealth Appeals Tribunal created under the *Administrative Appeals Tribunal Act 1975-1980* (Cth).

² Working Paper and Survey, *Review of Administrative Decisions, Part I – Appeals* (November 1978).

³ The special case of Parliamentary proceedings is discussed in para 9.18 below.

bodies have power to make a wide range of decisions which bind or otherwise affect the rights or interests of persons in the State, for example, decisions with respect to town planning, rates and taxes, public health, child welfare, mining, agriculture, conservation and environmental protection.

1.4 In Western Australia, the power of the organs of the State to make administrative decisions may be derived from one of two sources. First, under section 2(1) of the *Constitution Act 1889-1980*, Parliament may “make laws for the peace, order, and good Government” of Western Australia.⁴ Consequently, Parliament may make laws conferring statutory authority on various persons or bodies to make administrative decisions. Secondly, administrative decisions may also be made under the authority of the royal prerogative. The prerogative powers are exceptional powers of the Sovereign which have not been taken away by the Parliament by express words in an Act. The prerogative powers once were very extensive but Parliament has emerged as the primary source of power and the prerogative powers have consequently been severely reduced.

1.5 The office of Governor of Western Australia, the office occupied by the Queen's representative in the State,⁵ is created by Letters Patent. The Letters Patent authorise the Governor to exercise a number of the prerogative powers, for example, to grant land, to appoint judges, to summon, prorogue and dissolve Parliament and to grant pardons.⁶ For the purposes of this paper, the Commission assumes that the Governor has power to exercise all of the power and authority lawfully belonging to the Queen.⁷

⁴ This power is, of course, subject to the *Colonial Laws Validity Act 1865* (Imp) and the Commonwealth Constitution.

⁵ *Constitution Act 1889-1980*, s 50.

⁶ The Governor is given some instructions as to the manner in which the office is to be conducted in the *Instructions to the Governor*. For the Governor's duty with respect to these instructions see *Constitution Act 1889-1980*, s 51.

⁷ The Letters Patent do not specifically confer on the Governor the power to exercise all of the power and authority lawfully belonging to the Queen. There is, therefore, some doubt as to whether or not the Governor's power is coextensive with that of the Queen. The Letters Patent creating the office of Governor-General of the Commonwealth of Australia are drafted in terms similar to those creating the office of Governor of Western Australia and do not specifically confer on the Governor-General power to exercise all of the power and authority lawfully belonging to the Queen. Notwithstanding this fact a number of High Court decisions have proceeded on the basis that the Governor-General does have these powers: Fajgenbaum and Hanks, *Australian Constitutional Law* (1972), 38-46. It may be that a similar view would be taken of the grant of powers to the Governor of Western Australia.

3. IMPUGNING ADMINISTRATIVE DECISIONS

1.6 A number of means have been developed for ensuring that the organs of the State act only according to the power conferred on them. Three such means - ministerial accountability to Parliament, the office of Parliamentary Commissioner for Administrative Investigations and statutory right of appeal - are discussed briefly below.⁸

1.7 A fourth means of impugning such decisions involves a review of the legal basis of the decision, including the failure to make a decision, by means of the prerogative writs (in particular, certiorari, prohibition and mandamus)⁹ and the remedies of injunction and declaration. The impugning of administrative decisions in the Supreme Court by means of these remedies, as distinct from the other means referred to above and an action for damages in tort¹⁰ or for breach of contract, is the subject of this Working Paper and is referred to as judicial review. Chapters 2 to 4 below contain what is necessarily a brief outline of judicial review as it presently operates. A more detailed account of the remedies will be found in a number of works on administrative law.¹¹

4. HISTORICAL DEVELOPMENT OF JUDICIAL REVIEW

1.8 The use of the prerogative writs to review administrative decisions is the result of developments at common law over hundreds of years. Certiorari, for example, was used prior to the fourteenth century by the King primarily as a means for obtaining information for administrative purposes. This role continued in later centuries but in addition they were used by the Court of King's Bench to supervise proceedings in inferior courts and the administrative functions of justices and ad hoc authorities. Prohibition and mandamus were

⁸ Paras 1.11 to 1.16 below.

⁹ Another prerogative writ, habeas corpus, is referred to in paras 3.30 and 3.31 below.

¹⁰ Such as damages for injury or damage suffered as a result of a negligent act or misrepresentation.

¹¹ D G Benjafield and H Whitmore, *Principles of Australian Administrative Law* (4th ed 1971) hereinafter cited as "Benjafield and Whitmore".

J F Garner, *Administrative Law* (5th ed 1979) hereinafter cited as "Garner".

P W Hogg, *Liability of the Crown* (1971) hereinafter cited as "Hogg".

P Jackson, *Natural Justice* (1979) hereinafter cited as "Jackson".

S A de Smith, *Judicial Review of Administrative Action* (4th ed 1980), hereinafter cited as "de Smith".

L A Stein (ed), *Locus Standi* (1979) hereinafter cited as "Stein".

E I Sykes, D J Lanham and R R S Tracey, *General Principles of Administrative Law* (1979) hereinafter cited as "Sykes, Lanham and Tracey".

H W R Wade, *Administrative Law* (4th ed 1977) hereinafter cited as "Wade".

H Whitmore and M Aronson, *Review of Administrative Action* (1978) hereinafter cited as "Whitmore and Aronson".

H Whitmore, *Principles Of Australian Administrative Law* (5th ed 1980) hereinafter cited as "Whitmore".

also writs which issued out of the King's Bench. The purpose of prohibition was to ensure that bodies did not exceed their jurisdiction. Mandamus was used to compel the performance of duties imposed on administrative and judicial bodies.¹²

The writs can be described as “prerogative writs” because:¹³

“The King could be conceived as superintending the due course of justice and administration through the medium of his own court: as prosecuting indictments, preventing usurpation of jurisdiction and upholding the public rights and personal freedom of his subjects.”

Each writ was initially used to preserve or support the royal prerogative, the power of the King. Their use to protect private rights or interests from actions by administrators was only of secondary importance, though this gradually became their most important function. Judicial review continues to provide a most important constitutional check on the abuse of power by State institutions.

5. THE PURPOSES OF JUDICIAL REVIEW

1.9 Judicial review has two aspects. First, it is concerned with ensuring that duties imposed on decision-makers by Parliament are performed. A decision-maker who fails to perform such a duty can be compelled to perform it by the Supreme Court. Secondly, judicial review is concerned with ensuring that an administrative decision is *lawful*. Judicial review is based on the:¹⁴

“...fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits”.

At the heart of this second aspect is the doctrine of *ultra vires*. According to this doctrine, a decision-maker can only lawfully make a decision which he has been authorised to make. If a decision-maker acts outside the authority conferred, the Supreme Court can quash the decision. If, however, a decision is one which the decision-maker was authorised to make, the only question which can arise is whether the decision is right or wrong. This involves a consideration of the merits of the decision. With one exception, namely, an error of law on the

¹² For an account of the historical origins of the prerogative writs see de Smith, 584-595.

¹³ de Smith, 595.

¹⁴ Wade, 38.

face of the record, the courts have, in principle, not been prepared to review the merits of a decision unless Parliament has created a statutory right of appeal.

1.10 Although a large number of administrative decisions are made each year by State institutions only a very small number are the subject of judicial review. In the years 1971-1978 (inclusive) only 88 applications were made in the Supreme Court of Western Australia for one or other of the prerogative writs. The Commission suspects that more applications were not made because of the complex and uncertain nature of aspects of the existing law and the cost of instituting proceedings. Only 13 (14.8%) of these applications for review were successful.

6. OTHER MEANS OF REVIEW

1.11 Judicial review is one of a number of means by which the rights and interests of persons affected by administrative decisions may be protected. They may also be protected by -

- (a) the relevant Minister being called to account in Parliament;
- (b) an investigation by the Parliamentary Commissioner for Administrative Investigations (the Ombudsman);
- (c) a statutory right of appeal.

(a) Ministerial Accountability

1.12 It is a parliamentary convention that a Minister is accountable to Parliament for all matters within his administrative responsibility. Attention may be drawn to adverse administrative decisions in Parliament during question time and debates such as the adjournment and grievance debates. The relevant Minister may even be the subject of a motion of no confidence in respect of the decision. A person adversely affected by an administrative decision may also be able to have the decision reviewed by a submission to the appropriate Minister either personally or through his Member of Parliament. Ministerial accountability is essentially a political concept and does not provide a systematic or independent means of reviewing administrative decisions.

(b) The Parliamentary Commissioner for Administrative Investigations

1.13 In 1971 the Western Australian Parliament made provision for the appointment of a Parliamentary Commissioner for Administrative Investigations (commonly known as the “Ombudsman”).¹⁵ His function is to investigate decisions, recommendations, acts or omissions by government departments, local authorities and specified statutory authorities, such as the Builders' Registration Board and the Motor Vehicle Dealers Licensing Board. The Commissioner has wide powers of investigation, including all the powers, rights and privileges specified in the *Royal Commissions Act 1968*.¹⁶

1.14 The Commissioner is concerned primarily with investigating the process of administration rather than with the merits of individual decisions, although apparently he has power to consider the merits if he wishes to do so. In any case he does not have power to quash a decision or substitute his own decision for that of the decision-maker. The only sanction is an indirect one arising from the power of the Commissioner ultimately to report his adverse opinion to Parliament.¹⁷ Another limitation on his power is that, in general, he cannot conduct an investigation where the aggrieved person has, or had, a right of appeal to a tribunal, or could take proceedings in a court.¹⁸

(c) Statutory Right of Appeal

1.15 A right of appeal is a creature of statute and can be the most comprehensive method of reviewing administrative decisions, depending on the ambit of the appeal provisions. A right of appeal differs from judicial review in two major respects. First, an appeal usually involves a review of the merits of the decision appealed against, whereas judicial review is generally confined to a review of the lawfulness of a decision. Secondly, an appellate body usually has power to substitute its own decision for that of the decision-maker. The Supreme Court has no such power in the case of judicial review.

¹⁵ *Parliamentary Commissioner Act 1971-1976*.

¹⁶ *Id.*, s 20(1).

¹⁷ *Id.*, s 25.

¹⁸ *Id.*, s 14(4). Section 14(5) however provides that:

"Notwithstanding anything in subsection (4) of this section, the Commissioner may conduct any investigation notwithstanding that the person aggrieved has or had such a right or remedy as is referred to in that subsection if he is satisfied that, in the particular circumstances, it is not reasonable to expect him to resort, or to have resorted, to it."

1.16 The existing appellate rights as regards administrative decisions were examined in a Working Paper and Survey published as the first part of this project.¹⁹ The survey shows that there are many different kinds of appellate bodies in Western Australia. The present system is the result of a series of ad hoc legislative steps taken over a long period of time without any apparent overall plan. The Commission suggested in that Working Paper that the present system for review of the merits of administrative decisions should be rationalised and outlined a number of ways in which this could be done. The question whether or not other decisions not presently subject to appeal on the merits should be subject to appeal will be considered as a third part of this project. This paper is mainly concerned with the principles and procedures which should be followed in reviewing a decision to determine whether or not it is lawful.

7. ACKNOWLEDGEMENTS

1.17 By arrangement with the Hon the Chief Justice and the Attorney General the Commission has been assisted in its research on this project by Mr M S Ng, the Principal Registrar of the Supreme Court. Mr Ng prepared a detailed research paper for the Commission dealing with the supervisory jurisdiction of the Supreme Court over administrative decisions. By arrangement with the Legislative Review and Advisory Committee the Commission has also been assisted by Mr M J Hardy, the Executive Officer of the Committee, who commented on an early draft of this paper. Comments were also made by Mr L A Stein, a senior lecturer in law at the Law School of the University of Western Australia. Their assistance is gratefully acknowledged.

¹⁹ Working Paper and Survey, *Review of Administrative Decisions, Part I – Appeals* (November 1978).

PART II: THE EXISTING LAW

CHAPTER 2 - THE GROUNDS FOR JUDICIAL REVIEW

1. INTRODUCTION

2.1 There are two main grounds of judicial review, based upon the doctrines of jurisdictional error and *ultra vires*. As Whitmore and Aronson state:¹

“Analytically the two doctrines are identical; both involve a going beyond powers conferred by statute, regulation, rule, administrative order or other instrument. But in the past courts usually said that an inferior court or tribunal that had exceeded its powers had made a jurisdictional error; whereas an administrative officer who had gone beyond power was said to have acted *ultra vires*.”

This difference reflects the differing historical origins of the doctrines, particularly the administrative structures in use at the time of their development.

2.2 The doctrine of jurisdictional error was developed before that of *ultra vires* at a time when many administrative powers were exercised by justices and inferior courts.² The doctrine of *ultra vires* was developed in the nineteenth century to control newly created statutory bodies, such as railway companies. It was gradually extended to apply to municipal corporations and local government authorities and to Ministers and the Crown.³

2.3 As will be seen below,⁴ the distinction between the two doctrines has been blurred in recent years. However, as the distinction has not been discarded the two doctrines are discussed separately below. The Commission also discusses other subsidiary grounds of review, namely, error of law on the face of the record, breach of the rules of natural justice and fraud. It recognises that there is some controversy about whether these other grounds are separate from jurisdictional error or *ultra vires* or merely examples of the application of one or other of those doctrines.

¹ Whitmore and Aronson, 143.

² Ibid.

³ de Smith, 94-95.

⁴ Paras 2.17 and 2.18 below.

2. THE DOCTRINE OF ULTRA VIRES

(a) Simple Ultra Vires

2.4 The doctrine of ultra vires in its most basic form, “simple ultra vires”, is concerned with the question whether or not a decision-maker has exceeded an express power. A decision or action is ultra vires if it goes beyond what is authorised by law, for example, in one case a statutory body authorised to purchase and work tramways was held to have acted beyond power when it attempted to run buses.⁵ Simple ultra vires also involves a consideration of whether or not a delegation of the exercise of a power has been authorised by law⁶ and whether or not there is an inconsistency between a statute and subordinate legislation. If subordinate legislation is inconsistent with the statute under which it was purported to be made, or another statute,⁷ it will be invalid.

2.5 A decision or action will generally be ultra vires if there has been a failure to observe a *mandatory* procedural requirement. Generally, a failure to carry out a procedure which is merely *directory* has no effect on the validity of the decision or action. It may, however, be necessary to show that there has been “substantial compliance” with a directory procedure.⁸

(b) Extended Ultra Vires

2.6 A further aspect of ultra vires, the doctrine of “extended ultra vires”, has been developed primarily for the purpose of controlling the abuse or wrongful exercise of powers, particularly wide discretionary powers. Under the doctrine of extended ultra vires the exercise of a discretionary power may be reviewed in order to ensure that it has been exercised in accordance with certain implied legal limits and not in an arbitrary or capricious manner. The scope of the doctrine of extended ultra vires is discussed below under the following headings -

- (i) improper purposes;
- (ii) bad faith;

⁵ *London County Council v Attorney General* [1902] AC 165. See generally Whitmore and Aronson, 179-190.

⁶ *Vine v National Dock Labour Board* [1956] 3 All ER 939.

⁷ *Hotel Esplanade Pty Ltd and Plowman v City of Perth* [1964] WAR 51.

⁸ *Scurr v Brisbane City Council* (1973) 47 ALJR 532, 536. See generally Sykes, Lanham and Tracey, Ch 14 and Whitmore and Aronson, 180-182 and 190-198.

- (iii) relevant and irrelevant considerations;
- (iv) unreasonableness;
- (v) uncertainty;
- (vi) no evidence;
- (vii) divestment of power.

These grounds of review may overlap. It may be alleged, for example, that a decision was motivated by an improper purpose and was made in bad faith.

(i) Improper Purposes

2.7 The exercise of a power may be impugned under this head if the power was exercised for a purpose other than one for which it was granted. In *Municipal Council of Sydney v Campbell*,⁹ for example,¹⁰ the Council was empowered to resume land for the purpose of “carrying out improvements in or remodelling any portion of the city”. The power was exercised, however, for the purpose of gaining a financial advantage for the Council. The improper purpose head has also been used to control the exercise of wide regulation-making powers,¹¹ for example, a wide regulation-making power in an Act cannot be used to extend the purposes of the Act.

(ii) Bad Faith

2.8 A decision may be impugned on the ground that it has been reached in bad faith or for an improper motive. This head may be distinguished from the improper purpose head because it involves dishonesty, though not necessarily for a financial motive.¹² It is, however, difficult to find any case in which this ground has been successful.

(iii) Relevant and Irrelevant Considerations

2.9 A decision may be reviewed if the decision-maker has failed to take into account relevant considerations or has taken into account irrelevant considerations. The considerations

⁹ [1925] AC 338.

¹⁰ For other examples see *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37, 84 and *Thompson v The Council of the Municipality of Randwick* (1950) 81 CLR 87.

¹¹ *Whitmore and Aronson*, 210-212.

¹² *Id.*, 213-214. *Cannock Chase District Council v Kelly* [1978] 1 All ER 152, 156.

which are relevant to a decision may be expressly stated in a statute or implied from the terms and purposes of the statute. Unless the statute so requires, the express provision of factors to be taken into account is not conclusive and other factors may be implied.¹³

(iv) Unreasonableness

2.10 A number of English cases suggest that a *decision* may be reviewed on the ground that it is unreasonable, that is, that it is “...so absurd that no sensible person could ever dream that it lay within the powers of the authority”¹⁴ or that it “...is so unreasonable that no reasonable authority could ever have come to it”¹⁵. However, it is not clear that these cases establish a separate ground because most of the cases could have been based on one of the other grounds of review.¹⁶ In Australia it is even less certain that unreasonableness has been established as a separate ground of review.¹⁷ While it is not certain that decisions may be reviewed on the ground of unreasonableness it does appear that a *by-law* may be impugned on this ground. By-laws have been found to be unreasonable where:¹⁸

“...for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.”

(v) Uncertainty

2.11 Where a provision conferring power to make a decision or impose a condition requires that the decision or condition be certain, a decision or condition which is uncertain will be invalid.¹⁹ A decision will not be invalid merely because it is ambiguous, provided the ambiguity is capable of resolution.

¹³ *Andrews v Diprose* (1937) 58 CLR 299. For other examples of cases on this ground see *Roberts v Hopwood* [1925] AC 578, *R v Trebilco; Ex parte FS Falkiner and Son Ltd* (1936) 56 CLR 20, 32; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

¹⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, 683.

¹⁵ *Ibid*.

¹⁶ Whitmore and Aronson, 227.

¹⁷ *Id*, 227-228.

¹⁸ *Kruse v Johnson* [1895-1899] All ER Rep 105, 110.

¹⁹ *Television Corporation Ltd. v The Commonwealth of Australia* (1963) 109 CLR 59, 71. Whitmore and Aronson, 230-232.

(vi) No Evidence

2.12 In England it appears to have been established that a decision may be reviewed if the decision-maker made the decision without evidence or if the decision could not reasonably be supported on the evidence.²⁰ It is not clear whether this ground has been established as an independent ground in Australia.²¹

(vii) Divestment of Power

2.13 A discretionary power may also be reviewed if a decision-maker has effectively been divested of the discretion where -

- (a) the power is exercised on the directions or at the behest of some other person or body or because the decision-maker feels bound or compelled to act in accordance with a decision or finding of another body;²²
- (b) the power is exercised on the basis of a pre-determined rule or policy, irrespective of the merits of the case;²³
- (c) there is an agreement not to exercise a discretion;²⁴
- (d) there has been an unauthorised delegation of a discretionary power.²⁵

²⁰ *Secretary of State for Education and Science v Metropolitan Borough Of Tameside* [1976] 3 All ER 665, 682-683.

²¹ R R S Tracey, 'Absence or Insufficiency of Evidence and Jurisdictional Error' (1976) 50 ALJ 568. Sykes, Lanham and Tracey, 85-89 paras-1305-1312. But cf Whitmore and Aronson, 228-229. Even if this ground has not been established in Australia it may be possible to challenge a decision made in the absence of evidence under one of the other grounds, for example, the court could infer from the absence of evidence that the decision-maker used its powers for a wrong purpose: see generally R L Towner "No Evidence" and Excess of Jurisdiction in Administrative Law' [1978] NZLJ 48.

²² Sykes, Lanham and Tracey, 57, paras 806 and 807. D Pearce, 'Courts, Tribunals and Government Policy' (1980) 11 FLR 203, 208-215.

²³ Whitmore and Aronson, 233-234.

²⁴ Id, 234-236.

²⁵ *Barnard v National Dock Labour Board* [1953] 1 All ER 1113.

3. JURISDICTIONAL ERROR

2.14 If a court or tribunal²⁶ has determined a matter which it had no authority to decide the decision will be void on the ground of jurisdictional error.²⁷ A review on this ground involves consideration of the authority of the decision-maker to make the decision in question.

2.15 It is therefore necessary to distinguish findings of law and fact which are jurisdictional from those which are not. Generally this has involved distinguishing “preliminary” or “collateral” matters from matters which go to the merits of the decision.²⁸ A preliminary or collateral matter need not necessarily arise at the outset of an inquiry. Under this test there will be a jurisdictional error where, for example -

- (a) a tribunal sits outside a particular district specifically designated by a statute conferring jurisdiction on the tribunal;²⁹
- (b) proceedings have not been instituted within a prescribed time-limit;³⁰
- (c) a tribunal presides without the prescribed quorum.³¹

2.16 In general it does not appear that a procedural error can amount to a jurisdictional error.³² In this context the acceptance or rejection of evidence is not regarded as merely procedural. The improper rejection of evidence by a person having authority to conduct an inquiry results in a jurisdictional error if the rejection amounts to a refusal to enter into the inquiry.³³ A decision based upon inadequate evidence may involve a jurisdictional error if it indicates that the decision-maker did not understand the nature of the test to be applied in making a finding as to a preliminary or collateral matter.³⁴ A decision may also be reviewed

²⁶ Paras 2.1 and 2.2 above.

²⁷ *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 389 per Dixon J.

²⁸ Whitmore and Aronson, 153. de Smith, 139-141.

²⁹ *Ex parte Atkinson* (1903) 3 SR (NSW) 314.

³⁰ *Howard v Secretary of State for Environment* [1974] 1 All ER 644, 649. But cf. *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 57 CLR 369.

³¹ *R v Murray; Ex parte Procter* (1949) 77 CLR 387.

³² Whitmore and Aronson, 167.

³³ *R v Marsham* [1892] 1 QB 371, 375.

³⁴ *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 120.

where a decision-maker has misunderstood his power or jurisdiction or applied a wrong test. This is called constructive jurisdictional error.³⁵

2.17 The distinctions between preliminary or collateral matters and matters going to merit and between the doctrines of jurisdictional error and ultra vires have been blurred following the decision of the House of Lords in *Anisminic Ltd v The Foreign Compensation Commission*.³⁶ Although the distinction between errors of law and fact which are jurisdictional and those which are not was expressly preserved in *Anisminic*, a number of the speeches delivered in that case used phraseology which suggested that the concept of jurisdictional error had been widened to include errors made in the course of an enquiry which might not otherwise have been considered to be jurisdictional errors. Lord Reid, for example,³⁷ suggested that a decision may be a nullity if it were made in bad faith, or in breach of the rules of natural justice or if the decision-maker refused to take into account relevant considerations or took into account irrelevant considerations or “misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it”. The basis and effect of the decision in *Anisminic* has been described in the following way by Lord Diplock:³⁸

“It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The break-through made by *Anisminic*... was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy

³⁵ *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420 per Jordon CJ.

³⁶ [1969] 1 All ER 208.

³⁷ Id, 213-214.

³⁸ *In re Racal Communications Ltd* [1980] 3 WLR 181, 186-187.

would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity”.

2.18 Prior to this judgment of Lord Diplock, Lord Denning had suggested that the distinction between jurisdictional errors and errors of law within jurisdiction should be discarded not only as regards tribunals but as regards courts as well. In *Pearlman v Keepers and Governors of Harrow School* Lord Denning said:³⁹

“The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.”

In Lord Diplock's view, however, the distinction between jurisdictional errors and errors of law within jurisdiction has been abolished in respect of decisions of “administrative tribunals or authorities” but not inferior courts of law.⁴⁰

4. ERROR OF LAW ON THE FACE OF THE RECORD

2.19 Judicial review on the ground of an error of law on the face of the record has two elements: First, there must be an error of law, and secondly, the error must appear on the face of the record. Although this ground of review was originally confined to courts of record in the strict sense of that term,⁴¹ it now applies to any decision which may be reviewed by way of certiorari.⁴²

2.20 In *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*⁴³ Lord Denning said that any “...determination...which, on the face of it, offends against the law” could be quashed by certiorari. There are, however, cases in which it has been held that the error must be fundamental or material.⁴⁴ One area of considerable difficulty is that relating to

³⁹ [1979] 1 All ER 365, 372. For a discussion of this decision see H F Rawlings, 'Jurisdictional Review After Pearlman' [1979] *Public Law* 404.

⁴⁰ See generally H W R Wade, 'New Twists in the Anisminic Skein' (1980) 96 LQR 492. Lord Denning's approach has also been disapproved by the Privy Council: *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 WLR 318, 322.

⁴¹ A court of record is a court whose “...acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has power to fine and imprison for contempt of its authority”: *Jowitt's Dictionary of English Law* (2nd ed 1977), Vol 1, 501.

⁴² *R v Northumberland Compensation Appeal Tribunal; Ex parte shaw* [1952] 1 All ER 122. For a discussion of the circumstances in which a decision may be reviewed by certiorari see paras 3.2 to 3.6 below.

⁴³ [1952] 1 All ER 122, 127.

⁴⁴ Whitmore and Aronson, 412-413.

distinguishing errors of law from errors of fact. This matter is discussed in paragraphs 7.6 and 7.7 below. The importance of this ground of review may have been reduced by the apparent extension of the concept of jurisdictional error referred to above. However, it appears from the decision of the House of Lords in *re Racal Communications*⁴⁵ that there are still some errors of law which will not be treated as jurisdictional errors. de Smith suggests that these could include an error concerning the burden of proof or the admissibility of evidence.⁴⁶

2.21 There is no clear judicial statement of what documents can be said to comprise the record of a decision. It does not appear that a transcript or record of the evidence or arguments before a decision-maker are part of the record for the purposes of this ground of review. Whitmore and Aronson refer to a number of judgments in which Lord Denning suggests that the record includes:⁴⁷

- “(i) the formal order which is impugned ;
- (ii) ‘the document or information which initiated the proceedings’ before the respondent tribunal;
- (iii) the document which initiated the proceedings before the first instance tribunal, if the respondent is an appellate tribunal;
- (iv) the decision (including reasons, if any were given) of the first instance tribunal, if the respondent is an appellate body;
- (v) the pleadings, if any;
- (vi) the reasons (if any were given) of the respondent which accompanied the making of the order;
- (vii) the whole of all documents referred to in the respondent's decision ‘which appear therefrom [that is from the decision] to be the basis of the decision - that on which it is grounded’;
- (viii) affidavits filed in the superior court by the applicant and clerk of the respondent tribunal; indeed,
- (ix) ‘all documents in the case’.”

Of these documents, Whitmore and Aronson state:⁴⁸

⁴⁵ [1980] 3 WLR 181, 193-194.

⁴⁶ de Smith, 121.

⁴⁷ Whitmore and Aronson, 417-418 (the authors' footnotes have been omitted).

⁴⁸ Id, 418-419 (the authors' footnotes have been omitted).

“Some judges have defined 'records' as expansively as Lord Denning, but not all. Taking the nine points listed above, every case is consistent with (i); only two cases have adverted to point (ii), and they are in accord with Lord Denning; no-one else has adverted to point (iii); opinion is divided on point (iv); the only other case on point (v) accords with Lord Denning; and only one case is inconsistent with point (vi). Most of the cases accord with point (vii); opinion is divided on point (viii); and Lord Denning carried the rest of the court with him on point (ix) ”

5. THE RULES OF NATURAL JUSTICE

2.22 The rules of natural justice are procedural rules which have been developed by the courts to ensure that the decisions to which they apply are made in compliance with a fair procedure. The rules are based on two principles, first, that a hearing should be held before a decision is made, and secondly, that the decision should be free from bias.

2.23 There has been some debate as to whether these rules are merely an extension of the doctrine of ultra vires or whether they are properly a separate head under which a decision may be impugned. At least for the purpose of exposition it is customary to deal with them separately.

2.24 At one time the rules of natural justice were required to be observed only if the subject matter of a decision involved a right and the decision-making process was judicial or quasi-judicial.⁴⁹ However, a wider approach has been developed since the decision of the House of Lords in *Ridge v Baldwin*⁵⁰ and the advice of the Privy Council in *Durayappah v Fernando*.⁵¹ In *Ridge v Baldwin* it was established that a requirement to observe the rules of natural justice could be implied from the nature of the power. In *Durayappah v Fernando* Lord Upjohn enumerated a number of matters which should be considered when determining whether or not the rules should be observed.⁵² At present, there appear to be four main points which should be considered in determining whether or not the rules apply to a particular decision.

* Consideration should be given to the status of the decision-maker. At one extreme are decisions of courts of law, where the rules should be observed. At the other

⁴⁹ G D S Taylor, 'Natural Justice -The Modern Synthesis' [1975] *Monash University Law Review* 258, 260-262.

⁵⁰ [1963] 2 All ER 66.

⁵¹ [1967] 2 All ER 152.

⁵² *Id.*, 156. This approach appears to have been adopted in Australia: *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 419-420.

extreme are decisions of a political or policy nature made by a Minister, where the rules need not be observed.⁵³

* Consideration should be given to the subject matter of the exercise of the power, that is, the nature of the property or office affected by the decision. In *Durayappah v Fernando*, for example, a local authority was dissolved on the ground that it was not competent to perform its duties. In view of the importance of those duties, the Court considered that this step should not be taken lightly.

* If the statute creating the power lays down criteria to be considered by the decision-maker or provides that an inquiry is to be undertaken it is more likely that the rules will have to be observed.⁵⁴

* The courts have taken account of the gravity of the consequences of a decision for a person or the sanctions imposed. The more serious the consequences or sanctions, the more likely it is that the courts will require that the rules be observed.⁵⁵

2.25 It is not necessary to establish the existence of each of these four matters. Rather the courts:⁵⁶

“...must weigh them and come to an over-all conclusion upon their total effect. The presence of major sanctions, for instance, may well overcome the absence of express court analogy and the relative vagueness of the issue to be determined by the body concerned.”

2.26 Under the first principle, a person must be given notice of a proceeding so that he has a reasonable opportunity to prepare his case. Failure to give notice may be justified in some cases, for example, in a case of emergency.⁵⁷ The right to notice may also be waived by statute. A person should also be given an opportunity to be heard. But this does not necessarily mean that he must be heard orally. A person may be able to meet the case against him by making a written submission.⁵⁸ A person may also be entitled to legal representation.⁵⁹

⁵³ Jackson, 104-106.

⁵⁴ Id, 109-110.

⁵⁵ Id, 106-109.

⁵⁶ G D S Taylor, 'Natural Justice – The Modern Synthesis' [1975] *Monash University Law Review* 258, 266.

⁵⁷ *de Verteuil v Knaggs* [1918] AC 557, 561.

⁵⁸ *R v The Local Government Board, Ex parte Arlidge* [1914] 1 KB 160, 191.

⁵⁹ *R v Assessment Committee of St Mary Abott's Kensington* [1891-1894] All ER Rep (Ext) 2056 and *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183. This right can also be excluded by statute: see, for example, s 32 of the *Small Claims Tribunals Act 1974-1978*.

With the extension of the rules to bodies other than courts and bodies analogous to courts the actual content of the rule has become more variable. It appears that the four factors referred to above which may be considered in determining whether or not the rules should be observed will also influence the question of how comprehensive a hearing must be held. A comprehensive formal hearing, rather than merely written submissions, may be required where, for example, the subject-matter and sanction are of a serious nature.⁶⁰

2.27 Under the second principle, there will be a breach of the rules of natural justice if the decision-maker has a pecuniary interest in the subject matter of the proceeding.⁶¹ There may also be bias if some non-pecuniary interest is involved.⁶² A non-pecuniary bias will arise where there is partiality towards one of the parties or towards a particular outcome.⁶³

2.28 In recent years there has been a tendency for courts to refer to a duty to act fairly in some circumstances rather than to the rules of natural justice.⁶⁴ Sykes, Lanham and Tracey suggest that this is not a concept separate from the rules of natural justice. They describe the development of the use of the phrase in the following way:⁶⁵

“...natural justice principles originally only bound courts *stricto sensu* and such extensions as were made were made to authorities which performed functions similar to those of courts... It is not really surprising then that judges, steeped in this orthodoxy, had difficulty in holding that administrative authorities were bound to accord natural justice. To many of them it sounded too much like a command to administrators to act like courts. A number of English judges reacted by using the phrase ‘fairness’ as an alternative to natural justice when dealing with the newer authorities.”

2.29 There have been differing views on whether a breach of the rules of natural justice renders a decision void⁶⁶ or voidable.⁶⁷ In a recent case, *Calvin v Carr and Others*,⁶⁸ the Privy

⁶⁰ G D S Taylor, 'Natural Justice - The Modern Synthesis' [1975] *Monash University Law Review* 258, 270-278.

⁶¹ *Dimes v Grand Junction Canal Company* (1852) 3 HL Cas 759.

⁶² It appears to be necessary to establish a reasonable suspicion of bias: *R v Lusink; Ex parte Shaw* (1980) 32 ALR 47. Sykes, Lanham and Tracey, 127-128 para 1703.

⁶³ Whitmore and Aronson, 125-128.

⁶⁴ *In re HK (An Infant)* [1967] 2 QB 617, 630, *Heatley v Tasmanian Racing and Gaming Commission* (1977) 51 ALJR 703, 713.

⁶⁵ Sykes, Lanham and Tracey, 135 para 1801. *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 418.

⁶⁶ *Ridge v Baldwin* [1963] 2 All ER 66, 81 per Lord Reid and 116 per Lord Hodson.

⁶⁷ *Id.*, 88 per Lord Evershed and 120 per Lord Devlin. The other member of the House of Lords, Lord Morris, at 110 said: “The word ‘voidable’ is...apposite in the sense that it became necessary for the appellant to take his stand: he was obliged to take action for unless he did the view of the watch committee, who were in authority, would prevail. In that sense the decision of the watch committee could be said to be voidable.”

⁶⁸ (1979) 22 ALR 417, 425.

Council held that a breach of the rules of natural justice rendered a decision void, but that a decision could have some effect until it was declared to be void. The Privy Council suggested that it might be better to say that the decision was invalid or vitiated by the breach.⁶⁹ The effect of a breach of the rules of natural justice on the validity of a decision is important because if it is held to be void, the view is that the decision should be quashed, notwithstanding the existence of a privative clause. Where the decision is merely voidable, the decision remains valid until it is set aside, and the courts may refuse to intervene so as to overcome a privative clause.

6. FRAUD BY A PARTY

2.30 Where a decision is tainted with fraud, such as by perjured evidence or the suppression or falsification of evidence or information by a party or by one of his witnesses acting in collusion with him, the decision may be impugned.⁷⁰ This ground generally involves fraud practised on the decision-maker by a party. Where the fraud is on the part of the decision-maker it may be more appropriate to refer to it as bad faith.⁷¹

⁶⁹ Id, 426.

⁷⁰ *Hallahan v Campbell; Ex parte Campbell (No 2)* [1964] Qd R 337.

⁷¹ Para 2.8 above. Sykes, Lanham and Tracey, 89-90 para 1314.

CHAPTER 3 - THE REMEDIES

1. THE MAIN REMEDIES

(a) Introduction

3.1 The main¹ remedies currently available to the Supreme Court to review administrative decisions can be divided into two classes. The first comprises the prerogative writs, in particular, certiorari, prohibition and mandamus. The second comprises the remedies of injunction and declaration originally developed in the context of private law. The law relating to the remedies of certiorari, prohibition, mandamus, declaration and injunction is discussed below under the following headings -

1. The Scope and Purpose of the Remedies;
2. Discretionary Nature of the Remedies;
3. Grounds for Review;
4. Entitlement to the Remedies (Standing);
5. Practice and Procedure.

(b) The Scope and Purpose of the Remedies

3.2 As there are wide differences in the scope and purpose of the remedies, these differences must be considered by any person who wishes to have an administrative decision reviewed. Certiorari, for example, may be invoked where a decision has already been made and involves an order that the record of the decision-maker be sent to the Supreme Court. The Court has power to quash a decision in appropriate cases,² but it may not substitute its decision for that of the decision-maker. Prohibition, on the other hand, lies to restrain a decision-maker from making a decision or to prohibit action being taken to give effect to or to enforce a decision.³ As the procedure for obtaining these remedies is the same, a person may apply for them in the alternative if in doubt as to which one is the most appropriate remedy.

¹ Other remedies available to the Supreme Court are referred to in paras 3.29 to 3.36 below.

² *Rules of the Supreme Court 1971-1980*, Order 56 rule 13. The Court may also sever the invalid part of a decision from the valid part and quash the invalid part: Whitmore and Aronson, 406.

³ *R v Hibble; Ex parte The Broken Hill Pty Co Ltd* (1920) 28 CLR 456. As with certiorari, prohibition can be limited to a part of a decision or proposed course of action if only that part is invalid: *Ex parte Goodwin; Re Carruthers* (1968) 70 SR (NSW) 175.

3.3 Certiorari and prohibition are not, however, available in respect of all administrative decisions. The usual starting point in any discussion of the scope of certiorari and prohibition is a statement by Atkin L J in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co*. In this case Atkin L J said:⁴

“Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division...”

3.4 At its most restrictive, this statement has been interpreted as meaning that certiorari and prohibition can be invoked only where a duty to act in a “judicial” or “quasi-judicial” manner has been imposed on the decision-maker by the empowering statute.⁵ This approach was criticised by Lord Reid in *Ridge v Baldwin*.⁶ In Lord Reid's view it was not necessary to show that the duty to act judicially was “superadded”, but that the duty could be inferred from the nature of the power conferred on the decision-maker.⁷ This view now appears to have been accepted by the High Court of Australia. In *Banks v Transport Regulation Board (Vic)*, Barwick C J said:⁸

“The nature of the power given to the Board and the consequences of its exercise combine, in my mind, to make it certain that the Board is bound to act judicially and that its proceedings are subject to the prerogative writs. Not merely has the Parliament not given any positive indication in the statute that the Board in deciding to revoke the licence, shall not be required to act judicially and be immune from supervision in the exercise of an absolute and unfettered administrative discretion but it has specified with some precision the specific matters of which the Board should be satisfied before exercising the granted power and has imposed upon the Board the obligation to give written reasons to the licensee for its decision to revoke his licence”.

3.5 Generally, the term “legal authority” includes decisions authorised by a statute. It does not include a decision based on a contract, such as that of a private arbitrator. It is not, however, confined to decisions authorised by a statute. A decision of a government body established by executive action, and not by authority of a statute, has been held to be subject to review by certiorari. In *R v Criminal Injuries Compensation; Ex parte Lain*,⁹ for example,

⁴ [1923] All ER Rep 150, 161.

⁵ See, for example, *R v Church Assembly Legislative Committee; Ex parte Haynes Smith* [1927] All ER Rep 696, 699.

⁶ [1963] 2 All ER 66

⁷ Id, 77-79.

⁸ (1968) 119 CLR 222, 234. See also *R v Medcalf; Ex parte Conacker* [1978] WAR 53, 56-57. But cf *Testro Brothers Pty Ltd v Tait* (1963) 109 CLR 353, 362-363.

⁹ [1967] 2 All ER 770.

the decisions of a non-statutory board set up to make ex gratia payments of compensation to victims of crime were held to be reviewable by certiorari. In the course of his judgment Lord Parker CJ said:¹⁰

“We have, as it seems to me, reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially”.

3.6 Under the Atkin formulation it is also necessary to show that the rights of a subject have been affected by the determination in question. In some cases it has been suggested that this involves a distinction between rights and privileges and that mere privileges may not be protected by certiorari and prohibition.¹¹ There have, however, been more liberal approaches. It has been held that certiorari and prohibition may be used to protect the enjoyment of a personal liberty, such as the carrying on of a trade, or a legally recognised interest.¹² In *Schmidt v Secretary of State for Home Affairs*¹³ Lord Denning MR went further and said that “some legitimate expectation” could be protected, at least in cases involving a breach of the rules of natural justice.¹⁴

3.7 The decisions in respect of which mandamus, declaration and injunction apply do not appear to have been limited in the same way as certiorari and prohibition. Mandamus may be used to compel the decision-maker to whom it is directed to perform a public duty¹⁵ imposed on him. The duty may be one imposed by statute, custom or common law.¹⁶ Mandamus does not lie against the Sovereign personally¹⁷ or the Governor of the State in his capacity of

¹⁰ Id, 778.

¹¹ *The Metropolitan Meat Industry Board v Finlayson* (1916) 22 CLR 340, 344 and *Nakkuda Ali v Jayaratne* [1951] AC 66.

¹² *de Smith*, 389-392 and *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 which involved the revocation of a taxi-car licence.

¹³ [1969] 1 All ER 904, 909.

¹⁴ For a discussion of this concept by the High Court see *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 and *Heatley v Tasmanian Racing and Gaming Commission* (1977) 51 ALJR 703. See also P Cane, 'Natural Justice and Legitimate Expectation' (1980) 54 ALJ 546.

¹⁵ *Whitmore and Aronson*, 372-379. Mandamus may be granted by an interlocutory order of the Court where it is just and convenient to make such an order: *Supreme Court Act 1935-1979*, s 25(9). A modified form of mandamus is also available under a number of statutes: *District Court of Western Australia Act 1969-1978*, s 84; *Local Courts Act 1904-1976*, s 115; *Justices Act 1902-1980*, s 39.

¹⁶ *Sykes, Lanham and Tracey*, 166-167 para 2036.

¹⁷ The Law Commission said at pages 26 and 27 of its working paper, *Remedies in Administrative Law* (1971), that the rule has been justified on two grounds:

“...first, because it would be incongruous for the Crown to issue a prerogative order to command itself, and secondly, because it would be wrong to expose the Crown to the risk of committal for contempt, one penalty for disobedience to an order of mandamus. The first reason depends upon the peculiar historical origins of the prerogative writs; the second seems equally unconvincing, since there is no

Governor¹⁸ or to a minister or officer where the duty is owed to the Sovereign and not to the public by reason of a statute.¹⁹

3.8 On occasions the courts have delayed issuing a writ of mandamus in order to give the decision-maker an opportunity to make good his mistake.²⁰ If a decision-maker disobeys a writ he may be prosecuted for contempt of court.

3.9 An injunction may be either prohibitory or mandatory.²¹ A prohibitory injunction may be used to prevent a person breaching a duty and, consequently, overlaps with prohibition to some extent. As prohibition and injunction must be sought by different procedures, they cannot be sought in the alternative in one application. While it may be considered that injunction is preferable to prohibition because of the uncertainties as to the scope of the latter referred to in paragraphs 3.3 to 3.6 above, a counter-balancing factor is that the rules of standing for prohibition appear to be more liberal than those for injunction.²² The mandatory injunction may be used to direct a person to do a particular act.²³ Here too there is an overlap with a prerogative writ, in this case mandamus. Once again, the remedies cannot be sought in the alternative. Mandamus is probably the preferable remedy because of the courts' reluctance to grant a mandatory injunction and because the rules of standing for mandamus appear to be more liberal than those for an injunction.²⁴ A person in breach of an injunction can be punished for contempt of court.²⁵

3.10 Declaration is a remedy in which a statement of the legal position between a person and a decision-maker may be obtained. A declaratory judgment may be obtained in any action

need for the Crown to be dealt with in the same way, as for example, a disobedient local authority or tribunal. The immunity of Crown servants, as such, rests on the principle that one cannot enforce by indirect means that which cannot be compelled directly, but this argument depends upon the validity of the Crown's immunity".

See also de Smith, 384-385.

¹⁸ *R v The Governor of the State of South Australia* (1907) 4 CLR 1497.

¹⁹ *Tonkin v Brand* [1962] WAR 2, 21-22 per Hale J. *R v Commissioners of Inland Revenue; In re Nathan* (1884) 12 QBD 461, 472, *Ex parte Wilkes; Re Minister for Education; Ex parte Cornford; Re Minister for Education* [1962] SR (NSW) 220, 223-224.

²⁰ Whitmore and Aronson, 381.

²¹ The Supreme Court also has power to grant an interlocutory injunction " ...in all cases in which it shall appear. ..to be just or convenient" : *Supreme Court Act 1935-1979*, s 25(9). An interlocutory injunction can be granted where " ..it is desirable to preserve the *status quo* pending a trial which the plaintiff stands a reasonable chance of winning": Whitmore and Aronson, 341.

²² Paras 3.19 and 3.23 to 3.26 below.

²³ The courts are reluctant to grant a mandatory injunction: Sykes, Lanham and Tracey, 173-175 paras 2104-2106.

²⁴ Paras 3.22 to 3.26 below.

²⁵ Sykes, Lanham and Tracey, 173 para 2101.

before the Supreme Court.²⁶ Declaration cannot be used to obtain a statement of the legal position on a hypothetical question. However, the courts will not wait until an interest has actually been affected if there is a probability that an interest will be affected.²⁷

3.11 Some doubt as to whether or not declaration can be used to review the decisions of a statutory tribunal has been raised by the case of *Toowoomba Foundry Pty Ltd v The Commonwealth*.²⁸

3.12 Although the law relating to the circumstances in which a declaratory judgment can be sought is less complicated than that relating to certiorari or prohibition, it has the disadvantage that it can be used merely to declare the law and not to quash a decision or prohibit a decision from being made. Although it is generally considered to be unenforceable,²⁹ it is unlikely that a public officer would disregard a declaratory judgment. However, circumstances may arise where notwithstanding the existence of a declaratory judgment the decision-maker may have exhausted his statutory authority with the consequence that the original decision cannot be changed.

(c) Discretionary Nature of the Remedies

3.13 Each of the remedies being considered is discretionary and the Supreme Court may refuse to grant the relief sought even though the granting of relief would otherwise be justified. There appears to be one exception, namely, where a jurisdictional error appears on the face of the proceedings.³⁰ In this case, it appears that the applicant is entitled to certiorari or prohibition as of right. There are many grounds on which the courts have exercised the discretion to refuse to grant one of the remedies³¹ including -

- (i) undue delay by the applicant;³²

²⁶ *Supreme Court Act 1935-1979*, s 25(6) and Order 18 rule 16 of the *Rules of the Supreme Court 1971-1980*. *Tonkin v Brand* [1962] WAR 2, 15.

²⁷ Sykes, Lanham and Tracey, 183 para 2205.

²⁸ (1945) 71 CLR 545, 570-571. Sykes, Lanham and Tracey, 188 para 2220, Whitmore and Aronson, 290-292 and Whitmore, 201.

²⁹ Whitmore and Aronson, 309-310.

³⁰ *Id.*, 442-443.

³¹ See generally Whitmore and Aronson, 297-299 (Declaration), 350-352 (Injunction), 382-394 (Mandamus) and 442-446 (Certiorari and Prohibition).

³² No time limit has been provided for instituting proceedings by way of prohibition, injunction or declaration. An application for a writ of certiorari or mandamus must be made within six months or two months respectively of the date of the decision: *Rules of the Supreme Court 1971-1980*, Order 56 rule

- (ii) acquiescence by the applicant in the conduct of the proceeding against which he is complaining;³³
- (iii) the remedy sought would be legally ineffective;³⁴
- (iv) the applicant's conduct does not merit the relief sought;³⁵
- (v) the application, if granted, would permit an unlawful purpose to be achieved;³⁶
- (vi) the availability of other remedies.³⁷

One ground on which mandamus may be refused warrants special mention, namely, that mandamus will not be granted unless it is necessary. The best way of establishing that mandamus is necessary is for the applicant to show that he has demanded that the duty be performed and that the decision-maker has failed to comply with that demand.³⁸

(d) Grounds for Review

3.14 Although there are grounds for review which are common to two or more of the remedies, there are also differences in the grounds between the remedies which add to the difficulty of choosing the most appropriate remedy and the remedy most likely to be successful. A breach of the rules of natural justice is a ground of review for certiorari, prohibition, injunction and declaration. However, it is not clear whether a breach of the rules of natural justice will amount to a constructive refusal to perform a duty³⁹ and so provide a ground for seeking mandamus. Fraud is another ground which is common to certiorari, prohibition, injunction and declaration.

3.15 The grounds of jurisdictional error and ultra vires are grounds for the remedies of certiorari, prohibition and declaration. The most common administrative law application of injunction is where a decision-maker's conduct or proposed course of conduct is ultra vires. However, there is some doubt as to whether or not an injunction may be used to restrain a

11(1) and rule 27 respectively. The discretion to refuse relief may be exercised even though an application has been made within the prescribed period: *R v Inner London Crown Court; Ex parte London Borough of Greenwich* [1976] 1 All ER 273.

³³ *R v Magistrate's Court at Lilydale; Ex parte Ciccone* [1973] VR 122.

³⁴ *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222, 243 per McTiernan, J.

³⁵ *Permanent Trustee Co of New South Wales Ltd v Municipality of Campbelltown* (1960) 105 CLR 401, 413.

³⁶ *Wydgee Pastoral Co Pty Ltd v Registrar of Titles* [1963] WAR 176.

³⁷ *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 43-45.

³⁸ Whitmore and Aronson, 354.

³⁹ Id, 360.

tribunal from exceeding its jurisdiction.⁴⁰ Jurisdictional error may also provide a ground for mandamus. A decision-maker who has entered upon an inquiry may be held to have failed to perform a duty if he has failed to apply “himself to the question which the law prescribes”⁴¹ or his approach “reveals a basic misunderstanding” of the law.⁴² Mandamus may also be used to review a decision on the ground that the purported exercise of a power was invalid. In these cases the basis for review is that the error is tantamount to a failure to exercise the power.⁴³ The decision-maker can be compelled by mandamus to determine the matter according to law.

3.16 An error of law which goes to jurisdiction or makes the decision ultra vires⁴⁴ is a ground for review under all the remedies, whether or not the error appears on the face of the record. Other errors of law are not a ground for review,⁴⁵ except in the case of certiorari, and then only if the error appears on the face of the record. There appears to be no logical reason for according special treatment to certiorari or distinguishing errors on the face of the record from other errors.

3.17 As the purpose of mandamus is to compel a decision-maker to perform a public duty which has been imposed on him, it is not surprising that a failure to perform a public duty is the principal ground upon which an application for mandamus can be sought. Mandamus is not, however, the only remedy which can be sought on this ground. Declaration may also be sought to declare that a decision-maker is under a duty to perform an act.⁴⁶ A mandatory injunction is another remedy which could possibly be sought on this ground. However, there is considerable doubt as to whether it is available.⁴⁷

(e) Entitlement to the Remedies (Standing)

3.18 The law relating to the entitlement of a person to apply for one of the main remedies, that is whether or not a person has standing, is one of the most unsatisfactory aspects of the

⁴⁰ Id, 349-350; Sykes, Lanham and Tracey, 176-178 paras 2111-2113.

⁴¹ *R v Harlock; Ex parte Stanford and Atkinson Pty Ltd* [1974] WAR 101, 105.

⁴² *Re Mulligan; Ex parte Isidoro* [1979] WAR 198, 201.

⁴³ de Smith, 123.

⁴⁴ Paras 2.4 to 2.18 above.

⁴⁵ For declaration see *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448. But cf *London Borough of Ealing v Race Relations Board* [1972] 1 All ER 105. Sykes, Lanham and Tracey, 188-190 paras 2222-2226. P Cane, 'A Fresh Look At Punton's Case' (1980) 43 MLR 266.

⁴⁶ *Tonkin v Brand* [1962] WAR 2.

⁴⁷ Whitmore and Aronson, 347-348.

existing law. Not only do the rules vary between the various remedies, but the law relating to a number of the remedies is uncertain.

(i) Prohibition

3.19 Any party to adversary proceedings generally has standing to obtain prohibition.⁴⁸ The law relating to the standing of a person who is not a party is less certain. It has been held that a person who is not a party to the proceedings has standing where the court is clearly convinced that there is a defect of jurisdiction.⁴⁹ This approach appears to have been based on the original purpose of prohibition, that is, protection of the royal prerogative by enabling any person to bring to the attention of the review court an excess of jurisdiction by an inferior court.⁵⁰ More emphasis is now placed on protecting private interests. It appears that the courts have a discretion to refuse to grant prohibition where an application is made by a person other than a party. If such an applicant is “aggrieved” by the decision, the discretion is likely to be exercised favourably.⁵¹

(ii) Certiorari

3.20 Where an applicant is a “person aggrieved”, the applicant is entitled to a writ of certiorari, but the courts have a discretion to refuse to grant the relief sought if his conduct has been such as to disentitle him to the relief.⁵² If an applicant is not a person aggrieved, the courts have a discretion as to whether or not to grant relief, a discretion which is rarely likely to be exercised in favour of an applicant.⁵³

3.21 There is, however, uncertainty over who can be said to be a person aggrieved. In *Ex parte Sidebotham*,⁵⁴ for example, it was held that a person aggrieved must be a person who has suffered a legal grievance. A more liberal construction was adopted in *Re Liverpool Taxi Owners’ Association*. In this case Lord Denning MR said:⁵⁵

⁴⁸ Stein, 57.

⁴⁹ *Worthington v Jeffries* (1875) LR 10 CP 379, 383.

⁵⁰ de Smith, 416-417.

⁵¹ Stein, 68-69.

⁵² de Smith, 418.

⁵³ *R v The Justices of Surrey* (1870) LR 5 QB 466, 473. de Smith 418-419.

⁵⁴ (1880) 14 Ch D 458, 465.

⁵⁵ [1972] 2 All ER 589, 595.

“The writs of prohibition and certiorari lie on behalf of any person who is a ‘person aggrieved’, and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him”.

(iii) Mandamus

3.22 A number of different approaches have also been taken to the question of standing to sue in the case of mandamus. In the early cases it was held that only a person with a legal specific right could enforce the performance of a public duty.⁵⁶ This appears to mean that the applicant must establish the existence “...of a concomitant duty owed to him as an individual”.⁵⁷ More liberal approaches have, however, been adopted. In *Ex parte Northern Rivers Rutile Pty Ltd; Re Claye*⁵⁸ it was suggested that the applicant must have a substantial personal interest in the performance of the duty. In *R v Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd*⁵⁹ a person “aggrieved” was said to have standing. In *R v Metropolitan Police Commissioner; Ex parte Blackburn*⁶⁰ it was suggested that a person had standing if he had a “sufficient interest” to be protected.⁶¹

(iv) Injunction and Declaration

3.23 Although injunction and declaration are private law remedies which have been adopted in the administrative law sphere, the rules of standing have not been adapted and they continue to be based on the need to establish some interference with a private right of a person.

3.24 An injunction may be obtained by a person where an interference with a public right also involves an interference with some private right that he has. A public right includes a statutory provision enacted for the benefit or interest of the public generally.⁶² Where an interference with a public right does not involve interference with a private right, a person has

⁵⁶ *R v The Guardians of the Lewisham Union* [1897] 1 QB 498, 501. *R v The Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis* (1954) 90 CLR 55. *R v Harlock; Ex parte Stanford and Atkinson Pty Ltd* [1974] WAR 101, 105-106. Whitmore and Aronson, 481-484.

⁵⁷ *Environmental Defence Society Inc v Agricultural Chemicals Board* [1973] 2 NZLR 758, 763.

⁵⁸ (1968) 89 WN (Pt 2) (NSW), 13.

⁵⁹ [1965] 2 All ER 836, 840-841.

⁶⁰ [1968] 1 All ER 763, 770.

⁶¹ The movement towards this approach was particularly strong in England: *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 97.

⁶² Benjafield and Whitmore, 224-225.

standing to sue if he can show that he has suffered some special damage peculiar to himself as a result of the interference with the public right,⁶³ that is, if he can show that he has a grievance significantly greater than that of other members of the community⁶⁴ or damage peculiar to himself.⁶⁵ The meaning of this rule was recently considered by the High Court in *Australian Conservation Foundation Incorporated v The Commonwealth of Australia*.⁶⁶ Gibbs J said that the requirement that there be some special damage peculiar to the applicant was equivalent in meaning to “having a special interest in the subject matter of the action,⁶⁷ and that.”⁶⁸

“...an interest...does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.”

3.25 In other cases it is necessary for the Attorney General to sue ex officio or to be joined with the applicant either as a co-plaintiff or at the relation of a private plaintiff. The Attorney General has standing to sue where an act of a public authority is ultra vires because such an act is a public wrong.⁶⁹ The Attorney General has a discretion whether or not to intervene and the Courts will not review a decision to agree⁷⁰ or to refuse to agree⁷¹ to intervene.

3.26 A relator action usually involves the applicant approaching the Attorney General and relating to him the facts on which it is alleged that the decision-maker is breaching the law. The Attorney General may give his consent or fiat to the institution of proceedings. Where the Attorney General allows a proceeding to be instituted, the consent of the Attorney General

⁶³ *Boyce v Paddington Borough Council* [1900-1903] All ER Rep Ext 1240, approved recently by the High Court in *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 28 ALR 257.

⁶⁴ Whitmore and Aronson, 330-333; Sykes, Lanham and Tracey, 179-180 paras 2123 and 2124.

⁶⁵ de Smith, 451.

⁶⁶ (1980) 28 ALR 257.

⁶⁷ Id, 268.

⁶⁸ Id, 270.

⁶⁹ *Attorney-General v Sharp* [1930] All ER Rep 741, 746.

⁷⁰ *London County Council v The Attorney-General* [1902] AC 165.

⁷¹ *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70.

must be filed with the originating process.⁷² The proceeding is usually conducted by the applicant and not the Attorney General.⁷³

3.27 The rules of standing for declaration appear to be the same as those for injunction.⁷⁴ There are, however, decisions which suggest that the applicant need only establish that he has a “real interest” in the suit.⁷⁵

(f) Practice and Procedure

3.28 As the remedies of injunction and declaration are private law remedies they may be sought in an ordinary civil action. Certiorari, prohibition and mandamus, on the other hand, cannot be sought in an ordinary civil action and must be sought in “wholly distinct forms of proceedings”.⁷⁶ This means that one or other of the prerogative writs and the private law remedies of injunction and declaration cannot be sought in the alternative in a single proceeding. The existence of two distinct procedures means that a person who wishes to impugn a decision must choose the most appropriate remedy with which to proceed. This choice can, however, be a difficult one to make because of the uncertain nature of certain aspects of the law and because there are some fine distinctions between the remedies. An otherwise justifiable claim may be defeated if the applicant's choice of remedy is not the most appropriate in the circumstances. In *Punton v Ministry of Pensions and National Insurance (No 2)*,⁷⁷ for example, a declaratory judgment was refused because the decision-maker's error was a non-jurisdictional error on the face of the record. The decision in this case might have been different if the applicant had applied for certiorari or had been able to apply for certiorari as an alternative to declaration.

⁷² *Rules of the Supreme Court 1971-1980*, Order 18 rule 11(2). See generally, de Smith, 449-450.

⁷³ Whitmore and Aronson, 337-338.

⁷⁴ *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 28 ALR 257, 267.

⁷⁵ Whitmore and Aronson, 479.

⁷⁶ Professor S A de Smith, *Report of the Committee on Administrative Tribunals and Enquiries* (1957 Cmnd 218), Minutes of Evidence, Appendix I, 10. The procedure for certiorari, prohibition and mandamus is prescribed in Order 56 of the *Rules of the Supreme Court 1971-1980*.

⁷⁷ [1964] 1 All ER 448.

2. OTHER REMEDIES

(a) Introduction

3.29 Apart from the remedies referred to above, there are a number of other remedies which either have a limited scope for use in the administrative law area, such as habeas corpus, or which are rarely likely to be used in this area, namely, procedendo, quo warranto and relief in the nature of a civil action for a statutory mandamus. The scope of these remedies is discussed briefly below. In any reform of the law relating to the main remedies it will be necessary to consider the relationship between these remedies and the reforms proposed.

(b) Habeas Corpus

3.30 Habeas corpus is a process for securing the liberty of the subject.⁷⁸ It is a writ of right, and issues when cause has been shown. A person who has been unlawfully detained or any person entitled to obtain a writ for the purpose of liberating another from illegal detention or custody may apply for the writ. In the State sphere it may be used where, for example, a person has been detained under the *Mental Health Act 1962-1979*.⁷⁹

3.31 The effect of the writ of habeas corpus is to secure the speedy release of a subject from illegal detention or custody. The appropriate means of enforcing obedience is by attachment for contempt.

(c) Procedendo

3.32 The writ of procedendo is, under certain circumstances, a sequel to the issue of a writ of prohibition.⁸⁰ Where a writ of prohibition has been issued and it is afterwards shown that relief ought to be given against the judgment or order by which the writ was awarded, the Court may direct a writ of procedendo to issue commanding the judicial tribunal to which the writ of prohibition was issued to proceed or hear or determine the matter as if the writ of prohibition had not been issued.

⁷⁸ See generally Whitmore and Aronson, 447-470.

⁷⁹ See *R v Board of Control; Ex parte Ratty* [1956] 1 All ER 769.

⁸⁰ *Rules of the Supreme Court 1971-1980*, Order 56 rule 32 and Form No 70.

(d) Quo Warranto

3.33 An information in the nature of quo warranto is the modern form of the obsolete writ of quo warranto. The proceedings, though criminal in form, are deemed to be civil in nature.⁸¹ The information lies against a person who has claimed or usurped an office, the duties of which are of a public nature.⁸² The holder must have exercised the office: a mere claim to exercise it is not sufficient.⁸³

3.34 The Attorney General, or any person who has a sufficient interest, may apply for leave to exhibit an information of quo warranto.⁸⁴

3.35 The courts have adopted a wide approach to the question of standing, for example, in *R v Speyer*,⁸⁵ it was held that any member of the public could apply, even if he had no private interest to serve, so long as the public interest in respect of a matter concerning public government was affected.

(e) Relief of the Nature of Civil Action for a Statutory Mandamus

3.36 In 1854, the English *Common Law Procedure Act* created an action for a statutory mandamus. Section 68 of the Act provided that a notice that the plaintiff intended to claim a writ of mandamus could be endorsed upon a writ of summons in an ordinary civil action. This form of proceeding appears to have been adopted in Western Australia by virtue of s.16(1)(a) of the *Supreme Court Act 1935-1979*. The procedure for this particular type of action was prescribed by Order 52 of the *Rules of the Supreme Court 1909*. However, those Rules were revoked by the *Rules of the Supreme Court 1971-1980*.⁸⁶ Although the Rules do not now make provision for the procedure for such an action, the right to bring an action for a statutory

⁸¹ *Supreme Court Act 1935-1979*, s 36 and Order 56 rules 34 and 35 of the *Rules of the Supreme Court 1971-1980*.

⁸² de Smith, 463. Writs of quo warranto and informations in the nature of quo warranto to question the title of a person to act in the office of member of a local government council have been abolished by s 155(1) of the *Local Government Act 1960-1980*.

⁸³ de Smith, 464.

⁸⁴ *Rules of the Supreme Court 1971-1980*, Order 56 rules 1 and 35.

⁸⁵ [1916] 1 KB 595.

⁸⁶ *Rules of the Supreme Court 1971-1980*, The First Schedule.

mandamus may not be affected. The exact scope of the action for a statutory mandamus, and in particular whether or not it can be used to enforce a public duty, is unclear.⁸⁷

3. COLLATERAL PROCEEDINGS

3.37 Apart from the various remedies already referred to in this paper, the validity of an administrative decision may also be challenged in civil or criminal proceedings.⁸⁸ For example, a person charged with an offence created by a regulation may be able to claim that the regulation is invalid because it is inconsistent with the statute under which it was purported to be made.

3.38 In an action against a person by a government authority a person may be able to use the doctrine of estoppel in order to prevent the authority from denying the existence of some state of fact.⁸⁹ Estoppel provides a defence to a cause of action, not a separate cause of action. In an action for an injunction to prevent a company from using land for a purpose for which consent had been granted by a council, for example, the council may be estopped from denying that it had given its consent.⁹⁰

⁸⁷ See generally Whitmore and Aronson, 394-402 and Sykes, Lanham and Tracey, 169-170 paras 2041 and 2042.

⁸⁸ See, generally, Wade, 283-289, and Sykes, Lanham and Tracey, Chp 23.

⁸⁹ See generally Garner, 172-175.

⁹⁰ *Brickworks Limited v The Council of the Shire of Warringah* (1963) 108 CLR 568, 577.

CHAPTER 4 - EXCLUSION OF JUDICIAL REMEDIES

1. PRIVATIVE CLAUSES

4.1 Legislatures have on occasions attempted to exclude or limit the review of administrative decisions by the courts by specific statutory provisions. These clauses, known as “privative clauses” and sometimes called “ouster clauses”, tend to be construed narrowly and only clear and explicit words will deprive the courts of their jurisdiction.¹

4.2 Perhaps the most significant technique in the context of this paper is the use of clauses which specifically restrain the use of the prerogative remedies or any other remedy. Section 34 of the *Industrial Arbitration Act 1979-1980* provides, for example:

“(3) Proceedings before the President, the Full Bench, or the Commission shall not be impeached or held bad for want of form nor shall they be removable to any court by certiorari or otherwise.

(4) Except as provided by this Act, no award, order, declaration, or proceeding of the President, the Full Bench, or the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court on any account whatsoever”.

Even such explicit clauses do not completely oust the supervisory jurisdiction of the Supreme Court. In *R v Court of Arbitration; Ex parte Amalgamated Collieries of WA Ltd*,² for example, the court held that a section in terms similar to the one referred to above did not prevent the Supreme Court from issuing a writ of certiorari or prohibition where the decision-maker acted outside its jurisdiction, that is, the authority conferred on it by Parliament.

4.3 The Commission has carried out a survey to ascertain which statutes in Western Australia contain privative clauses. Apart from the provision referred to in paragraph 4.2 above, the Commission has found privative clauses in the *District Court of Western Australia Act 1969-1978*, sections 80 and 84, *Local Courts Act 1904-1976*, sections 113 and 115, and the *Justices Act 1902-1980*, section 147. However, these Acts contain relatively extensive appeal rights and it may be for this reason that privative clauses were incorporated in the Acts.

¹ *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1, 6.

² [1960] WAR 147. See also *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181, *Anisimic Limited v The Foreign Compensation Commission* [1969] 1 All ER 208 and *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 WLR 318.

4.4 Privative clauses are also found in the *Workers' Compensation Act 1912-1979*³ and the *Public Service Arbitration Act 1966-1978*.⁴ The Workers' Compensation Board does, however, have power to state a case to the Full Court of the Supreme Court on a question of law.⁵ In the case of a number of decisions of the Public Service Arbitrator there is a right of appeal to the Western Australian Industrial Appeal Court on the ground that the decision was erroneous in law or in excess of jurisdiction.⁶ *The Small Claims Tribunals Act 1974-1978* is another Act which contains a privative clause. Section 19 of this Act provides that no prerogative writ may be issued and no declaratory judgment may be given in respect of proceedings or an order of a Small Claims Tribunal unless the court before which the writ or judgment is sought is "...satisfied that the tribunal had or has no jurisdiction conferred by this Act to take the proceeding or that there has occurred therein a denial of natural justice to any party to the proceeding". The *Parliamentary Commissioner Act 1971-1976* also has a privative clause. Section 30(3) provides that no prerogative writ may be issued to compel the Commissioner to carry out any investigation.⁷

2. DISCRETIONARY POWERS

4.5 A second means by which the power of courts to review administrative decisions may be limited is by granting a decision-maker a wide discretionary power.⁸ The granting of such wide powers has not led to the complete exclusion of judicial review because the courts have developed the doctrine of extended ultra vires as a ground for review.⁹

3. DEEMING PROVISIONS

4.6 A third means of restricting review, at least, of subordinate legislation, is by the use of "deeming provisions" or "as if enacted" clauses. The purpose of these clauses is to place subordinate legislation in the same position as the Act authorising it. These clauses have been restricted by the courts by requiring that any procedural conditions precedent to the making of

³ Section 29(1).

⁴ Section 25.

⁵ *Workers' Compensation Act 1912-1979*, s 29(9).

⁶ *Public Service Arbitration Act 1966-1978*, s 26(1).

⁷ Section 30(1) of the Act provides that neither the Commissioner nor any of his officers is liable to any civil action for any act purportedly done under the Act, whether on the ground of want of jurisdiction or any other ground, unless the act was done negligently or in bad faith.

⁸ See, for example, *R v Medcalf; Ex parte Conacker* [1978] WAR 53.

⁹ Paras 2.6 to 2.13 above.

the subordinate legislation be complied with and that the subordinate legislation be consistent with the other provisions of the Act.¹⁰

4. TIME LIMITS

4.7 A fourth means by which judicial review can be limited is by the provision of time limits for the commencement of proceedings.¹¹ Even if a time limit is provided for one remedy, such as certiorari, it may be possible to apply for another remedy, such as declaration.

5. FINALITY CLAUSES

4.8 A fifth means used to limit or exclude the jurisdiction of the courts is the use of a provision which provides that a decision is final and without appeal.¹² Although such a clause excludes any possibility of an appeal it does not affect the supervisory jurisdiction of the Supreme Court because that jurisdiction does not depend on the existence of a statutory right of appeal.¹³

¹⁰ Sykes, Lanham and Tracey, 242-243, paras 2905 and 2906.

¹¹ *Rules of the Supreme Court 1971-1980*, Order 56 rule 11(1).

¹² See, for example, s 33B(2)(c) of the *Main Roads Act 1930-1980*.

¹³ Sykes, Lanham and Tracey, 243-244, para 2907. See also Whitmore and Aronson, 490-492.

PART III: APPROACHES TO REFORM

CHAPTER 5 - THE NEED FOR REFORM

5.1 As the discussion in Chapter 3 indicates, the existing law is befuddled with fine distinctions which make the law unnecessarily complex. Much of the complexity arises from the fact that a number of remedies have been adopted and developed to meet an increasing demand for judicial review associated with a more complex social structure and a more extensive control of the activities of individuals by the government. The law has been developed in a case by case manner and has not developed a rational and coherent body of law. Attempts have been made to rationalise the law from time to time. Perhaps the most important attempt was that made in the *Anisminic* case.¹ Nevertheless, Professor S A de Smith's summation of the state of the law in 1957 appears to be as well founded today as it was then:²

“Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals - remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action”.

5.2 Examples of the fine distinctions are the fact that certiorari may be sought for a non-jurisdictional error of law only if the error appears on the face of the record,³ that decisions of statutory tribunals may be reviewed by certiorari, prohibition, mandamus and injunction but possibly not by declaration,⁴ that the distinction between jurisdictional errors and errors of law within jurisdiction may have been abolished in respect of decisions of “administrative tribunals or authorities” but not inferior courts,⁵ and that there are differences in the rules of standing between the various remedies.⁶ The law is also needlessly uncertain, for example, the law relating to the circumstances in which certiorari or prohibition is available, in particular the need to show that the decision-maker was under a “duty to act judicially” is uncertain and

¹ Para 2.17 above.

² *Report of the Committee on Administrative Tribunals and Enquiries* (1957 Cmnd 218), Minutes of Evidence, Appendix I, 10.

³ Para 3.16 above.

⁴ Para 3.11 above.

⁵ Paras 2.17 and 2.18 above.

⁶ Paras 3.18 to 3.27 above.

there is doubt as to what constitutes the “record” where it is alleged that an error of law appears on the face of the record. The scope of judicial review also appears to be unnecessarily limited in some respects, for example, although injunction and declaration have been used to control excesses of public power, the rules of standing for those remedies remain those applicable to disputes between private individuals, rules more restrictive than those applicable to the other main remedies.

5.3 The existence of these fine distinctions, areas of uncertainty and limitations make the choice of the most appropriate remedy in the circumstances of the case difficult. The difficulty is exacerbated because the remedies must be sought by two “wholly distinct forms of proceedings”: one form applicable to certiorari, prohibition and mandamus, the other form applicable to injunction and declaration. The choice of a remedy which is not the most appropriate in the circumstances of the case can mean that an otherwise justifiable claim will be defeated.⁷ These matters are not the only matters which make the existing law unnecessarily complex. There are also matters of a procedural nature, such as -

- (1) that the time limit on applications for certiorari is six months whereas there is no time limit for declaration;
- (2) while interlocutory proceedings, such as interrogatories and the discovery and inspection of documents, may be obtained in an action for declaration or injunction, it is not clear whether they may be sought in an application for certiorari, prohibition or mandamus;⁸
- (3) that applications for certiorari, prohibition and mandamus are determined on the basis of affidavit evidence and, consequently, are not suited to resolving disputes as to fact which might arise.

5.4 In view of the difficulties with the existing law referred to above and in the earlier chapters, the Commission considers that reform of the principles and procedures for the judicial review of administrative decisions is necessary. The Commission is not the only body to have reached such a conclusion. Apart from calls for reform made by academic writers and

⁷ Para 3.28 above.

⁸ Interlocutory proceedings are available in respect of a “cause” or “matter”: *Rules of the Supreme Court 1971-1980*, Orders 26 and 27. As proceedings for certiorari and prohibition appear to be a “matter” it may be argued that interlocutory proceedings are available. However, it may be argued that Order 56 of the *Rules of the Supreme Court 1971-1980* relating to the prerogative writs is a self-contained code of procedure and that the interlocutory proceedings are not available. For one case in which the availability of interlocutory proceedings was important see para 10. 23 below.

the courts themselves the same conclusion has been reached by the following bodies which have made specific proposals for reform:

England

- * Justice⁹: *Administration Under Law* (1971);
- * The Law Commission: *Report on Remedies in Administrative Law* (1976 Cmnd 6407);

New Zealand

- * Public and Administrative Law Reform Committee: *Fourth Report* (1971) and *Fifth Report* (1972);

Canada

- * Ontario Royal Commission Inquiry into Civil Rights, Report No 1 (Vol 1) (1968);
- * Law Reform Commission of British Columbia: *Civil Rights: Part 4 - A Procedure for Judicial Review of the Actions .of Statutory Agencies* (1974);
- * Law Reform Commission of Canada: *Judicial Review and the Federal Court* (1980);

Australia

- * Statute Law Revision Committee (Victoria): *Prerogative Writs* (1971);
- * Commonwealth Administrative Review Committee Report (1971 Parliamentary Paper No 144) , referred to as the “Kerr Committee”;
- * Committee of Review (Cth): *Prerogative Writ Procedures* (1973 Parliamentary Paper No 56), referred to as the “Ellicott Committee”.

The following chapter contains a discussion of three approaches to reforming the law adopted elsewhere, namely -

- (1) the use of existing civil action procedures;
- (2) a new procedure; and
- (3) reform of the principles of judicial review.

⁹ Justice is the British Section of the International Commission of Jurists.

CHAPTER 6 - REFORM OF THE LAW ELSEWHERE

1. USE OF EXISTING CIVIL ACTION PROCEDURES

(a) Introduction

6.1 One approach to reform has been the application of the procedure for ordinary civil actions, a procedure which already applies to proceedings for declaration and injunction, to proceedings for certiorari, prohibition and mandamus.¹ This approach, which means that it is no longer necessary to have two distinct forms of procedure depending on the remedy sought, has been adopted in New South Wales² and Victoria.³

(b) Description of the Reform

6.2 In New South Wales, for example, the Supreme Court has power to grant relief against an administrative decision by way of certiorari, prohibition and mandamus in proceedings commenced by way of a summons. The Court also has power to grant an injunction⁴ and to make a declaratory order⁵ in proceedings commenced by either a summons or statement of claim.⁶ Damages may also be sought in an appropriate case, but the proceedings must, in

¹ The New Zealand Supreme Court Procedure Revision Committee has recommended that a similar approach be adopted in New Zealand: *Draft Revised Code of Civil Procedure* (1975). Recently there has been agreement between the Committee and the New Zealand Public and Administrative Law Reform Committee that this revised procedure should apply only to the dwindling category of applications for judicial review which could not be dealt with under the *Judicature Amendment Act 1972* (NZ) referred to in paras 6.9 to 6.23 below: New Zealand Public and Administrative Law Reform Committee, Twelfth Report, 17 para 20.

² *Supreme Court Act 1970-1980* (NSW), s 69(1). *Rules of the Supreme Court 1970-1980* (NSW), Part 54 rules 3 and 4.

³ In Victoria, a writ of summons may be used to seek relief where an applicant could seek a writ of certiorari, mandamus or prohibition: *Rules of the Supreme Court* (Vic), Order 3 rule 1A. Although the Commission has been unable to obtain precise information on the number of occasions on which this procedure has been used since it was first introduced in 1966, the Commission understands that it may have been used on only one occasion. In Victoria applications for certiorari, prohibition and mandamus may still be made by way of an ex parte application similar to the existing procedure in Western Australia. The Commission understands that since 1966 there have been approximately 228 applications for certiorari, prohibition and mandamus by means of this procedure. A new procedure has also been created in Victoria by the *Administrative Law Act 1978-1980*: see Appendix VI.

⁴ *Supreme Court Act 1970-1980* (NSW), s 66.

⁵ *Id.*, s 75.

⁶ *Rules of the Supreme Court 1970-1980* (NSW), Part 4 rules 1 and 3.

some cases, be commenced by way of a statement of claim.⁷ Proceedings commenced by way of a statement of claim generally involve pleadings and interlocutory proceedings such as interrogatories and the discovery and inspection of documents. This procedure is preferable where there is likely to be a dispute of fact. Proceedings commenced by summons are disposed of summarily without any pleadings or interlocutory proceedings unless the court has ordered otherwise.⁸

6.3 As the Court has power to grant any appropriate remedy notwithstanding that the remedy was not sought in the summons or statement of claim,⁹ an application for a judgment will not be defeated merely because the remedy sought is inappropriate.

6.4 The new procedure referred to above was introduced in 1970.¹⁰ It was followed in 1973 by the creation of an Administrative Law Division of the Supreme Court.¹¹ The proceedings which must be assigned to the Division are listed in section 53(3B) of the *Supreme Court Act 1970-1980* and Schedule H of the *Rules of the Supreme Court 1970-1980*. They include proceedings:¹²

- “(i) for commanding or otherwise requiring a public body or a public officer to perform a public duty;
- (ii) for prohibiting or otherwise restraining a public body or a public officer from performing or purporting to perform any act;
- (iii) for determining by declaration or otherwise any matter concerning the powers of a public body or a public officer”.

(c) General Comments

6.5 The major advantage of assimilating proceedings for the prerogative remedies to those for civil proceedings is that one or more of the main remedies can be sought in the same action. An applicant's claim will not be defeated merely because he has applied for a remedy

⁷ Id, Part 4 rule 2(1)(a)-(c). See also *Rules of the Supreme Court* (Vic), Order 53 rules 1A and 4A. The desirability of allowing an application for judicial review to be accompanied by a claim for damages is discussed in paras 10.10 and 10.11 below.

⁸ *Rules of the Supreme Court 1970-1980* (NSW), Part 5 rule 11.

⁹ Id, Part 40 rule 1.

¹⁰ A form of statutory mandamus was also introduced: *Supreme Court Act 1970-1980* (NSW), s 65 and *Dickinson v Perrignon* [1973] 1 NSWLR 72.

¹¹ *Supreme Court Act 1970-1980* (NSW), s 38.

¹² Id, s 53 (3B)(b).

which was not appropriate. If, for example, an application were made for a declaratory judgment and the applicant did not have standing to apply for that relief, the court could still grant relief in the nature of certiorari, assuming the case fell within the scope of that remedy. Such an approach would also overcome the difficulty and uncertainty surrounding the choice of the most appropriate remedy highlighted by the case of *Punton v Ministry of Pensions and National Insurance (No2)* referred to in paragraph 3.28 above. If a declaration were applied for on a ground for which declaration were not available, for example a non-jurisdictional error of law on the face of the record, the action would not be defeated, because the court could grant relief in the nature of certiorari. The court could also award damages in appropriate cases, for example, where there had been a breach of contract or a tortious act. All proceedings with respect to administrative decisions or actions could therefore be instituted by the same procedure.

6.6 This approach to reform is entirely procedural and perhaps its major shortcoming is that it does not involve any reform of the principles of judicial review to overcome the problems referred to in paragraphs 5.1 and 5.2 above. In determining the scope of the various remedies, the grounds for review, and the law relating to standing it is still necessary to look to the law and principles referred to in the previous chapters. Further reform of the principles, such as the introduction of uniform rules of standing,¹³ would be required to remove this necessity.

6.7 Although the English Law Commission considered recommending the application of the existing civil action procedures to proceedings for certiorari, prohibition and mandamus, the Commission ultimately favoured another approach.¹⁴ The Commission suggested that it may be undesirable to assimilate proceedings for the judicial review of administrative decisions to that for the ordinary civil action because "...the procedure applicable to private law actions has its own difficulties and, in particular, opportunities for delay"¹⁵ These delays could arise from the need to deliver pleadings, conduct interlocutory proceedings and to set the matter down for hearing. However, such proceedings would not be necessary in every case and there would not be the same opportunity for delay if the matter were disposed of summarily without such proceedings as is possible in New South Wales.

¹³ The reform of the rules of standing is discussed in Chapter 8.

¹⁴ Paras 6.8 to 6.24 below.

¹⁵ The Law Commission, *Report on Remedies in Administrative Law* (1976, Cmnd 6407) 17 para 36.

2. A NEW PROCEDURE

(a) Introduction

6.8 The assimilation of proceedings to a civil action has the effect of providing a single procedure for obtaining relief by way of the main remedies. A similar result has been achieved in New Zealand and England by the creation of a new remedy.¹⁶ The nature of the new remedy created in those jurisdictions is discussed below.

6.9 The law relating to the judicial review of administrative decisions in New Zealand was considered by the New Zealand Public and Administrative Law Reform Committee in its Fourth Report in 1971 and Fifth Report in 1972. The Committee recommended that the law be reformed by improving the procedure for obtaining a review, leaving the substantive law untouched. In examining the existing law, the Committee noted that because of the differences in the conditions and restrictions which govern the various remedies it is difficult for litigants to determine which remedy is appropriate in a particular case. The Committee said:¹⁷

“In our view a citizen is entitled to a system that is less complex and uncertain - it is wrong that so much can depend upon the particular remedy sought by a litigant. We consider that the ascendancy exerted by procedure today can readily be corrected by a simple addition to the law.”

The Committee therefore recommended that an additional remedy, an “application for judicial review” be provided. The Committee recommended that on such an application the Court should have power to grant any relief to which the applicant would be entitled in any proceeding for mandamus, certiorari, prohibition, declaration, injunction or any combination of them.¹⁸ The Appendix to the Committee's Fifth Report contains a draft bill setting out the Committee's recommendations in detail.¹⁹ The draft bill was based on a bill introduced in Ontario to give effect to a number of the recommendations of the McRuer Report on Civil Rights.²⁰

¹⁶ A new, less extensive, remedy has been created in Victoria by the *Administrative Law Act 1978-1980*: see Appendix VI. Another jurisdiction in which a new remedy has been created is the Commonwealth of Australia. This remedy, which involves reform of the principles of judicial review, is discussed in paras 6.32 to 6.50 below.

¹⁷ Fourth Report of the Public and Administrative Law Reform Committee (1971), 14.

¹⁸ Id, 16.

¹⁹ Fifth Report of the Public and Administrative Law Reform Committee (1972).

²⁰ See now the Ontario *Judicial Review Procedure Act 1971*.

6.10 The Committee's recommendations were adopted in 1972 with the enactment of the *Judicature Amendment Act 1972*. The operation of that Act was kept under review by the Committee and in 1975 the Committee recommended that the Act be amended in the light of experience gained from its first two years' operation.²¹ These recommendations were adopted with the enactment of sections 10-14 of the *Judicature Amendment Act 1977*.

6.11 The law relating to the review of administrative decisions in England was considered by the Law Commission in its Report, *Remedies in Administrative Law*.²² The Commission recommended the adoption of an approach which is similar to that adopted in New Zealand. These recommendations were adopted in 1977 by an amendment to the *Rules of the Supreme Court*.²³

(b) The New Remedy

6.12 The most important reform brought about by the *Judicature Amendment Act 1972* (NZ) was the introduction of the remedy by way of an application for review.²⁴ The application is made to the High Court.²⁵ Where, however, a proceeding is commenced by a writ or order of or in the nature of mandamus, prohibition or certiorari and the proceeding could have been commenced by an application for review it must be treated, and disposed of, as if it were an application for review.²⁶ Where a proceeding is commenced by proceedings for a declaration or injunction, any party to the proceeding may apply to the Court to have it treated and disposed of as if it were an application for review.²⁷

6.13 In England the new remedy which has been created is called an "application for judicial review". The application is made to a Divisional Court of the Queen's Bench Division, except in vacation when it may be made to a judge in chambers.²⁸

²¹ Eighth Report of the Public and Administrative Law Reform Committee (1975), 18-21 and the draft bill and explanatory notes appended to the Report.

²² *Remedies in Administrative Law* (1976, Cmnd 6407).

²³ *Rules of the Supreme Court* (Amendment No 3) 1977.

²⁴ *Judicature Amendment Act 1972* (NZ), s 4(1). The *Judicature Amendment Act 1972* (NZ) is deemed to be part of the *Judicature Act 1908* (NZ). The 1972 Act was amended in 1977 by ss 10-14 of the *Judicature Amendment Act 1977* (NZ). For convenience the 1972 Act, as amended by the 1977 Act, is referred to in this Working Paper as the "*Judicature Amendment Act 1972* (NZ)".

²⁵ Section 4(1) of the *Judicature Amendment Act 1972* (NZ) and s 12 of the *Judicature Amendment Act 1979* (NZ).

²⁶ *Judicature Amendment Act 1972* (NZ), s 6.

²⁷ *Id*, s 7.

²⁸ *Rules of the Supreme Court 1965-1979* (Eng), Order 53 rules 3(2) and 5(1).

(c) Scope of the New Remedy

6.14 In New Zealand an application for review may be made in respect of the “...exercise, refusal to exercise, or proposed or purported exercise by any person²⁹ of a statutory power”.³⁰

Statutory power means:³¹

“...a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate -

(a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or

(b) To exercise a statutory power of decision;³² or

(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or

(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

(e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person”.

6.15 A different approach has been adopted to defining the scope of the new remedy in England. Instead of defining the scope of the new remedy in terms of a statutory power, the rules merely provide that a person who wishes to obtain an order of certiorari, prohibition or mandamus must make the application by way of an application for judicial review. Consequently, the scope of the new remedy is governed by the law relating to certiorari, prohibition and mandamus. A person may also apply for a declaration or an injunction by way

²⁹ The Act binds the Crown: *Judicature Amendment Act 1972* (NZ), s 13.

³⁰ *Judicature Amendment Act 1972* (NZ), s 4(1).

³¹ *Id.*, s 3.

³² This means a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate to make a decision deciding or prescribing -

(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or

(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not: *id.*, s 3.

of an application for judicial review.³³ Apart from being able to apply for relief in the nature of certiorari, prohibition, mandamus, injunction and declaration by way of the new remedy a person may also apply for an award of damages in an appropriate case.³⁴

(d) Discretionary Grounds for Refusing Relief

6.16 The introduction of an additional remedy in New Zealand and England has generally not altered the discretion of the review court to refuse to grant relief on any ground on which relief could have been refused prior to the introduction of the new remedy.³⁵ There is one exception in New Zealand. It is no longer possible to exercise the discretion on the ground that the relief sought should have been sought in any other of the proceedings.³⁶

(e) Entitlement to the New Remedy (Standing)

6.17 Although the New Zealand Public and Administrative Law Reform Committee has stated that it was consistent with their broad intention that the differences in the rules of standing would be removed³⁷ with the introduction of the new remedy the *Judicature Amendment Act 1972* does not appear to have had this effect. For this reason the Committee gave further consideration to the law of standing in 1978. In its report, *Standing in Administrative Law*, the Committee recommended that the law relating to standing should be clarified and that the differences in the rules of standing should be eliminated by providing the court with a discretion to:³⁸

“...refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.”

6.18 In England, Order 53 rule 3(5) of the *Rules of the Supreme Court 1965-1979* provides that leave to apply for judicial review shall not be granted unless the applicant has “a sufficient interest in the matter to which the application relates”.³⁹

³³ *Rules of the Supreme Court 1965-1979* (Eng), Order 53 rule 1(2).

³⁴ Id, Order 53 rule 7.

³⁵ *Judicature Amendment Act 1972* (NZ), s 4(3).

³⁶ Id, s 4(4).

³⁷ Eleventh Report, *Standing in Administrative Law* (1978), 11.

³⁸ Id, 33.

³⁹ This provision is discussed further in paras 8.19 to 8.24 below.

(f) Powers of the Court

6.19 On an application for review the New Zealand High Court has power to grant any relief which the applicant would be entitled to in anyone or more proceedings for a writ or order of, or in the nature of, mandamus, prohibition, or certiorari or for a declaration or injunction.⁴⁰ In addition, the High Court has power to -

- (1) make an order setting the decision aside where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid;⁴¹
- (2) direct the decision-maker to reconsider and determine the matter of the application in accordance with directions given by the Court;⁴²
- (3) validate decisions where the sole ground of relief established is a defect in form or a technical irregularity, so long as there has been “no substantial wrong or miscarriage of justice”;⁴³
- (4) hold a conference of parties or intended parties, and make various orders at any such conference.⁴⁴

6.20 The powers referred to in (1) to (3) above and the power to order that the whole or part of the record of the proceedings in which a decision was made be filed in court⁴⁵ can be exercised only in the case of a *statutory power of decision*, and not generally in the case of any decision made pursuant to a *statutory power*⁴⁶. The reason for limiting the exercise of these additional powers in this way is obscure. It has been suggested that the term “statutory power of decision” was meant to embrace only decisions of a “judicial or quasi-judicial nature”.⁴⁷ If so, the result would be that these powers, for example, the power to direct that the record of a decision be filed in the court, could only be exercised in respect of such decisions. However, it has been suggested that this aim may not have been achieved because all or many of the powers falling within the other branches of the general definition of “statutory power”,

⁴⁰ *Judicature Amendment Act 1972* (NZ), s 4(1).

⁴¹ Id, s 4(2).

⁴² Id, s 4(5) and (6).

⁴³ Id, s 5.

⁴⁴ Id, s 10(1) and (2). The powers may also be exercised without holding a conference: id, s 10(3).

⁴⁵ Section 10(2)(j) of the *Judicature Amendment Act 1972* (NZ).

⁴⁶ See para 6.14 above where it appears that a “statutory power of decision” is only one among several types of “statutory power”.

⁴⁷ J A Smillie, 'The Judicature Amendment Act 1977' [1978] NZLJ 232, 236.

although not *expressly* included in the category of “statutory power of decision”, in any case probably fall within the latter category.⁴⁸

6.21 The High Court also has power to make interim orders.⁴⁹ At any time before the final determination of an application for review the Court may prohibit any respondent from taking any further action that is or would be consequential on the exercise of a statutory power, or may prohibit or stay any civil or criminal proceedings or may declare any licence to continue in force that has been revoked or suspended or that will expire by effluxion of time.

6.22 On the hearing of an application for judicial review in England, the powers of the Court have not been altered by the new remedy except that the Court may -

- (i) award damages to the applicant;⁵⁰
- (ii) where the relief sought is certiorari, in addition to quashing the decision, remit the matter to the decision-maker concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court;⁵¹
- (iii) hear any person who appears to the Court to be a proper person to be heard.⁵²

Where leave to apply for judicial review has been granted, the Court may also grant interim relief.⁵³

(g) The Procedure

6.23 In New Zealand, an application for review must be commenced by a motion accompanied by a statement of claim, which must state the facts on which the claim is based, the grounds on which relief is sought and the nature of the relief sought.⁵⁴

6.24 In England the procedure for applying for judicial review is a two stage process. The first stage involves an application for leave, supported by a statement setting out the name and

⁴⁸ D Mullan, 'Judicial Review of Administrative Action' [1975] NZLJ 154, 162 and 163. J A Smillie, 'The Judicature Amendment Act 1977' [1978] NZLJ 232, 236 and 237. Smillie has also suggested that there is little reason for making such a distinction: id, 236.

⁴⁹ *Judicature Amendment Act 1972* (NZ), s 8.

⁵⁰ *Rules of the Supreme Court 1965-1979* (Eng), Order 53 rule 7.

⁵¹ Id, Order 53 rule 9(4).

⁵² Id, Order 53 rule 9(1). This does not effect any reform in relation to standing: para 6.18 above.

⁵³ Id, Order 53 rule 3(10).

⁵⁴ *Judicature Amendment Act 1972* (NZ), s 9(1) and (2).

description of the applicant, the relief sought and the grounds on which it is sought.⁵⁵ Once leave is granted, the second stage involves an application for judicial review by an originating motion to a Divisional Court of the Queen's Bench Division, or by originating summons to a judge in chambers.⁵⁶ An application may also be made for interlocutory proceedings such as interrogatories and the discovery and inspection of documents.⁵⁷

(h) General Comments

6.25 The major advantage of the New Zealand and English reforms is that it is possible to apply for relief in the nature of the prerogative writs and injunction and declaration in the one application. The danger of choosing the wrong remedy associated with two “wholly distinct forms of proceedings” need no longer plague an applicant for judicial review. In England, however, an administrative decision can still be reviewed by means of an ordinary action for declaration or injunction. If an applicant chose to proceed by way of an ordinary action for declaration or injunction⁵⁸ he would not be able to obtain relief in the nature of the prerogative remedies unless he sought an application for judicial review. In New Zealand, where an action for declaration or injunction is commenced, any party to the action may apply to the court to have the action treated and disposed of as if it were an application for review.⁵⁹

6.26 A possible advantage of the English reform over the New Zealand reform is that an application for judicial review may also contain an application for an award of damages in an appropriate case. In New Zealand, when a person believes that he has a ground for claiming damages he is confronted with the problem of having to institute two separate proceedings or to choose between a civil action and the new remedy.⁶⁰

6.27 Perhaps the major limitation of the New Zealand and English reforms is that there has been little attempt at reforming the principles of judicial review.

⁵⁵ *Rules of the Supreme Court 1965-1979* (Eng), Order 53 rule 3(1) and (2).

⁵⁶ Id, Order 53 rule 5(1) and (2).

⁵⁷ Id, Order 53 rule 8.

⁵⁸ Applying for declaration or injunction by a civil action rather than by an application to judicial review would have the advantage that it would not be necessary to obtain leave. See *Heywood v Hull Prison Board Of Visitors* [1980] 3 All ER 594 where an action for declaration was stayed because the court considered that the plaintiff should proceed by way of an application for judicial review.

⁵⁹ *Judicature Amendment Act 1972* (NZ), s 7.

⁶⁰ The desirability of providing for a claim for damages to be determined with an application for judicial review is discussed in paras 10.10 and 10.11 below.

6.28 One major difference between the New Zealand and English reforms is in the scope of the new remedy. In England it is delimited by reference to the law relating to the remedies of certiorari, prohibition, mandamus, declaration and injunction. In New Zealand, on the other hand, the legislation defines the scope of the remedy as being available only to review the exercise, refusal to exercise, or proposed or purported exercise by any person of a *statutory power*. Certiorari, prohibition and mandamus were not abolished, although the New Zealand Public and Administrative Law Reform Committee envisaged that these remedies would fall into desuetude.⁶¹

6.29 It appears that the primary concern of the New Zealand Committee was to ensure that the new remedy would be available, in relation to statutory powers, in the same circumstances as those in which certiorari, prohibition, mandamus, declaration and injunction were available at the time the new remedy was created. Consequently non-statutory powers, such as those exercised by private bodies, including clubs, were not reviewable under the Act as originally passed. Under the existing law the exercise of such powers could not have been reviewed by certiorari, prohibition or mandamus, but could have been reviewed by declaration or injunction. The *Judicature Amendment Act 1972* was amended in 1977 to enable decisions of private bodies to be reviewed under the new remedy, by extending the definition of “statutory power” to include these decisions. A further restriction on the scope of the new remedy was that it only applied to decisions of an immediate and binding effect and did not include decisions of an investigatory, preliminary or recommendatory nature.⁶² In 1977 the definition of “statutory power” was amended to include decisions of this nature. The definition did not and still does not include decisions made under the prerogative power.⁶³ Generally, the courts only review a decision purported to be made under a prerogative power in order to determine whether or not it falls within the scope of the power. If it does fall within the scope of the power the manner in which the power was exercised will generally not be reviewed.⁶⁴

6.30 Another important difference between the New Zealand and English reforms relates to the procedure to be followed on an application for review. In England it is necessary to obtain

⁶¹ Fifth Report (1972), 7 para 18.

⁶² *Thames Jockey Club v New Zealand Racing Authority* [1975] 2 NZLR 768. There is some authority for these decisions being subject to judicial review by certiorari or prohibition if the decision “...is a necessary precondition for a subsequent act which will obviously affect rights”: Whitmore and Aronson, 431.

⁶³ Para 1.4 above.

⁶⁴ But of the judgment of Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182, 192.

leave before an application can be made for judicial review. There is no such requirement in New Zealand.⁶⁵

6.31 Although it is possible to institute interlocutory proceedings such as the discovery and inspection of documents and interrogatories in both New Zealand and England, in England an application for interlocutory proceedings cannot be made before an applicant has obtained leave to apply for judicial review.⁶⁶

3. REFORM OF THE PRINCIPLES OF JUDICIAL REVIEW

(a) Introduction

6.32 The law relating to the review of Commonwealth administrative decisions has been reformed by the *Administrative Decisions (Judicial Review) Act 1977-1980*.⁶⁷ The *Judicial Review Act* provides for the review of administrative decisions by way of an order of review.⁶⁸

(b) Scope of the Remedy

6.33 The remedy applies to all decisions⁶⁹ of an administrative character made, or proposed to be made, or required to be made under a Commonwealth enactment, except those made by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1 of the *Judicial Review Act*.⁷⁰ A reference to the making of a decision includes a reference to:⁷¹

⁶⁵ The question of whether or not leave should be required is discussed in paras 10.19 to 10.22 below.

⁶⁶ For a criticism of this provision see para 10.24 below.

⁶⁷ The Act is referred to in this working paper as the "*Judicial Review Act*". It was enacted following reports of the Commonwealth Administrative Review Committee (1971 - Parliamentary Paper No 144) and the Committee of Review on *Prerogative Writ Procedures* (1973 - Parliamentary Paper No 56).

⁶⁸ A similar approach to reforming the law relating to judicial review has been recommended by the Law Reform Commission of Canada: *Judicial Review and the Federal Court* (1980).

⁶⁹ The *Judicial Review Act* also applies to conduct related to the making of decisions: *Judicial Review Act*, s 6.

⁷⁰ *Judicial Review Act*, ss 5(1) and 3(1). Section 19 of the *Judicial Review Act* also provides that regulations may declare which class or classes of decisions are not subject to judicial review. The *Third Annual Report 1979* of the Administrative Review Council, at 35-36, para 146, lists the generic and specific classes of decision which the Council recommended should be excluded from the operation of the Act. See also Appendix I of that Report for extracts from the Council's Report on the proposed *Administrative Decisions (Judicial Review) Regulations*.

⁷¹ *Judicial Review Act*, s 3(2). The making of a report or recommendation before a decision is made is deemed to be the making of a decision where such a report or recommendation is required by an

- “(a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing,
- and a reference to a failure to make a decision shall be construed accordingly.”

6.34 Although the *Judicial Review Act* does not specifically bind the Crown, it has been suggested that this may be inferred from the Act.⁷²

(c) The Grounds of Review

6.35 The grounds of review of a decision or conduct are contained in sections 5 and 6 of the *Judicial Review Act*. In general, these are a codification of the common law grounds.

6.36 Section 5(1) of the *Judicial Review Act* provides that a decision may be reviewed on any one or more of the following grounds:⁷³

- “(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;
- (b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made.

enactment: id, s 3(3). In Western Australia, recommendatory decisions may not be reviewed at present: Sykes, Lanham and Tracey, 157-160 paras 2018-2023. But cf *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602, 615.

⁷² L J Curtis, 'Judicial Review of Administrative Acts' (1979) 53 ALJ 530, 533-534.

⁷³ The grounds of review of conduct are the same: *Judicial Review Act* s 6(1). There is no ground (i).

- (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (j) that the decision was otherwise contrary to law.”

6.37 Ground (e) must be construed as including:⁷⁴

- “(a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.”

6.38 Where a person has a duty to make a decision to which the *Judicial Review Act* applies and no period within which the decision must be made is prescribed, an order of review may be sought on the ground that there has been unreasonable delay in making the decision. Where a person has a duty to make a decision before the expiration of a prescribed period, an order of review may be sought on the ground that the person has a duty to make the decision notwithstanding the expiration of that period.⁷⁵

⁷⁴ *Judicial Review Act*, s 5(2). There is no provision (i).

⁷⁵ *Judicial Review Act*, s 7.

6.39 A number of the grounds referred to in paragraph 6.36 above warrant particular comment. First, ground (a) may involve a change of the existing law. At common law, a breach of the rules of natural justice is only a ground for review in limited circumstances.⁷⁶ It has been suggested, however, that the effect of the *Judicial Review Act* is that all decisions to which the Act applies must be made in accordance with the rules of natural justice.⁷⁷ The contrary view is that:⁷⁸

“The Act appears to have proceeded on the basis that this ground of review would not be available unless the decision or conduct in question is such that the decision-maker would be required, on the principles of the present law, to observe the rules of natural justice, or such of them as is applicable to the particular situation.”

Secondly, it is not clear that ground (e) referred to in paragraphs 6.36 and 6.37 above, represents all of the circumstances in which a decision may be reviewed under the existing common law.⁷⁹ Thirdly, ground (f) appears to alter the existing common law in two respects. It no longer appears to be necessary to distinguish errors of law which are jurisdictional from those which are not. Despite this, jurisdictional error continues to be a separate ground of review.⁸⁰ This may be necessary because some jurisdictional errors may result from mistakes of fact. It is also no longer necessary to show, in the case of non-jurisdictional errors of law, that the error appears on the face of the record. Fourthly, under ground (h) a decision may be reviewed if there was no evidence or other material to justify the making of a decision. There is some doubt as to whether this is a ground of review under the existing law.⁸¹

(d) Entitlement to Judicial Review (Standing)

6.40 An application for an order of review may be made by a person who is aggrieved by a decision or conduct for the purpose of making a decision to which the Act applies.⁸² The reference to a person aggrieved includes a reference to a person whose interests are adversely affected by a decision or, in the case of a decision by way of the making of a report or recommendation, to a person whose interests would be adversely affected if a decision were,

⁷⁶ Paras 2.24 and 2.25 above.

⁷⁷ J Griffiths, *Legislative Reform of Judicial Review of Commonwealth Administrative Action* (1978) 9 Fed LR 42, 51-53.

⁷⁸ L J Curtis, 'Judicial Review of Administrative Acts' (1979) 53 ALJ 530, 535.

⁷⁹ Discussed further in paras 7.13 to 7.21 below.

⁸⁰ Ground (c) referred to in para 6.36 above.

⁸¹ Para 2.12 above.

⁸² *Judicial Review Act*, ss 5(1) and 6(1).

or were not, made in accordance with the report or recommendation.⁸³ The Act does not, however, define what is meant by “interest”. Curtis suggests that the Act takes what might “...be described as a somewhat conservative attitude to the question of standing”.⁸⁴ He suggests that there may be scope for judicial development because the Act does not specify whether the interest must be special to a particular person or a limited class of persons of which he is a member, or whether the interest need only be one which he has in common with other members of the community.⁸⁵

6.41 Where an application has been made to the Court, a person “interested” in the decision may apply to the Court to be made a party to the application.⁸⁶ The Attorney General may intervene on behalf of the Commonwealth in a proceeding before the Court under the Act.⁸⁷

(e) Powers of the Court

6.42 On an application for an order of review, the Court has a discretion to make an order quashing or setting aside the decision or a part of a decision, referring the matter back to the decision-maker for further consideration, subject to such directions as the Court thinks fit, declaring the rights of the parties, or directing any of the parties to do, or to refrain from doing, any act or thing.⁸⁸ Where the application is in respect of a failure to make a decision,⁸⁹ the Court may make an order directing the making of the decision, declaring the rights of the parties, or directing any of the parties to do, or to refrain from doing, any act or thing.⁹⁰ The Court also has power to order a stay of proceedings in respect of applications for the review of a decision under section 5 of the Act.⁹¹

(f) Procedure

6.43 All proceedings under the *Judicial Review Act* are commenced by way of an application for an order of review.⁹² The application must state the grounds of the

⁸³ Id, s 3(4).

⁸⁴ L J Curtis, *Judicial Review of Administrative Acts* (1979) 53 ALJ 530, 539.

⁸⁵ Ibid.

⁸⁶ *Judicial Review Act*, s 12.

⁸⁷ Id, s 18.

⁸⁸ Id, s 16(1) and (2).

⁸⁹ Id, s 7.

⁹⁰ Id, s 16(3).

⁹¹ Id, s 15.

⁹² *Federal Court Rules*, Order 54 rule 2 and Form 56.

application,⁹³ but the applicant is not limited to those grounds and the Court may direct that the application be amended to specify another ground.⁹⁴

6.44 A person entitled to apply for review of a decision may request the decision-maker to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or the material on which those findings were based and giving the reasons for the decision.⁹⁵

(g) Privative Clauses

6.45 The *Judicial Review Act* has effect notwithstanding anything contained in any law in force at the commencement of the Act.⁹⁶ The Act therefore overrides any existing privative clauses .

(h) General comments

6.46 The approach adopted by the Commonwealth, at least so far as the grounds of review are concerned,⁹⁷ generally involves a codification of the law. The adoption of such an approach necessarily raises the question of how the courts approach the interpretation of a code, and whether or not a code supersedes the existing common law. The orthodox approach is that a code supersedes the existing common law and:⁹⁸

“...should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.”

⁹³ *Judicial Review Act*, s 11(1)(b).

⁹⁴ *Id*, s 11(6).

⁹⁵ *Id*, s 13. The requirement to give reasons is discussed in more detail in Chapter 11.

⁹⁶ *Judicial Review Act*, s 4. 8.

⁹⁷ Para 6.36 above.

⁹⁸ *Brennan v R* (1936) 55 CLR 253, 263 per Dixon and Evatt JJ. It has, however, been suggested that, at least so far as basic principles are concerned, they cannot be interpreted:

“...as if they were written on a tabula rasa, with all that used to be there removed and forgotten”:
Vallance v R (1961) 108 CLR 56, 76 per Windeyer J.

6.47 There has been considerable debate over the merits of codification as a method of law reform.⁹⁹ Amongst the arguments put forward by those opposed to codification are the following:

1. A code limits the ability of the courts to change the law to meet new circumstances.
2. Although a code may make the law more accessible, at least to a lawyer, if not to a lay person, it may not make the law more certain or predictable. This is so because it is necessary to interpret the meaning of the provisions of a code in order to apply them to a particular case.

On the other hand those in favour of codification put forward the following arguments:

1. A code can be amended readily by the legislature to meet changing circumstances. For this reason a code need not prove to be inflexible.
2. Codification provides an opportunity to reform the basic principles upon which the law is based and to rationalise the existing law.

6.48 Experience in Western Australia with the *Criminal Code* and the *Partnership Act 1895* suggests that a code can have the effect of making the law more certain and predictable. The provision of a code relating to judicial review may also prove to be beneficial in Western Australia.

6.49 Another aspect of the *Judicial Review Act* which warrants comment is that the Act only applies to decisions of an “administrative character”. This requirement could be construed as excluding decisions of a “judicial” or “quasi-judicial” or “legislative nature.”¹⁰⁰ In Victoria, a similar term, “administrative action”, in the *Ombudsman Act 1973-*

⁹⁹ H R Hahlo, 'Here Lies the Common Law: Rest in Peace' 30 MLR 241; M R Topping and J P M Vandenlinden, 'Ibi Renascit Jus Commune' 33 MLR 170; B Donald, 'Codification in Common Law Systems' 47 ALJ 160; The Law Reform Commission of Canada, *Criminal Law: Towards Codification*; and The New Zealand Public Administrative Law Reform Committee, *Twelfth Report* (1978), 20-25.

¹⁰⁰ L J Curtis, 'Judicial Review of Administrative Acts' (1979) 53 ALJ 530, 533 and J Griffiths, 'Legislative Reform Of Judicial Review Of Commonwealth Administrative Action' (1978) 9 FLR 42, 44-45. See also *Hamblin v Duffy* (1981) 34 ALR 333, 338, per Lockhart J. In holding that decisions of the ABC's Promotions Appeal Board were reviewable under the Act, Lockhart J expressly rejected the ABC's argument that for a decision to be of “an administrative character” it must have “inherent governmental

1979, has been interpreted as excluding decisions of legislative or judicial organs of the government from the scope of the Act.¹⁰¹ That term has also been interpreted as excluding policy matters. However, it is difficult to distinguish policy matters from administrative matters as “...no clear line of demarcation exists between what is involved in policy and what is involved in administration”.¹⁰²

6.50 However, as the phrase has not yet been the subject of interpretation by either the Full Court of the Federal Court of Australia or by the High Court of Australia, its scope remains unclear.

character”: id, 341. Lockhart J declined to define exhaustively the meaning of “a decision of an administrative character”: id, 339.

¹⁰¹ *Glenister v Dillon* [1976] VR 550, 564.

¹⁰² *Booth v Dillon (No 2)* [1976] VR 434, 439.

PART IV: ISSUES FOR CONSIDERATION

CHAPTER 7 - POSSIBLE GROUNDS FOR JUDICIAL REVIEW

1. EXCESS OF STATUTORY JURISDICTION OR AUTHORITY

7.1 The traditional grounds of review of administrative decisions are based on the doctrines of jurisdictional error and ultra vires.¹ By their means the Supreme Court can control the use of power by the organs of the State by ensuring that decision-makers act within the authority conferred by Parliament, that is, within their lawful bounds. The Commission is of the view that these grounds should continue to be grounds of review.² If provision were made for review on the ground of an error of law³ the importance of grounds such as these may be significantly reduced because many errors falling within those grounds would be errors of law. However, it would be necessary to retain them as grounds of review because there may be circumstances in which a decision-maker would go beyond the power conferred on him as a result of an error on a question of fact. If certain facts must exist before a decision can be made, the decision-maker would be acting in excess of his power if he incorrectly found that the facts existed.

7.2 As the concepts of jurisdictional error and ultra vires have different historical origins they have developed separately. However, as they are analytically identical,⁴ consideration could be given to developing a single ground of review. Provision could, for example, be made for judicial review on the ground that the decision was not a decision which the decision-maker was authorised by law to make or that the provision, such as an Act, regulation or by-law, under which the decision was made or was authorised to be made was invalid or that the decision was made or the provision was enacted or prescribed without legal authority.⁵

¹ Paras 2.1 to 2.18 above.

² The grounds of review were retained in the *Judicial Review Act*: see (c) and (d) in para 6.36 above.

³ Paras 7.3 to 7.7 below.

⁴ Para 2.1 above.

⁵ N Lyon, 'Administrative Law - Continuing Search for a General Theory of Judicial Review of Administrative Action for Legality' (1980) 58 *Canadian Bar Review* 646.

2. ERROR OF LAW

7.3 Although it has been suggested that the distinction between jurisdictional errors and errors of law within jurisdiction has been abolished in respect of “administrative tribunals or authorities”,⁶ this has not been clearly established and judicial review for error of law may still be restricted to cases in which the decision-maker has exceeded the authority conferred by Parliament or the error is one which appears on the face of the record. If provision were made for review on the ground of an error of law, as has been done in the *Judicial Review Act*, it would probably involve an extension of the existing common law grounds of review, for example, a decision could possibly be reviewed on the ground that the decision-maker misconstrued a statute.

7.4 Traditionally the courts have been reluctant to embark on a consideration of whether an administrative decision was right or wrong on the merits. Instead the courts have been concerned with ensuring that a decision-maker has acted only within the true limits of his power. This approach is reflected by the doctrines of ultra vires and jurisdictional error. The basis for the traditional approach is that Parliament, in authorising a decision-maker to make a decision, has clothed that person or body with power to determine the matter conclusively. The courts have thus been confined to ensuring that a decision-maker has not exceeded the scope of the power conferred by Parliament.

7.5 If the traditional approach were retained it would mean that a decision-maker would continue to be the final arbiter on questions of law and fact. While a decision-maker may be as well placed as a court to determine questions of fact, particularly where some expertise is required, courts are better qualified to determine questions of law. For this reason it might be desirable to provide for judicial review on the ground of an error of law. The decision-maker would continue to be the final arbiter of questions of fact.

7.6 One difficulty with such a ground of review is that it is necessary to distinguish errors of law from errors of fact.⁷ In other contexts the courts have adopted two distinct approaches to distinguishing errors of law from errors of fact; the analytical approach and the pragmatic approach. Under the analytical approach, the determination of primary facts, that is, whether or not a phenomenon happened or is likely to or will happen is a question of fact. Whether or

⁶ Paras 2.17 and 2.18 above.

⁷ H Whitmore, 'O! That Way Madness Lies: Judicial Review For Error of Law' (1967) 2 FLR 159.

not those facts or inferences from those facts satisfy some legal definition is a question of law.⁸

7.7 The pragmatic approach does not differ from the analytical approach in that the determination of primary facts is a question of fact. It differs from the analytical approach because the meaning of words and whether or not the facts satisfy a definition are considered to be questions of fact. Inferences deduced from facts are also considered to be questions of fact. A question of law will arise if there is no evidence to support a decision or an inference, if the inferred facts are not capable of justifying the decision, if the decision-maker has misdirected itself in law⁹ or if the conclusion is unreasonable.¹⁰ In a recent case, *Hope v The Council of the City of Bathurst*¹¹ Mason J set out the following principles for distinguishing questions of fact from questions of law where words of statutes are being interpreted -

1. The question whether facts fully found fall within the provisions of a statutory enactment, properly construed, is a question of law.¹²
2. However, special considerations apply when the statute uses words according to their common understanding. The question whether or not the facts fall within those words is a question of fact.¹³
3. The next question, whether or not the material before the decision-maker reasonably admits of different conclusions, is a question of law.
4. Where different conclusions are reasonably possible, the determination of which conclusion is the correct conclusion is a question of fact.

3. IMPROPER EXERCISE OF A POWER

7.8 Over the years Parliament has conferred numerous discretionary powers on Ministers and other decision-makers. Such powers enable a decision-maker:¹⁴

⁸ Wade, 775-776.

⁹ *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126, 137-138.

¹⁰ Whitmore and Aronson, 261.

¹¹ (1980) 54 ALJR 345, 347-348.

¹² *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47, 51 per Fullagar J.

¹³ The question whether or not words are used according to common understanding is a question of law: (1980) 54 ALJR 345, 347-348.

“...to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.”

Such powers have the advantage that they tend to make the decision-making process more flexible because the decision-maker is not constrained in individual cases by overly technical limitations. The exercise of these powers is not, however, unfettered under the existing law. The exercise of these powers may be reviewed if there has been a breach of the rules of natural justice or under the doctrine of extended ultra vires.

7.9 Two questions arise for consideration: Should discretionary powers continue to be subject to judicial review? If so, what is the proper scope for the review of such decisions?

7.10 So far as the first question is concerned, it is the Commission's view that the Supreme Court should continue to have power to review the improper or capricious exercise of discretionary powers. The Commission considers that an independent and impartial review of the exercise of discretionary powers in the Supreme Court by means of judicial review is a valuable and necessary addition to any reviews which may be available within the administrative process. As Lord Halsbury LC said in *Sharpe v Wakefield*:¹⁵

“...discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not to private opinion...; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself”.

7.11 The second question is a more difficult one to answer. On the one hand it is desirable to provide citizens with a means of reviewing discretionary decisions made in an improper manner. On the other hand, if the scope of review were too wide, it could hinder the efficiency of the decision-making process and involve the Supreme Court in the review of the merits of a decision.

7.12 As can be seen from the discussion of the doctrine of extended ultra vires in paragraphs 2.6 to 2.13 above the courts have had some difficulty balancing the competing interests referred to in the previous paragraph and the existing law is unsettled. In the

¹⁴ *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, 695 per Lord Diplock.

¹⁵ [1886-1890] All ER Rep 651, 653.

Commonwealth sphere the *Judicial Review Act* has attempted to balance the competing interests by providing that a decision may be reviewed if it involves "... an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made."¹⁶ This ground of review includes: ¹⁷

- “(a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.”

7.13 Although grounds (a), (b), (c) and (d) generally represent the common law grounds,¹⁸ the other grounds may not do so and warrant further comment.

7.14 One ground which may not represent the existing common law is ground (e). In one respect it may be narrower than the common law, while in another respect it may be wider. It appears to be narrower in that it requires that the power should be exercised at the "direction or behest of another person". At common law it appears to be sufficient that a particular decision was made because the decision-maker felt bound or compelled to act in accordance with a decision or finding of another body. In *Evans v Donaldson*,¹⁹ for example, a Court of Petty Sessions holding a hearing into whether or not a public servant should be dismissed did

¹⁶ *Judicial Review Act*, s 5(1)(e).

¹⁷ *Id.*, s 5(2). There is no provision (i).

¹⁸ For the common law grounds corresponding to grounds (a) and (b), (c) and (d) see paras 2.9, 2.7 and 2.8 above respectively. As with the common law ground it may be possible to distinguish the bad faith ground from the improper purpose ground on the basis that it involves dishonesty.

¹⁹ (1909) 9 CLR 140.

not carry out a proper investigation into the matter and based its decision on the conclusions of a Royal Commission into the conduct of the department in which the public servant was employed.

7.15 Ground (e) may be wider than the common law because it appears to treat “directions” of Ministers in the same way as “directions” of other persons or bodies. Judicial opinion on this matter, at least where the decision-maker is responsible to a Minister, appears to be divided.²⁰ On one view a decision-maker:²¹

“...would have to act honestly, but he might well pay some regard to the preference scheme favoured by the Government ... the discretion to be exercised would be his discretion, and he could not allow the Executive or any other person to exercise it for him. Upon the same assumption of a discretion, there is no reason why he should not be allowed to seek the opinions of persons well experienced in the methods of providing and organising labour. It cannot be assumed that the well experienced and the well qualified are absent from the responsible Executive of the day. The weight the licensing officer might see fit to attach to any or all such opinions would be a matter entirely for him.”

A different view, based on the notion of responsible government, is that:²²

“The system of responsible government which is reflected in ss 61 and 64 of the Constitution contemplates (if it does not require) that executive powers and discretions of those in the departments of the executive government be exercised in accordance with the directions and policy of the Minister. Unless the language of legislation (including delegated legislation) is unambiguously to the contrary, it should be interpreted consistently with the concept of responsible government. It would be inconsistent with that concept for the secretary or any officer of a department to exercise such a power or discretion contrary to the Minister's directions or policy (provided of course these are lawful). It is not for the officer to distinguish between 'government policy' and the Minister's policy. The duty of those in a department is to carry out the lawful directions and policy of their Minister. It is the Minister who is responsible to the government and the parliament for the directions and policy.”

7.16 It may be that the approach adopted in the *Judicial Review Act* is reasonable because:²³

“If a person is given a discretion, either by name or by virtue of his holding a particular office, it is his responsibility to exercise that discretion. If he acts as directed by his Minister or merely automatically applies a governmental policy, it is not he who is taking the decision.”

²⁰ D Pearce, 'Courts, Tribunals and Government Policy' (1980) 11 FLR 203, 209-213.

²¹ *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131, 145 per Evatt J.

²² *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth of Australia* (1977) 139 CLR 54, 87, per Murphy J.

²³ D Pearce, 'Courts, Tribunals and Government Policy' (1980) 11 FLR 203, 213-214.

Pearce suggests that:²⁴

“It is undesirable, and indeed unfair, for discretions to be vested in designated officials if the exercise of the discretion is likely to be a matter of political controversy. Much the better course would seem to be for legislation either to designate no person as the decision-maker, thereby leaving the administration to the ordinary departmental processes. Alternatively, and particularly where there is a political content to the exercise of the discretion, the Minister should be designated. He can then delegate this function in respect of its day-to-day exercise but reserve any final decision on difficult cases for himself.”

7.17 On occasion a decision-maker may be required to make a large number of decisions under a particular power. One means of processing a large number of applications in an expeditious manner is to adopt a general policy. Ground (f) seems to be designed to ensure that such a policy is not applied in an inflexible manner without regard to the merits of a particular case. After discussing the major judicial decisions, Pearce summarises the existing common law in the following manner:²⁵

“(i) an administrator may adopt a general rule to govern the exercise of a discretionary power in all ordinary cases, provided that the rule is valid and fair;

(ii) in cases other than those mentioned in (iii) *infra*, a discretion may not be exercised in accordance with such a policy ruling without consideration being given to whether it is appropriate to decide the particular application in accordance with that ruling;

(iii) where there is a 'multitude of similar applications' involving the exercise of a discretion to which a policy rule relates, individual representations by an applicant need not be considered unless they raise novel issues or call into question the policy governing the exercise of the discretion.”

7.18 While ground (f) appears to be consistent with the first two points above, it may be that it does not apply to a case in which the decision-maker has regard to the merits of the particular case, but is not prepared to consider that the policy should be changed, that is, point (iii) above.

²⁴ Id, 214-215.

²⁵ Id, 207-208.

7.19 Ground (g) appears to have been expressed in the very narrow sense used in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.²⁶ This ground may, however, represent an extension of the existing law in Australia because of the doubt as to whether or not the decision in that case is applicable in Australia.

7.20 Ground (h) appears to represent an extension of the existing common law ground. The common law ground applies only if a requirement of certainty of meaning and application is inherent in the provision creating the power. Ground (h), on the other hand, appears to apply to all decisions to which the *Judicial Review Act* applies. It has, however, been suggested that this ground is narrower than the common law ground in one respect:²⁷

“The principle at common law, where applicable, requires certainty of expression as well as certainty of application or operation. In contrast, the Act merely provides that the 'result' of the exercise of the power be certain.”

7.21 Extensive as these grounds are, they do not specifically represent all the common law grounds, for example, there is no specific reference to review on the ground that there has been an agreement not to exercise a discretion or that there has been an unauthorised delegation of a discretionary power. If a reform along the general lines of the Commonwealth legislation were considered desirable in this State, perhaps the following two guidelines could be added to those contained in the *Judicial Review Act* in order to represent specifically the corresponding common law grounds -

- (i) that there is an agreement not to exercise a discretion; and
- (ii) that there is an unauthorised delegation of a power.

While the approach adopted in the *Judicial Review Act* is not without its difficulties, such an approach may be preferable to a less precise statement of the ground of review, for example, that there had been an abuse of a power.

²⁶ Para 2.10 above.

²⁷ J Griffiths, 'Legislative Reform of Judicial Review Of Commonwealth Administrative Action' (1978) 9 FLR 42, 59.

4. BREACH OF THE RULES OF NATURAL JUSTICE

7.22 The rules of natural justice are rules which have been developed by the courts to provide minimum standards of procedural fairness in the decision-making process, particularly where Parliament has not expressly prescribed procedures. These rules are discussed in paragraphs 2.22 to 2.29 above. These are important rules because, where they apply, they ensure that a decision is made after a person interested in the decision has had a fair hearing. They have been described as “...an essential part of any system of administrative justice”.²⁸ The Commission agrees that minimum standards of procedural fairness are essential.

7.23 One means of providing minimum standards would be to develop a detailed code of procedure applicable to all decision-makers.²⁹ At present, the Commission considers that the adoption of such an approach would require a more thorough consideration than can be given in the context of a review of the general principles applicable to the judicial review of administrative decisions. The Commission would reserve, such an inquiry for a later part of its administrative law reference.³⁰ Short of carrying out such a comprehensive enquiry, the Commission considers that the best approach to adopt at present is to preserve the rules of natural justice, as has been done in section 5(1)(a) of the *Judicial Review Act*. This would mean that it would be necessary to look to the common law to determine the content of the rules in a particular case. Such an approach may be justified in view of the importance attached to the rules of natural justice. In preserving the rules, provision could be made for the rules to apply to all decisions subject to judicial review or only to those decisions in which the rules must be observed at present under the common law. One problem with the *Judicial Review Act* is that it is not clear which of these two approaches has been adopted. One drawback with providing that the rules need only be observed where they must be observed under the existing law is that it may be difficult to know in advance whether or not the rules

²⁸ Wade, 393.

²⁹ Such an approach was suggested by Justice, the British Section of the International Commission of Jurists, in its Report, *Administration Under Law* (1971). The code of administrative procedure suggested by Justice called *Principles of Good Administration* is reproduced as Appendix I to this Working Paper. Justice and All Souls College, Oxford have since established the *Justice - All Souls Review of Administrative Law Committee* to make a study of administrative law in the United Kingdom: Justice, *Twenty-Second Annual Report* (1979), 20-21.

³⁰ Such an inquiry would involve a consideration of experience in the United States of America with the *Administrative Procedure Act 1946*, in particular, s 5.

apply to a particular decision.³¹ This drawback would be avoided if provision were made for the rules of natural justice to apply to all decisions subject to judicial review or to decisions defined in some way. Such is an approach need not unnecessarily delay decisions or add to the cost of administration if, as at present, the application of the rules were variable, for example, if the formality of the hearing necessary to comply with the rules varied depending on the seriousness of the subject matter or consequences of the decision. It may be difficult to know in advance how formal a hearing should be held. However, some guidance is provided by the factors referred to in paragraph 2.24 above.

5. PROCEDURAL ERRORS

7.24 Under the existing law an administrative decision can be reviewed on the ground of an error of procedure if there has been a failure to comply with a procedure prescribed by Parliament of a mandatory, as distinct from a directory, nature.³² If provision were made for review on the ground of an error of law³³ it would not be necessary to make provision for a separate ground of procedural error, at least so far as mandatory procedural requirements are concerned.³⁴ If provision is not made for review on the ground of an error of law, the Commission considers that procedural error should be preserved as a ground of review.³⁵

6. FRAUD

7.25 Fraud is a ground of review both at common law and under the *Judicial Review Act*.³⁶ At common law it involves actual dishonesty, such as the suppression or falsification of evidence,³⁷ generally by a party to the decision rather than by the decision-maker. The Commission considers that it should continue to be a ground of review.

³¹ For the principles which the courts take into account in determining this matter see paras 2.24 and 2.25 above.

³² Para 2.5 above.

³³ Paras 7.3 to 7.7 above.

³⁴ Para 2.5 above.

³⁵ Both error of law and procedural error are grounds of review under the *Judicial Review Act*. Under section 5(1)(b) of this Act a decision may be reviewed on the ground "that procedures that were required by law to be observed in connexion with the making of the decision were not observed".

³⁶ *Judicial Review Act*, s 5(1)(g).

³⁷ Para 2.30 above.

7. ERRORS OF FACT

7.26 As judicial review is primarily concerned with ensuring that decision-making bodies act within their lawful authority and not with reviewing the merits of a decision, the courts have been reluctant to review findings of fact, findings which are usually associated with the merits of the decision. This reluctance may have been reinforced by the consideration that the decision-maker, having personally heard the evidence, is usually in a better position to determine questions of fact, without more. For these reasons the Commission does not consider that it is desirable to provide for judicial review on the ground of an error of fact. Where Parliament considers that it is desirable to enable a finding of fact to be reviewed, this can best be done by providing a statutory right of appeal in which the procedure can be designed to provide the appellate body with an opportunity to rehear the evidence or information on which the decision was made, should that be necessary.

7.27 While it is a general rule that the Supreme Court will not impugn decisions on the ground of error of fact, lack of evidence to support a finding of fact may form the basis for review under one or other of the existing grounds of review, for example, it may involve an abuse of a discretionary power³⁸ or a breach of the rules of natural justice.³⁹ Judicial review for lack of evidence appears to be justified on the ground that a decision made without evidence is insupportable and involves an abuse of power. Although lack of evidence to support a finding of fact could form the basis for review under a number of the grounds of review discussed above, for example, an allegation that there is no evidence to support a finding of fact involves a question of law, consideration could be given to developing a separate ground of review. Such a ground would provide the Court with guidance as to the circumstances in which an error of fact would amount to an abuse of authority. In the Commonwealth sphere, for example, a separate ground of review has been created by section 5(1)(h) of the *Judicial Review Act*. This section provides that a decision may be reviewed on the ground that there is no evidence or other material to justify the making of the decision.⁴⁰ This ground cannot be made out unless:⁴¹

“(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other

³⁸ Para 2.12 above.

³⁹ R R S Tracey, 'Absence or Insufficiency of Evidence and Jurisdictional Error' (1976) 50 ALJ 568, 570.

⁴⁰ This ground is the result of a recommendation of the Ellicott Committee, *Prerogative Writ Procedures* (1973, Parliamentary Paper No 56), 10, following a suggestion by Professor H W R Wade.

⁴¹ *Judicial Review Act*, s 5(3).

material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or

- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.”

7.28 The meaning and scope of ground (a) is not free from doubt. At common law, despite recent developments, “no evidence” does not appear to have been established as a separate ground of review,⁴² though in some cases “no evidence” may involve a jurisdictional error or an error of law on the face of the record. Ground (a) clearly establishes a “no evidence” ground of review so that, where a particular matter must be established, there must be evidence which provides a reasonable basis for the decision-maker's conclusion that the matter had been established.⁴³ However, the courts may construe ground (a) as requiring that the empowering statute must itself expressly or by necessary implication impose the requirement that a particular matter must be established. If so, it may not go as far as the present circumstances in which “no evidence” provides a ground for review for jurisdictional error or error of law on the face of the record. If this were the case, ground (a) accordingly may not add anything to the ground of review for error of law.⁴⁴ It could also be argued that ground (a) is an attempt to codify the law as to the power of the court to review a decision for an error of jurisdictional fact.⁴⁵ If so, the attempt has failed because the ground as developed by the common law is wider than the statutory ground. Under the common law a decision can be upset even though there was evidence or other material from which the decision-maker “could reasonably be satisfied that the matter was established”.

7.29 Ground (b), unlike ground (a), is not limited to decisions in which the decision-maker is required to reach a decision only if a particular matter is established, and applies to any decision reviewable under the *Judicial Review Act*. It enables a decision to be reviewed even if it appeared to the decision-maker that there was evidence which provided a reasonable basis for the decision, but only if a particular fact on which the decision was based did not exist. This ground appears to involve an extension of the common law grounds of review, and

⁴² Wade, 278.

⁴³ If this is the case, ground (a), in its limited area of operation, is very similar to the United States “substantial evidence” rule. Section 10(e) of the *Administrative Procedure Act 1946* (USA) provides that a decision may be reviewed if the decision is “unsupported by substantial evidence”. In order for a decision to be valid there must be “...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”: *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229.

⁴⁴ Paras 7.3 to 7.7 above.

⁴⁵ Wade, 238-239; Whitmore and Aronson 275-276.

involves a significant inroad into the authority of a decision-maker to make decisions in the light of facts as they reasonably appear to him.⁴⁶

8. FAILURE TO PERFORM A STATUTORY DUTY

7.30 At present, a decision-maker who fails to reach a decision or to take action where there is a statutory duty to do so may be compelled to perform the duty by means of a writ of mandamus.⁴⁷ The Commission considers that the Supreme Court should continue to have power to compel a decision-maker to perform a statutory duty,⁴⁸ for instance, on the ground that there has been unreasonable delay in making the decision.

⁴⁶ J Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 FLR 42, 61-62.

⁴⁷ Para 3.7 above.

⁴⁸ For the position under the *Judicial Review Act* see para 6.38 above

CHAPTER 8 - ENTITLEMENT TO SEEK JUDICIAL REVIEW (STANDING)

1. INTRODUCTION

8.1 The Commission is of the view that the existing law as to the entitlement of a person to seek judicial review is unsatisfactory. Not only are there differences in the rules of standing between the various remedies,¹ but the law relating to a number of the remedies is not entirely certain, for example, in the case of mandamus it is not clear whether the applicant must show that he has a “legal specific right”, that he is a “person aggrieved” or merely that he has a “sufficient interest”.² Injunction and declaration tend to have more restrictive rules of standing than certiorari, prohibition and mandamus. In the case of injunction a person must show that an interference with a public right involves an interference with a private right or that he has suffered “special damage”.³ The rules of standing relating to declaration appear to be the same as those for injunction. However, it has been suggested that an applicant for declaration need only show that he has a “real interest” in the matter.

8.2 The Commission, at this stage, is not satisfied that there should be different rules of standing depending on the nature of the remedy sought.⁴ The question arises, who should be entitled to seek judicial review? Should any person be entitled? Should only a person who has a particular interest affected by a decision be entitled and, if so, what sort of interests should be protected? Should the question of standing be determined by the courts as part of the determination of the case? Should courts screen people wishing to represent the public interest? These issues are discussed below.

2. SHOULD ANY PERSON BE ENTITLED TO SEEK JUDICIAL REVIEW?

8.3 One of the most important principles which requires consideration in a review of the law relating to judicial review is whether or not the rules of standing should be broadened to allow any person to apply for judicial review. Generally, the existing rules of standing ensure that not every person may seek judicial review of an administrative decision; a person must have some particular interest in the decision sought to be impugned. The wider public interest

¹ Paras 3.19 to 3.27 above.

² Para 3.22 above.

³ Para 3.24 above.

⁴ See, however, the view of Lord Wilberforce in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 97.

in ensuring that State organs act according to law is not a matter which an individual citizen can seek to protect, except to the extent that an illegal act or omission interferes with a particular interest of the citizen. The protection of the wider public interest is the responsibility of the Government and, in particular, the Attorney General.⁵

8.4 Rules of standing which allowed any person to apply for judicial review would encourage "...individual citizens to participate actively in the enforcement of the law".⁶ Such an approach would increase the likelihood of unlawful decisions being challenged and "...operate as a deterrent against administrative illegality and enhance the prospects of lawful and accountable government".⁷ It would have the advantage that it would not be necessary to develop more restrictive rules of standing which could be difficult to apply to particular factual situations and which could become as uncertain and complex as the present law.

8.5 One consequence of allowing any person to apply for judicial review is that it would do away with the need for relator actions in the administrative law area, though the Attorney General would still be able to apply for judicial review. The relator action, where it operates, has the advantage that it allows a person who may not otherwise have standing to institute proceedings to do so.⁸ However, the relator action has been criticised because it depends on a decision of the Attorney General, a department of whose government may be involved in the decision sought to be reviewed. For this reason, an application for a relator action can prove to be embarrassing for an Attorney General as has been shown by three recent cases in Australia.⁹ Ormrod LJ discussed the advantages and disadvantages of the relator action in the following way in *Gouriet v Union of Post Office Workers*:¹⁰

"It has the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts but there are other ways of dealing with that problem. It has the grave disadvantage of putting the Attorney-General into the invidious position of appearing to be the prime mover in litigation conducted by some other person, with motives which may be quite different from his, or of forcing

⁵ There is, however, at least one statutory example of a wide standing provision in Western Australia. Section 73(6) of the *Constitution Act 1889-1980* provides that any person entitled to vote at a general election of members of the Legislative Assembly is entitled to bring proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the provisions of the section.

⁶ de Smith, 409.

⁷ J A Smillie, 'Locus Standi - The Report of the Public and Administrative Law Reform Committee' [1978] *Otago Law Review* 141, 145.

⁸ Paras 3.25 and 3.26 above.

⁹ These cases are discussed in the Australian Law Reform Commission Working Paper No 7, *Access To Courts - 1 Standing: Public Interest Suits*, 29-30, para 2.22.

¹⁰ [1977] 1 All ER 696, 731-732. This case was not concerned with the exercise of governmental powers but with a trade union which had called upon its members to take industrial action.

him to decide whether to sanction such proceedings as in the present case, and thus appear to be standing between a private citizen and the court.”

8.6 The fact that relator actions would no longer be necessary may provide another reason for allowing any person to apply for judicial review. It may, however, be desirable to retain some role for the Attorney General in protecting and representing the public interest. In British Columbia, the Province's Law Reform Commission recommended that the Attorney General should be able to participate in and exercise some control over “public interest” proceedings. The recommendations of the Law Reform Commission of British Columbia are discussed below.¹¹

8.7 Although there would be advantages in allowing any person to apply for judicial review there are factors which suggest that such an approach could be undesirable.

8.8 One such factor is that the institution of any proceeding involves certain costs to the community, for example, the costs involved in the administration of the Supreme Court, the costs resulting from delays in other proceedings in the Court and the costs incurred by government bodies which have to defend actions. The fact that these costs will be incurred may suggest that only persons with a particular interest in a decision should be entitled to apply to have the decision reviewed or, where a person cannot establish such an interest, that some body should be given the power of balancing the costs referred to above against the benefits of allowing the lawfulness of a decision to be impugned. The relator action is one such means, though it has its difficulties.¹² Another means would be to give the Supreme Court a discretion to grant leave for proceedings to be instituted where an applicant had no particular interest in the decision sought to be impugned.¹³

8.9 Two factors advanced by de Smith for providing rules of standing which place a restriction on the people who can seek judicial review are that:¹⁴

“...even if it is assumed that the litigant could establish some unlawfulness, it does not necessarily follow that power should be so distributed between the courts and the Administration as to allow the Judiciary to pronounce authoritatively on the legality of the conduct of the business of government whenever any member of the public chooses. Whilst the independence of the Judiciary from the political process is one of

¹¹ Paras 8.34 and 8.35 below.

¹² Para 8.5 above.

¹³ Paras 8.30 to 8.33 below.

¹⁴ de Smith, 410.

its most highly valued assets, it also limits its powers to interfere with the working of other branches of government. [Secondly] there is much to be said for the courts, as a matter of prudence, reserving their power and prestige for those occasions when they are moved by those upon whom the unlawful conduct of public authorities has tangibly impinged.”

8.10 Three possible difficulties with allowing any person to apply for judicial review are that it could lead to a flood of litigation, to the institution of unmeritorious proceedings, or to proceedings being pursued in an incompetent manner.

8.11 The fear of a flood of litigation was described as “unreal” by Deane J in *Phelps v Western Mining Corporation Ltd*. Deane J said it was unreal to assume:¹⁵

“...the existence of a shoal of officious busybodies agitatedly waiting, behind ‘the flood-gates’, for the opportunity to institute costly litigation in which they have no legitimate interest.”

8.12 Unmeritorious litigation could be discouraged, and if commenced, brought to a speedy end by empowering the court to dismiss or strike out an application for judicial review on the ground that it disclosed no reasonable cause of action or was frivolous or vexatious or an abuse of the process of the court.¹⁶ Unmeritorious litigation might also be discouraged if an applicant were required to provide security for the costs of the proceeding¹⁷ or if the Court's power to grant relief were discretionary.¹⁸

8.13 The fear that proceedings would be pursued in an incompetent manner is based on the view that only a person whose legal position will be affected by a decision of a court can be relied upon to present the case in a thorough and competent manner. On the other hand, a person who embarks on litigation for reasons of principle without the likelihood of some financial benefit, but who is prepared to make a financial commitment to the case, in the form

¹⁵ (1978) 20 ALR 183, 189. The views of Deane J appear to be supported by the experience in Western Australia since s 80(1)(c) of the *Trade Practices Act 1974-1980* (Cth) was enacted. In general terms that provision allows any person to apply for an injunction to restrain a person from contravening provisions of the Act. Between 1976 and 1980 (inclusive) only nine applications were made for such an injunction in Western Australia. Five of these applications related to an industrial dispute over the export of sheep. An interim injunction was granted in one case and the other four cases were adjourned sine die. Of the remaining four applications, one was successful, one was unsuccessful and the other two had not been determined at 19 January 1981.

¹⁶ Para 10.22 below. If an applicant were required to obtain the leave of the Supreme Court to institute proceedings such proceedings could be prevented at that stage: paras 10.19 to 10.22 below.

¹⁷ Para 10.16 below.

¹⁸ Paras 10.1 to 10.7 below.

of the costs involved in litigation,¹⁹ might still be expected to pursue the case in a proper manner.

8.14 Another consequence of allowing any person to apply for judicial review is that it would increase the likelihood of more than one action being instituted with regard to a particular decision. In order to overcome this problem, provision could be made for the consolidation of a number of actions in a single action or for the summary dismissal of a subsequent action if the matter in dispute had been fully and properly determined in an earlier action. A subsequent action could proceed if, for example, a further matter, such as damages,²⁰ were raised or if the first action were not genuine.

3. REQUIRING A PERSON TO HAVE A PARTICULAR INTEREST

8.15 If one concludes that it is undesirable to allow any person to apply for judicial review and that only those people with some form of particular interest should be permitted to make such an application, the next question which arises is what particular interests should a person be required to have in order to be entitled to apply for a review of the decision. This approach is also not without its difficulties. It could, as has already been stated, lead to rules which are uncertain and complex. There is also a danger, if the formula is too vague, that the courts will fall back on the existing common law, possibly with the consequence that the rules of standing would continue to differ depending on the relief sought. Another problem is that:²¹

“The courts and individual judges will make of any phrase that which they desire. ...a conservative court will be free as a matter of reality to continue applying stringent standards and a liberal court will be free to construe the very same phrase as entitling it to hear any member of the public who is genuinely concerned with the issues at stake.”

Two possible formulae which have been adopted elsewhere are discussed below. The Commission welcomes comment on these formulae or any other formula which might be considered to be preferable.

¹⁹ The question of costs is discussed in paras 10.12 to 10.16 below.

²⁰ The question of costs is discussed in paras 10.10 to 10.11 below.

²¹ G A Flick, 'Relator Actions: The Injunction and the Enforcement of Public Rights' (1978) 5 *Monash ULR* 133, 156.

(a) A Person Aggrieved

8.16 In the Commonwealth sphere, the *Judicial Review Act* provides that an application for judicial review may be made by a

“person who is aggrieved by a decision”.²² The reference to a person aggrieved includes a person whose *interests* are adversely affected by the decision, or in the case of a decision by way of the making of a report or recommendation, to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation.²³

8.17 The *Judicial Review Act* does not contain a definition of the term “interests”. Without a more precise indication of the interests to be protected the courts could fall back on the common law cases. The term could be construed narrowly as limiting judicial review to a person who has suffered a legal grievance. On the other hand, it could be interpreted as including any person who has a genuine grievance.²⁴ Some guidance as to how the term “interests” will be interpreted can perhaps be obtained from the decision in *Re McHattan and Collector Of Customs* on section 27(1) of the *Administrative Appeals Tribunal Act 1975-1980* (Cth). This section provides that a person “whose interests are affected” by a decision may apply to the Administrative Appeals Tribunal for a review of the decision. In *Re McHattan and Collector of Customs* Brennan J said:²⁵

“The relevant ‘interests’ do not have to be pecuniary interests or even specific legal rights... Restrictions of that kind are incompatible with the variety of decisions which are subject to review - some decisions affecting legal rights, others being unlikely to do so.

Thus a decision to deport a migrant clearly affects interests of a different kind from those which may be affected by a demand for customs duty, though both kinds of decision may be reviewed in certain circumstances.

²² *Judicial Review Act* s 5(1). Where an application has been made to the Court, a person “interested” in the decision may apply to the Court to be made a party to the application: id, s 12, The Attorney General may intervene in a proceeding on behalf of the Commonwealth: id, s 18. The law relating to standing in the Commonwealth sphere is being reviewed by the Australian Law Reform Commission: see in particular Discussion Paper No 4 and Working Paper No 7, both entitled: *Access to the Courts – 1 Standing: Public Interest Suits*.

²³ Id, s 3(4).

²⁴ *Re Liverpool Taxi Owners’ Association* [1972] 2 All ER 589; para 3.21 above.

²⁵ (1977) 18 ALR 154, 157.

However, a decision which affects the interests of one person directly may affect the interests of others indirectly. Across the pool of sundry interests, the ripples of affection may widely extend. The problem which is inherent in the language of the statute is the determination of the point beyond which the affection of interests by a decision should be regarded as too remote for the purposes of s 27(1). The character of the decision is relevant, for if the interests relied on are of such a kind that a decision of the given character could not affect them directly, there must be some evidence to show that the interests are in truth affected.”

8.18 The Kerr Committee envisaged that a person would be aggrieved by a decision if the decision “..affected his rights, property, privileges or liberties or denied him some right, property, privilege or liberty which he was claiming”.²⁶ Perhaps a definition of interests could be provided in these terms.

(b) A Sufficient Interest in the Matter

8.19 In England, Order 53 rule 3(5) of the *Rules of the Supreme Court 1965-1979* provides that the “Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates”. This rule was recently considered by the Court of Appeal²⁷ and the House of Lords on appeal from that Court.²⁸ In this case, the National Federation of Self-Employed and Small Businesses Ltd sought a declaration that the Inland Revenue Commissioners had acted unlawfully in granting an amnesty to some tax evaders, described as “Fleet Street casuals”, and an order of mandamus directed to the Commissioners to assess and collect income tax from them. The question arose whether or not the Federation had a sufficient interest in the matter. In the Court of Appeal Lord Denning MR said that the rule represented the existing law. He stated the test in the following manner:²⁹

²⁶ Report (1971), 91 para 306. Professor E I Sykes has suggested that a showing of interest should be in broad terms and that:

“It should be enough that the applicant is affected, will be affected or is reasonably likely to be affected by the action or inaction in relation to (a) his business or trade interests, (b) his enjoyment of material amenities, (c) his enjoyment of personal liberty or (d) his enjoyment of relationships with the close members of his family, viz spouse and children”: Stein, 233.

²⁷ *R v Inland Revenue Commissioners; Ex parte National Federation Of Self-Employed and Small Businesses Ltd* [1980] 1 QB 407. This case involved an appeal from a decision of the Divisional Court on a preliminary objection. The Divisional Court held that the Federation did not have a sufficient interest in the matter.

²⁸ *Inland Revenue Commissioners v National Federation of Self-Employed Businesses Ltd* [1981] 2 All ER 93.

²⁹ [1980] 1 QB 407, 422-423.

“Have they a genuine grievance? Are they genuinely concerned? Or are they mere busybodies? This matter is to be decided objectively. A ‘busybody’ is one who meddles officiously in other people's affairs. He convinces himself - subjectively - that there is cause for grievance when there is none. He should be refused. But a man who is genuinely concerned can point - objectively - to something that has gone wrong and should be put right. He should be heard.”

Ackner LJ also considered that the rule involved a consideration of whether or not the applicant had a genuine grievance, justified on reasonable grounds.³⁰ Both Judges held that the Federation had a “sufficient interest”. However, a more restrictive view was taken by Lawton LJ. He considered that the rule required that:³¹

“...there must be a connection with the subject matter of the application greater than that which citizens generally may have ... more than a sense of grievance which any citizen might reasonably have against a government department or any statutory body performing public duties.”

8.20 In the House of Lords, Lord Wilberforce expressed the opinion that generally standing could not be considered in isolation, but must be considered in the context of the:³²

“...powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed.”

Although the test in respect of all forms of remedy is expressed to be one of sufficient interest, he did not consider that the test was the same in all cases. The common law had developed different tests for good reason. So far as an application for mandamus for an alleged failure to perform a duty was concerned, Lord Wilberforce said that it was necessary to consider –

- * the nature of the duty alleged to have been breached; and
- * whether or not the applicant was within the scope or ambit of the duty.³³

³⁰ Id, 433.

³¹ Id, 426.

³² [1981] 2 All ER 93, 96.

³³ Id, 97.

After considering the legislation concerned, he concluded that the decision-maker owed no duty to the Federation, and that the applicant had shown no sufficient interest in the matter to justify the application for relief .

8.21 Lord Scarman, however, considered that a legal duty of fairness was owed to the general body of taxpayers, subject to a duty imposed on the Commissioners of sound management.³⁴ Lord Scarman approved of the test advanced by Lord Denning MR and Ackner LJ in the Court of Appeal, but held that the Federation had failed to show any grounds for believing that the Commissioners had failed to do their statutory duty and therefore had not shown a sufficient interest in law to justify the grant of leave to proceed further with the application.³⁵

8.22 Lord Diplock, on the other hand, appears to have been of the view that the Federation had a sufficient interest in obtaining an appropriate order, but that the Federation had failed to show that the conduct of the Commissioners was ultra vires or unlawful.³⁶

8.23 Lord Fraser considered that the question whether or not the Federation had a sufficient interest to make the application was a separate, and logically prior, question to the question whether or not the Commissioners had acted lawfully. Lord Fraser concluded that the statute concerned gave no express or implied right to the Federation to complain of an alleged unlawful act or omission. He said:³⁷

“It would, I think, be extravagant to suggest that every taxpayer who believes that the Inland Revenue or the Commissioners of Customs and Excise are giving an unlawful preference to another taxpayer, and who feels aggrieved thereby, has a sufficient interest to obtain judicial review under Ord 53. It may be that, if he was relying on some exceptionally grave or widespread illegality, he could succeed in establishing a sufficient interest, but such cases would be very rare indeed and this is not one of them.”

8.24 Lord Roskill expressly disapproved the view adopted by Lord Denning MR because such a view means that the words “sufficient interest” would, in practice, cease to be words of

³⁴ Id, 113.

³⁵ Id, 114.

³⁶ Id, 106-107.

³⁷ Id, 108.

limitation.³⁸ Lord Roskill examined the nature of the statutory duty, the complaint made and the relief sought and concluded:³⁹

“...having regard to the nature of the Revenue's statutory duty and the degree of confidentiality enjoined by statute which attaches to their performance, that in general it is not open to individual taxpayers or to a group of taxpayers to seek to interfere between the Revenue and other taxpayers, whether those other taxpayers are honest or dishonest men, and that the court should, by refusing relief by way of judicial review, firmly discourage such attempted interference by other taxpayers. It follows, in my view, taking all those matters into account, it cannot be said that the federation had a ‘sufficient interest’ to justify its seeking the relief claimed by way of judicial review.”

8.25 The difficulties with a general phrase such as “sufficient interest” referred to in paragraph 8.15 above appear in the contrasting views expressed in the judgments in the Court of Appeal and House of Lords. A clearer understanding of the meaning and scope of the term will have to await further judicial decisions.

4. LEAVING STANDING TO THE DISCRETION OF THE COURT

8.26 The law of standing has recently been reviewed in New Zealand by the Public and Administrative Law Reform Committee.⁴⁰ The majority of the Committee considered that it was desirable to develop rules of standing which would ensure that only those whose rights were in issue or whose interests were directly and seriously threatened could apply for judicial review. The majority seems to have been principally concerned with ensuring that actions could only be brought by those who are able and who have an incentive to present the case from a background of knowledge and interest.⁴¹ The majority did, however, recognise that there may be circumstances in which no particular individual would be more affected than others. In such a case the majority considered that an administrative decision should not be immune from judicial review merely because the “allegedly illegal action equally affects the *whole population*”.⁴²

8.27 The majority considered that these purposes could best be achieved by leaving the question of standing “...to be considered along with other issues in the context of the court's

³⁸ Id, 119

³⁹ Id, 120.

⁴⁰ Eleventh Report, *Standing in Administrative Law* (1978).

⁴¹ Id, 7.

⁴² Id, 8.

general discretion”⁴³ to grant or refuse the relief sought. The majority therefore recommended that the following clause should be inserted in the *Judicature Act 1908*:⁴⁴

“On an application for review under Part I of the *Judicature Amendment Act 1972*, or for a writ or order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or injunction, the [High] Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.”

The majority envisaged that the High Court, in exercising such a discretion, would assess the interests protected by the legislation in issue and the extent of the applicant's involvement with those interests.⁴⁵

8.28 The minority of the Committee criticised the approach of the majority because it did not provide criteria for the Court to consider in exercising its discretion, and consequently, provided no basis for predicting who would be afforded standing.⁴⁶ A second criticism of the minority was that some bodies who deserved standing would not necessarily be granted standing.⁴⁷

8.29 The minority recommended leaving standing to be determined according to the common law rules, but in order to deal with their second criticism they recommended that there should be a preliminary standing hearing. Their recommendations in this respect are discussed below.

5. REPRESENTATION OF PUBLIC INTEREST

8.30 Although the minority of the New Zealand Public and Administrative Law Reform Committee recommended that the existing rules of standing should be retained⁴⁸ they did recommend that provision should be made for a representational action. That recommendation arose from their concern that some groups wishing to bring actions in the "public interest", would not have standing under the existing common law rules. They recommended that a

⁴³ Id, 29-30.

⁴⁴ Id, 33.

⁴⁵ Id, 29.

⁴⁶ Id, 36.

⁴⁷ Id, 37.

⁴⁸ The minority considered that the advantages of liberalising the rules of standing were outweighed by the increased opportunity to institute proceedings for the purpose of delaying the implementation of decisions: id, 35.

person who otherwise lacked standing should be screened by the Attorney General in the first instance and, if he refused to grant his fiat, by a court. A court would be empowered to make a standing order if it were satisfied:⁴⁹

- “(a) that the person claiming to represent the public interest genuinely represents the interests of the public or a significant section of the public; and
- (b) that the public or, as the case may be, that section of the public, has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and
- (c) that in all the circumstances, having regard to the nature of the statutory power in question, and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review.”

8.31 Such an approach could be adopted irrespective of whether or not an attempt were made to reform the common law rules of standing, for example, by adopting one of the formulae referred to in paragraphs 8.16 to 8.25 above. However, a representational action would be unnecessary if any person were entitled to apply for judicial review.

8.32 The approach recommended by the minority of the Committee has been criticised as being “unnecessarily complex, cumbersome and time-consuming”.⁵⁰ Smillie has also expressed the view that -

- (1) The involvement of the Attorney General is neither necessary nor desirable.
- (2) The requirement that an applicant represent "a significant section of the public" is a vague concept. In any case, the actual number of persons involved is a relatively unimportant consideration.
- (3) The second requirement involves some consideration of the merits of the applicant's case. This appears to be contrary to one aim of the approach of the minority, namely, to settle standing problems at a preliminary stage without an assessment of the applicant's likelihood of success.

⁴⁹ Id, 38.

⁵⁰ J A Smillie, 'Locus Standi - The Report of the Public and Administrative Law Reform Committee' (1978) 4 *Otago Law Review* 141, 158.

8.33 Smillie suggested that the court should be empowered to grant a person standing to make an application for judicial review, if the court were of the opinion that the person "...will genuinely and competently represent an aspect of the public interest relevant to the action to which the application relates".⁵¹

8.34 The role of the Attorney General in "public interest" proceedings⁵² has recently been considered by the Law Reform Commission of British Columbia. The Commission concluded that it would be desirable to allow any person to institute a public interest proceeding, but that the Attorney General should have an opportunity to participate in and exercise some degree of control over proceedings. The Commission said that the Attorney General may wish to participate for a number of reasons:⁵³

"For example, he may have doubts as to the competence of the person to conduct the proceedings, or that the case is one which would benefit from having the full resources of his ministry behind it. At the same time he may not wish, for a variety of reasons, to be involved in the proceeding at all. As a result of our recommendation, his decision not to participate will not give rise to any suggestion that this decision has prevented an otherwise meritorious case being brought before the courts."

8.35 In order to provide the Attorney General with an opportunity to intervene, the Commission recommended that a person wishing to commence a public interest proceeding should first be required to make a request to the Attorney General to commence the proceeding. On receipt of the application, the Attorney General could, within ten days of receiving the application, undertake the proceeding or allow the applicant to undertake the proceeding in the name of the Attorney General in a relator action. If the Attorney failed to respond within ten days, the applicant could apply to the Supreme Court for consent to undertake the proceeding in his own name. The Supreme Court would be required to give its consent, on such conditions as it considered appropriate, unless it considered that there was no

⁵¹ Id, 161.

⁵² The Law Reform Commission of British Columbia defined a "public interest" proceeding as:
"...a civil proceeding which can by law...be brought by the Attorney General, either on his own initiative or at the request of a relator, in the Supreme Court, in respect of a present or apprehended violation of a public right, including a proceeding
(a) in respect of a public nuisance, or
(b) to restrain
(i) a person from violating an enactment, or
(ii) a public body from exceeding its power.":

Civil Litigation in the Public Interest (1980), 74.

⁵³ *Civil Litigation in the Public Interest* (1980), 72.

justiciable issue to be tried.⁵⁴ Although this procedure gives the Attorney General an opportunity to intervene, it is cumbersome and in many cases could involve unnecessary delay. It would also deprive some people of direct access to the Court which they now enjoy. Another approach would be to require any person who commenced an action for judicial review to serve a copy of the application on the Attorney General. The Attorney General could be empowered to intervene in the case if he considered that intervention were desirable.

8.36 The Commission invites comment as to the appropriate standing rules.

⁵⁴ Id, 74-75.

CHAPTER 9 - THE SCOPE OF JUDICIAL REVIEW

1. WHICH DECISIONS OR BODIES SHOULD BE SUBJECT TO THE PROPOSED REFORMS?

9.1 The Commission has interpreted its terms of reference as excluding decisions made by private or domestic bodies from the scope of this project, but as requiring the Commission to consider the principles and procedures which should apply to the judicial review of decisions of the organs of the State of Western Australia.¹ One question which arises in considering possible reforms of the law in this area is: Which decisions of which bodies should be subject to any reforms ultimately decided upon?

9.2 The approach adopted in New South Wales, that is, the use of existing civil action procedures, does not involve any change to the range of decisions or bodies subject to judicial review under the existing remedies. Decisions or bodies previously subject to review by way of certiorari, prohibition and mandamus are still subject to review but by means of civil action procedures.²

9.3 The same result was achieved in England where the law was reformed by the creation of a new remedy. In England, the rules creating the new remedy merely provide that a person who wishes to obtain an order of certiorari, prohibition or mandamus must make the application by way of the new remedy.³

9.4 In New Zealand, on the other hand, the decisions or bodies subject to review under the new remedy have been defined by providing that an application for the new remedy may be made in respect of the "...exercise, refusal to exercise, or proposed or purported exercise by any person of a *statutory power*".⁴ However, since the remedies of certiorari, prohibition and mandamus have not been abolished there, any decisions outside the scope of the new remedy but which were within the scope of the old remedies may still be reviewed under those remedies.⁵

¹ Para 1.3 above.

² Para 6.2 above.

³ Para 6.15 above.

⁴ Paras 6.14 and 6.29 above.

⁵ Even if the decision impugned does involve a statutory power, the proceeding may be commenced by an application for a writ of certiorari, prohibition or mandamus. However, in such a case the proceeding must be treated and disposed of as if it were an application for the new remedy: *Judicature Amendment Act 1972* (NZ), s 6.

9.5 In the Commonwealth sphere, where the principles of judicial review were reformed, an approach similar to that in New Zealand was taken to defining the scope of the new remedy. The scope of the remedy provided by the *Judicial Review Act* is defined by the provision that all decisions of an "administrative character" made, proposed to be made, or required to be made "under an enactment" may be reviewed under it. The remedy created by the *Judicial Review Act* is in addition to, and not in derogation of, any other rights that a person has to seek review.⁶

9.6 If a new remedy were to be created in Western Australia its scope could be defined either by expressly providing that it was to be co-extensive with that of the prerogative writs, as in England, or by specifically defining the decisions or bodies which would be subject to it, as in New Zealand and the Commonwealth.

9.7 At present the Commission favours the latter approach.⁷ In order to exclude decisions of private or domestic bodies from the scope of any new remedy proposed, and to avoid the difficulties raised by the term "administrative character" in the *Judicial Review Act*,⁸ the Commission proposes that, subject to any exceptions, any new remedy should apply to all decisions made, or proposed, or required to be made by an organ of the State of Western Australia.

9.8 This definition would include decisions made under the prerogative. The prerogative powers are exceptional powers of the Sovereign, some or all of which the Governor may be able to exercise in Western Australia.⁹ The Commission considers that it may be appropriate to apply the same legal standards to the judicial review of those powers as are applied to statutory powers. However, if it were considered desirable to exclude the prerogative powers

⁶ *Judicial Review Act*, s 10(1)(a).

⁷ Even if the decision were made to use the existing civil action procedures (as in New South Wales and Victoria), it would be possible to go further by also reforming the grounds of judicial review. Consideration could thus also be given to defining the scope of judicial review by such a procedure, in the terms discussed in this paragraph and paragraph 9.8.

⁸ Paras 6.49 and 6.50 above.

⁹ Paras 1.4 and 1.5 above. Generally the courts will only determine whether or not a prerogative power exists and, if so, the extent of its operation: de Smith, 286-287. One exception is the decision of Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182. In that case Lord Denning MR was prepared to review the exercise of a prerogative power to determine whether or not the power had been used "improperly or mistakenly": id, 193. The majority, Roskill LJ (at 206) and Lawton LJ (at 210-211) took a narrower view that an Act of Parliament had fettered the prerogative power and that it was that Act which governed the rights and duties of the plaintiff and not the prerogative power.

from the scope of any new remedy, this could be done by specifying that it would apply only to decisions made, or proposed, or required to be made under an enactment,¹⁰ by an organ of the State of Western Australia. Comment is invited.

9.9 The *Judicial Review Act* of the Commonwealth expressly excludes any decision of the Governor-General from its scope. The question arises whether a similar restriction should be provided in Western Australia, either generally or with respect to specific powers. For example, it may be considered desirable to exclude a decision of the Governor made under the *Constitution Act 1889-1980* and the *Constitution Acts Amendment Act 1899-1980* from the scope of a new remedy. Under these Acts the Governor is authorised to make a number of decisions, including the summoning, proroguing or dissolution of the Legislative Council and the Legislative Assembly and the designation of the principal executive officers of the Government, which are of a political or constitutional nature, that is, they are concerned with the formation, constitution and continuity of the government of Western Australia. A decision whether or not to exclude any decisions of the Governor from the scope of a new remedy may depend on the approach to reform adopted. If the new remedy extended the grounds on which decisions could be impugned it might be considered that all or some decisions of the Governor should be excluded from review under it. In this case it would seem desirable also to retain the remedies in their present form so that any existing rights to review decisions made by the Governor (and any other decisions excluded from the scope of the new remedy) which are currently available under those remedies would not be abridged.¹¹

2. EXCLUSION OF DECISIONS FROM THE SCOPE OF JUDICIAL REVIEW

(a) Introduction

9.10 Irrespective of whether the reform ultimately decided upon is confined to procedural reforms or goes further by including reform of the substantive principles of judicial review, the question arises whether or not there are any decisions, other than those referred to above, which should be excluded altogether from judicial review by the Supreme Court. In paragraphs 4.3 and 4.4 above, the Commission referred to a number of statutory provisions which are designed to exclude or limit the review of administrative decisions by the Supreme

¹⁰ “Enactment” would include an Act of the Parliament of Western Australia or an instrument, including rules, regulations or by-laws, made under such an Act: see *Judicial Review Act*, s 3(1).

¹¹ Para 10.27 below.

Court. Should these provisions be retained? In the Commonwealth sphere, section 4 of the *Judicial Review Act* provides that provisions in force at the time of the commencement of the Act which would otherwise have excluded review under that Act do not prevail over the remedy provided in the Act. However, a number of decisions listed in Schedule 1 of the Act have been excluded from the operation of the Act. In Victoria, section 12 of the *Administrative Law Act 1978-1980* provides that certain provisions excluding judicial review by the Supreme Court are not to prevail over the remedy provided in the Act.

9.11 As judicial review is concerned with ensuring that decision-makers act according to law, the Commission considers that there should be cogent reasons for excluding a particular decision from the scope of judicial review.

9.12 The question whether or not decisions should be excluded from the operation of the *Judicial Review Act* of the Commonwealth was considered by the Administrative Review Council. The Council considered a number of reasons for excluding decisions from review under the *Judicial Review Act*,¹² including the reasons discussed in paragraphs 9.13 to 9.17 below.

(b) Possible Reasons for Exclusion

(i) Decisions Involving Large Elements of Policy

9.13 The Council concluded that the presence of large elements of policy should not be a ground for exclusion from the *Judicial Review Act*. The Council considered that those who advanced this reason misconceived the operation and effect of the Act, namely, that the Act is concerned with providing for the review of the lawfulness of decisions.¹³

(ii) Adequate Alternative Avenues of Review

9.14 Where there are adequate alternative avenues of review, particularly those involving review on the merits, it may be considered to be unnecessary to provide for judicial review. The Council saw judicial review as being a basic remedy in administrative review and did not

¹² Although the Council was concerned only with this limited question, the same considerations would be relevant in considering whether any decisions should be excluded from judicial review altogether.

¹³ Administrative Review Council, *Third Annual Report* (1979), 54.

consider that the existence of an alternative remedy was, of itself, a substitute for judicial review. The Council considered that it should be a factor only if there were other reasons which supported exclusion from the Act and where the alternative remedy "...could properly be regarded as compensating for the consequences of exclusion". The Council also noted that, in any case, the Federal Court had a discretion to refuse a remedy where an alternative remedy existed.¹⁴

9.15 In Western Australia it might be considered that the privative clauses relating to inferior courts¹⁵ should be retained because the alternative appellate rights which exist are reasonably extensive. On the other hand, it may be considered that these privative clauses would be unnecessary if the Supreme Court had a discretion to refuse to grant relief if an alternative remedy existed.¹⁶ This would mean that the option of judicial review would be retained for circumstances in which it was considered preferable to the right of appeal.

(iii) The Need to Make Decisions in Urgent or Emergency Contexts

9.16 The Council considered whether or not the need to make a decision in an urgent or emergency context, such as where it was alleged that food was a health hazard, should lead to that decision being excluded from judicial review. In such a case delay in making the decision could destroy the value and purpose of the decision. The Council concluded that this should not be a reason for excluding review because it envisaged that courts would continue "to hold that justice may be done, where necessary, by remedies available subsequent to the making or implementing" of a decision and that the making or implementing of a decision would be prevented only in very rare circumstances.¹⁷

(iv) Commercially Competitive Statutory Authorities

9.17 In Western Australia there are at least two commercially competitive statutory authorities, the Rural and Industries Bank of Western Australia and the State Government Insurance Office. These bodies are created and operated under Acts of Parliament. It may be considered that they should not be subject to judicial review because to do so would mean that

¹⁴ Id, 54-55.

¹⁵ Para 4.3 above.

¹⁶ Para 10.6 below.

¹⁷ Administrative Review Council, *Third Annual Report (1979)*, 55.

competitors may be able to obtain information on the operations of the authorities by means of requiring reasons for decisions, or use the review process to hamper the activities of the authorities. On the other hand, it may be considered that their decisions should be subject to review for lawfulness in the same way as any other governmental body which derives its authority to make decisions from a statute.¹⁸

(v) The Proceedings of Parliament

9.18 Defining the ambit of judicial review in the terms discussed in paragraphs 9.7 and 9.8 above might permit the Supreme Court to pass upon those proceedings of Parliament which are governed solely by Standing Rules and Orders. These Rules and Orders are made under an Act of Parliament.¹⁹ However, as this would seem to be contrary to the long established right of each House to be the sole judge of the lawfulness of its own proceedings,²⁰ the Commission considers that these proceedings should not be subject to judicial review. The exclusion of these proceedings from the scope of such review would have to be carefully worded to ensure that it did not exclude review of the validity of bills or legislation passed by Parliament.²¹

¹⁸ If these decisions were made subject to review the decisions of these bodies could be excluded from any requirement to give reasons or state findings of fact: para 11.10 below.

¹⁹ *Constitution Act 1889-1980*, s 34.

²⁰ O Hood Phillips, *Constitutional and Administrative Law* (5th ed 1973), 206-207. This right applies to the Western Australian Parliament under s 1 of the *Parliamentary Privileges Act 1891-1966*.

²¹ See in particular s 73 of the *Constitution Act 1889-1980*. Subsection (6) of s 73 provides that any elector is capable of bringing proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the provisions of that section.

CHAPTER 10 - OTHER MATTERS

1. DISCRETIONARY NATURE OF THE REMEDY

10.1 Under the existing law the Supreme Court has a discretion to refuse to grant the relief sought even if the grant of the remedy sought would otherwise be justified. This power is not exercised in an arbitrary manner and various matters are taken into account in determining whether or not to exercise the discretion to refuse to grant the relief sought.¹

10.2 The question arises whether or not judicial review should continue to be a discretionary remedy. On the one hand it may be considered that because judicial review is mainly concerned with ensuring that administrative decisions are lawful a remedy should be granted once sufficient cause has been shown.

10.3 On the other hand, the rigorous application of the rule of law by means of judicial review without regard to factors such as the worthiness of the applicant or his case and administrative efficiency could lead to unfortunate results in particular cases.

10.4 It might be suggested that applicants or cases which are tainted in some way should not be entitled to relief by way of judicial review. Relief could be refused if, for example, the applicant acquiesced in an error by participating in the proceedings² or if the applicant's conduct contributed to the error.³ It might also be considered that the Court should have a discretion to refuse to grant the relief sought if the application involved an abuse of the process of the court, for example, if granting the relief sought would permit an unlawful purpose to be achieved or lead to some illegality.⁴

10.5 Although it would probably be going too far to allow a discretion to refuse relief on the general ground of administrative efficiency there may be particular considerations or circumstances relating to administrative efficiency which would justify the exercise of such a discretion. The need for finality in the administrative decision-making process might suggest that undue delay by the applicant in seeking a remedy should be a matter which could be

¹ Para 3.13 above.

² *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR.122.

³ *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 42-43.

⁴ *McPherson v Perth Electric Tramways Ltd* (1910) 12 WALR 192.

considered in deciding whether or not to exercise the discretion. While a similar result could be achieved by providing time limits on an application for review, such a period would necessarily be arbitrary and, unless the period could be extended, could prove to be harsh in particular cases.

10.6 Another factor relating to administrative efficiency which could be considered would be the availability or use of an alternative remedy. If, for example, a right of appeal were available which provided a rehearing *de novo* on the merits it may be preferable for such an appeal to be pursued. Such an appeal may result in a final decision on the merits, whereas judicial review may only lead to the original decision being quashed. In the latter case, the matter would have to be re-determined by the decision-maker and the applicant could still institute an appeal from an adverse decision. Granting judicial review in these circumstances would lead to unnecessary delay and expense. It might also be considered that there should be a discretion to refuse to grant judicial review where the applicant has already unsuccessfully appealed against the decision sought to be reviewed, particularly if the matters raised on the application for judicial review were raised on the appeal or, if not, the matters could have been raised on the appeal but were not so raised.

10.7 The interests of administrative efficiency might also suggest that the discretion to refuse relief should be exercised against the applicant where the error was of a trivial nature or did not involve a substantial miscarriage of justice⁵ or if a different result would not have resulted had the error not been made.⁶ It might also be desirable to discourage applications for judicial review where the remedy would be ineffective or unnecessary by allowing these factors to be taken into account in determining whether or not to exercise a discretion to refuse to grant the relief sought.

2. POWERS OF THE COURT

10.8 At present the remedies available to an applicant for judicial review are reasonably extensive. The Court can make an order quashing a decision. It can prohibit the making of a decision or the continuation of a course of action based on a decision already made. It can order or direct a decision-maker to do some act or make an order to prevent the breach of some duty. It can make a declaration of the rights of the parties in respect of any matter to

⁵ See, for example, s 5 of the *Judicature Amendment Act 1972* (NZ).

⁶ *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 42.

which the decision under review relates. A major disadvantage of the existing system, however, is that it is not possible to apply for these various remedies in one application. For example, the procedure for applying to have a decision quashed is different from that for applying for a declaration of the rights of the parties. It is therefore not possible to apply for these remedies in the alternative. Consequently, the courts are not always in a position to grant the most appropriate remedy in the circumstances of the case.

10.9 The Commission considers that this disadvantage of the existing system should be overcome in any reform of the law.⁷ Generally, the Commission considers that on any application for judicial review of an administrative decision the Supreme Court should have powers similar to those now available on an application for certiorari, prohibition, mandamus, declaration or injunction and, in particular, power to make an order -

- (1) quashing or setting aside the decision, or a part of the decision;
- (2) preventing a decision-maker or authority from proceeding further with the matter;
- (3) directing the making of a decision or the performance of a legal duty, including compliance with correct procedures in making a decision;
- (4) declaring the rights of the parties in respect of any matter to which the decision or proposed decision relates.⁸

Consideration could also be given to empowering the Supreme Court to -

- (1) Direct the decision-maker to reconsider and determine a matter in accordance with any directions of the Court.⁹ This would permit the original decision-maker to re-determine the matter in accordance with any directions of the Court without the necessity for a complete rehearing of the matter in question.

⁷ This disadvantage has been overcome in New Zealand: para 6.19 above. See *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 where, because of the time which had elapsed since the applicant had sought a licence, the Court decided not to grant relief in the nature of mandamus. Such a remedy would have required the Minister to make the order according to law and would have involved further delay. Instead a declaration was made that the applicant was entitled to a licence subject to certain conditions.

⁸ Such a remedy may be appropriate where the decision-maker is the Governor or a body such as the Executive Council: see, for example, *Tonkin v Brand* [1962] WAR 2 where a non-coercive judgment was made against members of the Executive Council.

⁹ There are similar powers in New Zealand (para 6.19 above), England (para 6.22 above) and in the *Judicial Review Act*: para 6.42 above.

Such a rehearing would be necessary if the decision were quashed and the original proceedings were a nullity.

- (2) Stay proceedings the subject of an application for judicial review.¹⁰ This would provide a means of preserving the status quo pending a final determination of the application for judicial review.

3. DAMAGES

10.10 Another matter requiring consideration is whether or not the Supreme Court should be empowered to award damages on an application for judicial review.¹¹ A public authority may be liable for damages for injury or economic loss caused by a negligent act or misrepresentation or for trespass, false imprisonment or assault. The law relating to the circumstances in which damages should be awarded for unlawful administrative action was recently considered by the New Zealand Public and Administrative Law Reform Committee.¹² This matter is not considered in this Working Paper. The question relating to damages raised in this Paper is whether or not it should be possible to join claims for damages with an application for judicial review. A need to join a claim for damages with an application for judicial review is not often likely to arise. The most likely circumstance in which it would be desirable to join a claim for damages with an application for review would be where there had been a breach of a statutory duty and the statute creating the duty conferred a private right of action on the applicant.¹³ At present an application for damages can be joined with an application for an injunction or a declaration but not with an application for certiorari, prohibition or mandamus. In order to overcome this problem the English Law Commission recommended that the court hearing an application for judicial review should have power to make an award of damages if such an award were justified under the existing law.¹⁴ This

¹⁰ There are similar powers in New Zealand (*Judicature Amendment Act 1972*, s 8), England (*Rules of the Supreme Court 1965-1979*, Order 53 rule 3(10)(a)) and in the *Judicial Review Act*: para 6.42 above.

¹¹ For a discussion of the liability of public authorities for damages see Wade 617-650.

¹² Fourteenth Report, *Damages in Administrative Law* (1980). The Committee recommended against the introduction of a broad new liability; id, 33-36. Instead the Committee recommended that:

“...whenever a new statute confers powers that, if exercised unlawfully will cause economic loss, consideration should be given to the inclusion of a provision relating to compensation for losses flowing from any unlawful decisions given by the donee(s) of the powers”: id, 31.

¹³ See also *Springvale Washed Sand Pty Ltd v City of Springvale* [1969] VR 784 where a by-law purporting to require the payment of royalties on excavated sand to the Council was held to be ultra vires. The plaintiff was unable to recover the royalties which had been paid because the payment was made “voluntarily”.

¹⁴ The Law Commission, *Report on Remedies in Administrative Law* (1976, Cmnd 6407), 25, para 54.

recommendation has since been implemented.¹⁵ There is no power to award damages in New Zealand or under the *Judicial Review Act* on an application for judicial review.

10.11 While empowering the Supreme Court to award damages on an application for judicial review would have the advantage that a person would not have to institute separate proceedings in order to recover damages, the procedure for judicial review may not permit such an issue to be determined in a satisfactory manner. This is because judicial review usually involves a summary procedure based on affidavit evidence without extensive, or indeed any, interlocutory proceedings. If a summary procedure is provided without interlocutory proceedings it may be preferable to leave the determination of whether or not a person is entitled to damages to an ordinary civil action, particularly where there is a dispute as to whether or not the damages arose from the matter the subject of the application or as to the quantum of damages. On an application for judicial review the Court could be empowered to give directions as to how any such dispute could be determined without the need to institute fresh proceedings.

4. COSTS

10.12 At present the Supreme Court has a discretion to make an award of costs where an order nisi for a writ of certiorari, prohibition or mandamus is made absolute.¹⁶ This discretion must be exercised judicially in accordance with fixed principles. Generally, a successful party is entitled to recover his costs from an unsuccessful party. A successful party may, however, be deprived of the whole or part of his costs if, for example, his conduct has materially increased the cost of the proceedings.¹⁷

10.13 One question which arises for consideration is whether or not the Court should continue to have such a discretion to make an award of costs.¹⁸ If proceedings for judicial review are seen as being solely concerned with the protection of private interests it might be considered that the discretion should be retained. Where purely private interests are concerned a person can balance the costs of an unsuccessful action against the benefits of a successful action. If, however, proceedings for judicial review are seen as also being concerned with

¹⁵ Para 6.22 above.

¹⁶ *Rules of the Supreme Court 1971-1980*, Order 56 rule 9(2).

¹⁷ *Keddie v Foxall* [1955] VLR 320.

¹⁸ There is such a discretion in proceedings under the *Judicial Review Act: Federal Court of Australia Act 1976-1979*, s 43.

ensuring that administrative decision-makers act according to law it might be thought that less discouragement should be imposed upon people wishing to impugn an administrative decision.

10.14 One means of doing this would be to provide that each party should bear his own costs. This would reduce the financial risk attached to litigation. While a person wishing to challenge an administrative decision may be prepared to meet the cost of his own legal representation, the possibility that he would have to pay the costs of a successful respondent might deter him from making an application for judicial review. Another means would be to provide that costs could be recovered by a successful applicant, but that he would not be liable for costs if unsuccessful. This approach could, however, place a significant financial burden on some administrative decision-makers, such as a local authority with a relatively small number of ratepayers.

10.15 Both approaches discussed in the previous paragraph could also increase the danger that frivolous or vexatious litigation or litigation without a reasonable basis would be instituted. Such litigation could be discouraged by giving the Court a discretion to award costs against an unsuccessful applicant if the application were frivolous, vexatious or without a reasonable basis.

10.16 If an applicant is to continue to be liable for costs, another matter which would arise for consideration is whether or not the Court should have a discretion to make an order requiring an applicant to provide security for the payment of any costs which may be awarded against him.¹⁹ Such a requirement could have the advantage of providing a means of discouraging litigation without a reasonable basis or frivolous or vexatious litigation without unduly hindering genuine litigation. Amongst the factors which are considered when determining whether or not to require security for costs are the bona fides of the action and whether an order for security would prevent a bona fide action from proceeding.²⁰

¹⁹ See, for example, s 56 of the *Federal Court of Australia Act 1976-1979* and Order 56 rule 5(1) of the *Rules of the Supreme Court 1971-1980*.

²⁰ *Sir Lindsay Parkinson and Co Ltd v Triplan Ltd* [1973] 2 All ER 273, 285-286.

5. THE REVIEW COURT

10.17 At present, applications for certiorari, prohibition and mandamus are heard by the Full Court of the Supreme Court, unless the matter appears to be one of urgency, in which case it may be heard by a judge in court or chambers.²¹ Proceedings for declaration or injunction are heard before a single judge. It might be desirable to provide for applications for judicial review to be heard by a single judge if any reform of the law led to an increase in the number of applications with a consequent increase in the burden of work of the Full Court. It might, in any case, be considered to be a waste of resources for applications for judicial review to be heard by the Full Court. If provision were made for applications to be heard by a single judge, the judge could be empowered to refer the matter to the Full Court if he considered that the matter in question was of general importance. If provision were made for applications to be heard by a single judge there would be a further appeal to the Full Court under section 58 of the *Supreme Court Act 1935-1979*. Provision for applications to be heard by the Full Court as at present would avoid the possibility of introducing an additional step into the review process in some cases. If an administrative division of the Supreme Court were established,²² applications for judicial review could be heard in that division.

6. PROCEDURE

10.18 A number of salient matters relating to the procedure for applications for judicial review are discussed below.

(a) Institution of Proceedings

10.19 At present an application for a writ of certiorari, prohibition or mandamus involves a two stage process. The first stage involves an *ex parte* application for a writ by means of a motion for an order to show cause. This procedure in effect means that it is necessary to obtain the leave of a judge of the Supreme Court before a proceeding can be instituted. This requirement provides a means of preventing frivolous, vexatious or untenable applications from proceeding. If the judge grants an order nisi to review, the second stage of the process

²¹ *Rules of the Supreme Court 1971-1980*, Order 56 rule 3.

²² As was suggested by the Commission in its Working Paper and Survey, *Review of Administrative Decisions; Part I - Appeals* (1978), 38 para 4.20.

involves the service of the order nisi on such persons as the judge directs and a hearing of the substantive matter in dispute.

10.20 The purpose of requiring a party to obtain leave appears to be to prevent the institution of actions with no chance of success. Following a recommendation of the Law Commission the new procedure introduced in England has retained this two stage process. The Law Commission gave two reasons for retaining the two stage procedure. First,²³

“A procedure which provides an expeditious method whereby the Court can sift out the cases with no chance of success at relatively little cost to the applicant and no cost to any prospective respondent would seem at first impression worthy of retention.”

Secondly,²⁴

“A further consideration which may have particular relevance to applicants for leave in person is that there is in our view some social value in a procedure which enables the litigant expeditiously and at small cost to himself to hear in public from the court that he has no legal case and the reasons for its refusal to give leave.”

10.21 An alternative, simpler, and perhaps less expensive, approach has been adopted in New Zealand, New South Wales²⁵ and in the Commonwealth sphere. In none of these jurisdictions is it necessary to obtain leave to commence a proceeding. In New Zealand, an application for review is commenced by a motion accompanied by a statement of claim. Proceedings in the Commonwealth sphere under the *Judicial Review Act* are commenced by way of an application for an order of review. In New South Wales and Victoria proceedings may be commenced by a writ of summons.

10.22 At present, the Commission has no final view on which of these two approaches should be adopted. Perhaps a procedure similar to that under the *Judicial Review Act* could be adopted initially. Provision could be made for applications to be dismissed if they disclosed no reasonable cause of action, or were frivolous or vexatious or an abuse of the process of the court.²⁶ A two stage process could be introduced at a later date if experience indicated that the

²³ The Law Commission, *Report on Remedies in Administrative Law* (1976, Cmnd 6407), 18, para 38.

²⁴ Ibid.

²⁵ Leave is also not required in Victoria if proceedings are commenced by a writ of summons: *Rules of the Supreme Court* (Vic), Order 3 rule 1A.

²⁶ See, for example, Order 20 rule 19 of the *Rules of the Supreme Court 1971-1980*. Such powers are exercised sparingly and only if the case for dismissal is clearly demonstrated: *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR 125, 128-129.

Supreme Court was being overburdened with applications which had no chance of success or with frivolous or vexatious applications.

(b) Interlocutory Proceedings

10.23 One feature of the ordinary civil action is that interlocutory proceedings, such as the discovery and inspection of documents and interrogatories, are available. It is not clear whether these procedures are available in respect of applications for certiorari, prohibition or mandamus.²⁷ Although it does not appear that these procedures have been used in Western Australia, at least in recent years, in proceedings for certiorari, prohibition or mandamus, there is no reason why they should not be as useful in the area of judicial review as they are in ordinary civil actions, particularly if a claim for damages could be joined with an application for judicial review.²⁸ The usefulness of these proceedings, even where damages are not in issue, has been demonstrated by the case of *Barnard v National Dock Labour Board*.²⁹ In this case, involving an application for a declaration, the plaintiffs probably would not have been able to mount a good and successful case if they had not had a right to discovery and inspection of the defendant's documents.³⁰ It may, therefore, be desirable to ensure that interlocutory proceedings are available to an applicant for judicial review. Interlocutory proceedings are available in New Zealand and England,³¹ and under the *Judicial Review Act*.³²

10.24 In England, an application for interlocutory proceedings may only be made when an applicant has obtained leave to apply for judicial review. Wade has suggested that this may:³³

“involve some sacrifice of justice for the sake of administrative convenience. If in *Barnard v National Dock Labour Board* [1953] 2 QB 18 the dockers had had to apply for leave, it would probably have been refused, since at that stage, before obtaining discovery, they could not have shown that they had a case. Now that the new Order makes discovery available in prerogative order applications, it may be prejudicial to make them subject to leave while the applicant may still be in the dark as to the true merits of his case”.

²⁷ Para 5.3 above.

²⁸ Para 10.10 above.

²⁹ [1953] 1 All ER 1113.

³⁰ Whitmore and Aronson, 302. An alternative approach would be to require decision-makers to provide reasons for decisions and to disclose findings of fact: see Chapter 11.

³¹ Para 6.31 above.

³² *Federal Court Rules*, Order 54 rule 5 and Order 10.

³³ H W R Wade, *Reform of Remedies in Administrative Law* (1978) 94 LQR 179, 180.

This difficulty would only arise if a two-stage process were adopted. If provision were made for interlocutory proceedings, the Commission is of the view that they should be made available at the earliest opportunity.

(c) A Pre-trial Conference

10.25 In New Zealand, a judge may make an order for the discovery of documents and for a party to administer interrogatories. The power to make these orders is one of a number of powers which a judge can exercise at a pre-trial conference for the purpose of ensuring that an application or intended application for review is determined in a “convenient and expeditious manner”.³⁴ A direction for a pre-trial conference may be made on the application of a party or on the judge's own motion. At any such conference a judge may:³⁵

- “(a) Settle the issues to be determined:
- (b) Direct what persons shall be cited, or need not be cited, as respondents to the application for review, or direct that the name of any party be added or struck out:
- (c) Direct what parties shall be served:
- (d) Direct by whom and within what time any statement of defence shall be filed:
- (e) Require any party to make admissions in respect of questions of fact; and, if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge by whom the application for review is finally determined is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs:
- (f) Fix a time by which any affidavits or other documents shall be filed:
- (g) Fix a time and place for the hearing of the application for review:
- (h) Require further or better particulars of any facts, or of the grounds for relief, or of the relief sought, or of the grounds of defence, or of any other circumstances connected with the application for review:

³⁴ The powers may also be exercised at any time before the hearing of the application without holding a conference: *Judicature Amendment Act 1972*, s 10(3). A directions hearing may be held in the Commonwealth sphere under Order 10 of the *Federal Court Rules*. In New South Wales a judge may give directions in proceedings commenced by summons or statement of claim: *Supreme Court Rules 1970-1980* (NSW), Part 5 rule 7 and Part 26.

³⁵ *Judicature Amendment Act 1972* (NZ), s 10(2).

- (i) Require any party to make discovery of documents, or permit any party to administer interrogatories:
- (j) In the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing:
- (k) Exercise any powers of direction or appointment vested in the Court or a Judge by the rules of Court in respect of originating applications:
- (l) Give such consequential directions as may be necessary.”

Consideration could be given to making provision for a similar pre-trial conference in Western Australia.

(d) Time Limits

10.26 At present, an application for a writ of certiorari must be made within six months of the date on which the decision sought to be reviewed was made, unless the delay is accounted for to the satisfaction of the Court.³⁶ No doubt this provision stems from the view that proceedings should be commenced and dealt with promptly. The Commission would welcome comments on whether or not this period should be retained or some other period provided.³⁷ Instead of, or in addition to, allowing a proceeding to be instituted after the expiration of any such period if the delay were accounted for to the satisfaction of the Court, the Court could be empowered to extend the period for commencing the proceeding if to do so would not be likely to cause substantial hardship or prejudice to any person or be detrimental to good administration.

7. SHOULD THE PREROGATIVE WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS BE ABOLISHED?

10.27 If a new remedy were provided, one question which would arise would be whether or not the existing remedies of certiorari, prohibition and mandamus should be abolished.³⁸ This

³⁶ *Rules of the Supreme Court 1971-1980*, Order 56 rule 11. The time limit for applications for mandamus with respect to a judicial tribunal is two months: *Rules of the Supreme Court 1971-1980*, Order 56 rule 27. There is no time limit on applications for prohibition.

³⁷ The period provided in the *Judicial Review Act* is generally 28 days: *Judicial Review Act*, s 11.

³⁸ This question does not arise under the approaches adopted in New South Wales and England. In New South Wales, where the Supreme Court had jurisdiction to grant any relief or remedy by way of

question has been touched on in the previous Chapter. Although a new remedy would be comprehensive it may not cover all the circumstances in which the existing remedies are available, for example, it may not apply to the exercise of the prerogative powers.³⁹ However, if the writs were abolished, these decisions could be reviewed by means of the remedies of injunction and declaration. In New Zealand, the fear that the new remedy might not cover all the circumstances in which the existing remedies were available apparently prompted the legislature to retain those remedies. However, section 6 of the *Judicature Amendment Act 1972* (NZ) provides that where a proceeding is commenced for a writ of or order in the nature of certiorari, prohibition or mandamus in relation to a statutory power the proceeding must be treated and disposed of as if it were an application for review. Such a provision would appear to be desirable if the prerogative writs were retained, in order to ensure that all matters to which any new remedy applied could be disposed of under the new remedy. For this reason it may also be desirable to make a similar provision with regard to injunctions and declarations which relate to matters which could be dealt with under the new remedy.⁴⁰ One exception may be where the application for an injunction or declaration also involves an application for a remedy, such as damages,⁴¹ if damages could not be sought under the new remedy.

prohibition, mandamus or certiorari, the Court continues to have jurisdiction to grant that relief or remedy but only in proceedings commenced by a summons or statement of claim: para 6.2 above. In England, an application for an order of mandamus, prohibition or certiorari must be made by an application for judicial review: para 6.15 above.

³⁹ Para 9.8 above.

⁴⁰ See, for example, s 7 of the *Judicature Amendment Act 1972* (NZ).

⁴¹ Para 10.11 above.

CHAPTER 11 - REASONS FOR DECISIONS AND FINDINGS OF FACT

1. EXISTING LAW

11.1 Unless there is an express statutory provision to the contrary, a decision-maker is not required to give reasons for a decision¹ or to state findings of fact.²

2. REFORMS ELSEWHERE

11.2 In the Commonwealth sphere the common law has been changed by the *Judicial Review Act*. Under section 13 of this Act a person entitled to apply for review of a decision may obtain reasons for a decision. The person entitled to review may request the decision-maker to furnish a statement in writing giving reasons for the decision, setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based.³ If there is a dispute as to whether or not a person who has applied for reasons is entitled to make the request, the issue can be determined by the Federal Court.⁴ Unless there is such a dispute, the decision-maker must comply with the request as soon as practicable, and in any event, within twenty-eight days after receiving the request.

11.3 The requirement that a decision-maker must give reasons for a decision and state findings of fact is circumscribed in a number of ways. First, the provision does not apply to a decision within any of the classes of decision set out in Schedule 2 of the *Judicial Review Act*.⁵ Secondly, regulations may declare a class or classes of decisions to be decisions that are not decisions to which the provision applies.⁶ Thirdly, a decision-maker is not required to disclose information of a personal or confidential nature.⁷ Fourthly, a disclosure of information may be prevented if the Attorney General certifies that:⁸

“...the disclosure of information concerning a specified matter would be contrary to the public interest -

¹ de Smith, 148.

² M Taggart, *Should Administrative Tribunals Be Required To State Findings of Fact?* (1980) 9 New Zealand Universities Law Review 162, 170.

³ The enactment of such a provision was recommended by both the Kerr Committee in its report in 1971 (at 78-79) and the Ellicott Committee in 1973 (at 8-9).

⁴ *Judicial Review Act*, s 13(3)-(4A).

⁵ Id, s13(11)(c).

⁶ Id, s 13(8).

⁷ Id, s 13A.

⁸ Id, s 14(1).

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed.”

Fifthly, a request may not be made in respect of a decision that includes or was accompanied by a statement setting out findings of fact, a reference to the evidence or other material on which those findings were based and the reasons for the decision.⁹

11.4 A person who receives a statement under section 13 and considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision may apply to the Federal Court for an order that the decision-maker provide further and better particulars in relation to any or all of those matters.¹⁰ Further and better particulars cannot be obtained where the decision-maker has given a person a statement voluntarily.

11.5 The Commonwealth is not the only jurisdiction to have introduced such a requirement for reasons to be supplied. There are also requirements for reasons in Victoria and England. In Victoria, a tribunal may be required to supply reasons where a decision may be reviewed under the *Administrative Law Act 1978-1980*.¹¹ Reasons need not be supplied under the Act where:¹²

“...to furnish the reasons would, in the opinion of the Court or Judge, be against public policy, or the person making the request is not a person primarily concerned with the decision and to furnish the reasons would, in the opinion of the Court or Judge, be against the interests of a person primarily concerned.”

11.6 In England, tribunals specified in Schedule 1 of the *Tribunals and Inquiries Act 1971-1979* and ministers who make a decision after a statutory inquiry are required to furnish a

⁹ Id, s 13(11)(b).

¹⁰ Id, s 13(7).

¹¹ Section 8. In the United Kingdom reasons may be requested in the case of decisions of specified tribunals and certain Ministerial decisions: *Tribunals and Inquiries Act 1971-1979*, s 12.

¹² *Administrative Law Act 1978-1980* (Vic), s 8(5).

statement, either written or oral, of the reasons for the decision.¹³ The statement may be refused or the specification of reasons restricted on the grounds of national security or because the person seeking the statement is not primarily concerned with the decision and the tribunal or minister is of the opinion that to furnish it would be contrary to the interests of any person primarily concerned.¹⁴ A statement given under these provisions or any other statutory provisions must be taken to form part of the decision and to be incorporated in the record.¹⁵ This provision facilitates the use of certiorari to quash a decision for error of law on the face of the record in appropriate cases.¹⁶

3. DISCUSSION

11.7 The introduction of a provision along the lines of the provision in the *Judicial Review Act* would have two significant advantages. First, a person would be in a better position to assess whether or not there was a good ground for seeking judicial review. The effectiveness and possibility of seeking judicial review would consequently be improved. It could also mean that judicial review would not be sought if the person were satisfied that the decision was not arbitrary or contrary to law. Secondly, if a decision-maker were required to provide reasons for a decision and to state the findings on which the decision was based it could promote better decision-making.

11.8 On the other hand, such a provision would impose additional burdens on decision-makers. However, the benefits which would flow from such a provision would in the Commission's estimation in many cases outweigh any administrative inconvenience and expense that might be caused.

11.9 If provision were made for interlocutory proceedings in proceedings for judicial review,¹⁷ the value of a provision similar to that in the *Judicial Review Act* would be diminished to some extent. However, it may still be a valuable provision, particularly if it were available before proceedings for judicial review were commenced.

¹³ *Tribunals and Inquiries Act 1971-1979*, s 12(1).

¹⁴ *Id.*, s 12(2).

¹⁵ *Id.*, s 12(5).

¹⁶ Paras 2.19 to 2.21 above.

¹⁷ Paras 10.23 and 10.24 above.

11.10 If a provision along the lines of the *Judicial Review Act* were introduced consideration would have to be given to whether or not the legislation should be circumscribed or limited in any of the ways in which the *Judicial Review Act* has been circumscribed or limited.¹⁸ The third, fourth and fifth exclusions or limitations are of general application. The first two limitations involve the exclusion of specific decisions from the requirement to give reasons and state findings of fact. While no decisions have been excluded under regulations prescribed under the Act, a number of decisions have been excluded under Schedule 2. Schedule 2 includes a number of decisions made in the course of or for the purpose of the criminal justice system. These decisions were excluded from the requirement to give reasons and state findings of fact because of concern that the system would be impeded.¹⁹ This category includes a decision relating to the appointment of inspectors, a decision relating to the prosecution of a person and a decision relating to the issue of a search warrant. Decisions of statutory commercial bodies, such as the Commonwealth Banking Corporation, are also excluded under Schedule 2. They were excluded because of concern that the operation of these bodies could be impeded if they were required to give reasons and state findings of facts for the countless decisions made in relation to their activities,²⁰ Another category of decisions excluded from the requirement to give reasons and state findings of fact is decisions relating to personnel management in the Commonwealth Public Service.

¹⁸ The Act has been circumscribed by the following five exclusions or limitations -

1. The exclusion of the decisions set out in Schedule 2 of the Act.
2. A class or classes of decision may be excluded by regulations.
3. Information of a personal or confidential nature need not be disclosed.
4. The Attorney General may prevent the disclosure of information.
5. Further information need not be disclosed where information was given with the decision in question.

¹⁹ Commonwealth Parliamentary Debates (Senate) 20 August 1980, 180.

²⁰ Ibid.

CHAPTER 12 - QUESTIONS AT ISSUE

12.1 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of the terms of reference or this Paper, and in particular on the following -

Approach to Reform

1. Should reform be limited to applying the procedure for ordinary civil actions to applications for certiorari, prohibition and mandamus without reviewing the principles for judicial review?

(Paragraphs 6.1 to 6.7)

2. Should reform be limited to creating a new remedy without reviewing the principles for judicial review?

(Paragraphs 6.8 to 6.31)

3. Should the principles of judicial review be reformed?

Grounds for Judicial Review

4. Should excess of statutory jurisdiction or authority be a ground of review?

(Paragraphs 7.1 and 7.2)

5. Should error of law be a ground of review?

(Paragraphs 7.3 to 7.7)

6. Should improper exercise of a power be a ground of review, and if so, should this ground include -

- (a) taking an irrelevant consideration into account;
- (b) failing to take a relevant consideration into account;
- (c) an exercise of a power for a purpose other than a purpose for which the power was conferred;
- (d) bad faith;

- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an unreasonable exercise of a power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain;
- (i) any other exercise of a power in a way that constitutes abuse of the power;
- (j) that there is an agreement not to exercise a discretion;
- (k) that there is an unauthorised delegation of power.

(Paragraphs 7.8 to 7.21)

7. Should a breach of the rules of natural justice be a ground of review?

(Paragraph 7.23)

8. If so, should the rules apply to all decisions subject to judicial review or should they only be observed where they must be observed under the existing law?

(Paragraph 7.23)

9. Should an error of procedure be a ground of review?

(Paragraph 7.24)

10. Should fraud be a ground of review?

(Paragraph 7.25)

11. Should errors of fact be reviewable, and if so, to what extent should they be reviewable?

(Paragraphs 7.26 to 7.29)

12. Should failure to perform a statutory duty be a ground of review?

(Paragraph 7.30)

Entitlement to Seek Judicial Review

13. Should any person be entitled to seek judicial review?
(Paragraphs 8.3 to 8.14)
14. Should a person be required to have a particular interest in the matter, and if so, what sort of interest?
(Paragraphs 8.15 to 8.25)
15. Should the question of standing in a particular case be left to the discretion of the Court?
(Paragraphs 8.26 to 8.29)
16. Should provision be made for people to institute proceedings in the public interest?
(Paragraphs 8.30 to 8.35)

Decisions or Bodies Subject to Review

17. Should the scope of judicial review be defined by providing that, subject to any exceptions, all decisions made, or proposed, or required to be made by an organ of the State of Western Australia should be subject to review or should some other approach be adopted?
(Paragraph 9.7)
18. What should be the position with regard to -
 - (a) prerogative powers;
 - (b) powers of the Governor of a political or constitutional nature;
 - (c) the proceedings of Parliament.
(Paragraphs 9.8, 9.9 and 9.18)
19. Should any decisions or classes of decision be excluded from the scope of judicial review, and if so, which decisions or classes?
(Paragraphs 9.10 to 9.17)

Reasons for Decisions and Findings of Fact

20. Should a decision-maker be required to furnish to a person considering seeking judicial review a statement setting out -

- (a) the reasons for the decision;
- (b) findings on material questions of fact;
- (c) the evidence or other material on which those findings were based?

(Paragraphs 11.7 and 11.8)

21. Should there be any restrictions on such a power, and if so, what restrictions should be imposed?

(Paragraphs 11.3 and 11.10)

Discretionary Nature of the Remedy

22. Should judicial review continue to be a discretionary remedy?

(Paragraphs 10.1 to 10.7)

Powers of the Court

23. What powers should the Supreme Court have on an application for judicial review, and in particular, should the Court have power to -

- (a) direct the decision-maker to reconsider and determine a matter in accordance with any directions of the Court;
- (b) stay proceedings the subject of an application for judicial review?

(Paragraphs 10.8 and 10.9)

Damages

24. Should the Supreme Court be empowered to award damages on an application for judicial review?

(Paragraphs 10.10 and 10.11)

Costs

25. Should the Supreme Court continue to have a discretion to make an award of costs, and if so, should each party be required to bear his own costs, or should an applicant be entitled to recover costs if successful but not be liable for costs if unsuccessful?

(Paragraphs 10.13 and 10.14)

26. Should the Supreme Court have a discretion to require an applicant to provide security for the payment of any costs that may be awarded against him?

(Paragraph 10.16)

The Review Court

27. Should applications for judicial review be heard by a single judge or the Full Court of the Supreme Court?

(Paragraph 10.17)

28. If applications were heard by a single judge, should he have power to refer matters raising questions of general importance to the Full Court?

(Paragraph 10.17)

Procedure

29. Should a person be required to obtain the leave of a judge of the Supreme Court before instituting a proceeding for judicial review?

(Paragraphs 10.19 to 10.22)

30. Should interlocutory proceedings be available in the case of proceedings for judicial review?

(Paragraph 10.23)

31. Should provision be made for a pre-trial conference?

(Paragraph 10.25)

32. Should a limit be imposed on the time within which proceedings can be instituted, and if so, should the Court have power to extend the time?

(Paragraph 10.26)

The Future of the Prerogative Writs

33. Should the prerogative writs of certiorari, prohibition and mandamus be abolished?

(Paragraph 10.27)

APPENDIX I

EXTRACT FROM THE REPORT BY JUSTICE: ADMINISTRATION UNDER LAW

PRINCIPLES OF GOOD ADMINISTRATION

1. Before making any decision, an authority shall take all reasonable steps to ensure that all persons who will be particularly and materially affected by such decision have been informed in sufficient time of its intention to make the decision and shall afford to all such persons a reasonable opportunity of making representations to the authority with respect thereto.
2. No decision shall have retrospective effect unless the decision is taken to relieve particular hardship resulting from an earlier decision.
3. It shall be the duty of an authority in proceeding to a decision to take all reasonable steps to ascertain the facts which are material to the decision.
4. Where a written request is made to any authority for information relating to the discharge of its duties or the exercise of its powers, being information that ought reasonably to be given, it shall be the duty of the authority to take all reasonable steps to ensure that such information is given expeditiously and is accurate.
5. Where an authority receives a request in writing from any person to make a decision in pursuance of a statutory duty which prescribes no time limit for making such decision, it shall be the duty of that authority to make the decision to which the request relates within two months of the date of the receipt of the request by the authority. Provided that where the said period of two months is extended for a further specific period by agreement between the authority and the said person, this sub-paragraph shall have effect as if for the period of two months there were substituted the period as extended; and provided further that where by reason of exceptional circumstances, particulars of which are to be notified, it is impracticable to make a decision within the said period, and the decision is made as soon as the circumstances permit, the authority shall be deemed to have complied with this sub-paragraph.

6. Where an authority receives a request in writing from any person to make a decision in pursuance of any statutory *power or discretion* it shall be the duty of that authority to make the decision to which the request relates within a reasonable time of the date of the receipt of the request by the authority.
7. An authority shall upon request in writing give a written statement of the reasons justifying any decision it has made.
8. An authority may refuse to give information under paragraph 4 or a statement under paragraph 7 if -
 - (a) to give such information or statement would be prejudicial to national security; or
 - (b) the relevant request was made more than two months after the date on which the duty was finally discharged or the power finally exercised or the decision made, as the case may be; or
 - (c) the relevant request is made under paragraph 7 by a person not particularly and materially affected by the decision and to give a statement of reasons would be contrary to the interests of any person so affected.
9. An authority shall take all reasonable steps to ensure that its decisions are made known to those persons likely to be affected by them.
10. Where by any statute or statutory instrument express provision is or shall hereafter be made in respect of matters referred to in "The Principles of Good Administration," compliance with the said statute or statutory instrument shall to that extent be presumed to be compliance with "The Principles of Good Administration."

Note: "all reasonable steps" means measures by way of inquiry, verification, deliberation or otherwise as are in all the circumstances of the case necessary according to good administrative practice.

APPENDIX II
RULES OF THE SUPREME COURT 1971-1980, ORDERS 56 AND 57

ORDER 56

Mandamus, Certiorari, Prohibition, Quo Warranto

1.--General

Application ex parte

1. (1) An application for -
 - (a) a writ of Mandamus, Certiorari or Prohibition, or for leave to exhibit an information of Quo Warranto; or
 - (b) relief of like nature to Mandamus or Quo Warranto,may be made ex parte to the Court, and must be supported by affidavit.

Title of proceedings

(2) The motion for an order to show cause and all subsequent proceedings shall be entitled -

“In the matter of an application for (description of the writ or order sought, e.g., a writ of Prohibition) against (name of every person or authority against whom the relief is sought) EX PARTE (name of the applicant) applicant”.

(3) (a) Where a writ of Mandamus, Certiorari or Prohibition is sought against a judicial or public authority or officer, the authority or officer shall be described by his or their name, and the name of his or their office.

(b) In all other cases a party respondent may be described in the title by his name or the name of his office or both, or, in the case of a magistrate or justice in a court of summary jurisdiction, as the magistrate or justice at the place where the court is held.

(4) The applicant shall in all cases of applications under this Rule be called “the applicant”.

Order to show cause

(5) Subject to paragraph (6) the application shall, in the first instance, be for an order calling upon the parties interested in resisting the application to show cause why the writ

should not be issued, or the information filed, or the relief of like nature to Mandamus or Quo Warranto given.

Order may be absolute in certain cases

(6) Where it appears necessary for the advancement of justice, the Court may in its discretion, grant an order absolute in the first instance for a writ of Mandamus, Certiorari, or Prohibition, or for leave to exhibit an information of Quo Warranto.

Judge may direct application in Court or to Full Court

2. When application to show cause is made to a Judge in chambers or otherwise he may, if he thinks fit, direct that the application be made by notice of motion to a Judge sitting in court, or to the Full Court, and may adjourn the application so that notice of the application may be given.

Order returnable before Full Court except in special cases

3. An order to show cause shall be to show cause before the Full Court, unless the matter appears to be one of urgency, in which case the Court may make the order returnable before the Court in court or chambers.

Service of order to show cause or notice of motion

4. (1) The order to show cause, or notice of motion must be served on such persons and in such manner as the Court directs, and unless the Court otherwise directs, there must be at least 7 clear days between service of the order to show cause or the notice, and the date named therein for the hearing of the application.

(2) Where the application relates to any proceedings in or before a court, and the object is either to compel the court or an officer of the court to do an act in relation to the proceedings or to quash the proceedings or any order made therein, the order to show cause or notice of motion must be served on the clerk or registrar of the court, the other parties to the proceedings, and where an objection to the conduct of the judge or magistrate or justices constituting the court is to be made, on the judge, magistrate or justices.

(3) An affidavit of service must be filed before the order to show cause or notice of motion is placed in the list for hearing, and if any person who ought to be served under this

Rule has not been served, the affidavit must state that fact and the reason why service has not been effected.

(4) If on the application for the order absolute or the hearing of the motion, the Court is of opinion that any person who ought to have had notice of the application has not been served, whether or not he is a person who ought to have been served under or pursuant to the foregoing provisions of this Rule, the Court may direct service on that person, and adjourn the hearing in the meantime on such terms, if any, as it or he may direct.

Terms, stay of proceedings

5. (1) The Court may grant the order to show cause upon such terms as to costs, and as to giving security, or otherwise, as it or he thinks fit.

(2) An order nisi for Certiorari or Prohibition, shall, if the Court so directs, operate as a stay of the proceedings in question until the determination of the application, or until the Court otherwise orders.

Applicant limited to grounds etc in order nisi

6. (1) The grounds of the application and the relief sought must be set out in the order nisi or notice of motion, if any, and if the applicant intends to ask for any amendment at the hearing he must give notice of his intention and of the proposed amendment.

(2) The Court may allow any amendment which it thinks necessary for the advancement of justice, but except by leave of the Court a ground shall not be relied on or relief sought on the hearing other than a ground set out or relief sought in the order nisi or notice of motion.

Right to be heard in opposition

7. (1) On the hearing of the application the Court shall hear any person who desires to oppose it, and appears to the Court to be a proper person to be heard, notwithstanding that he has not been served with the order nisi or notice of motion.

(2) A person who is served with the order nisi or notice of motion or who is heard under this Rule, may, in the discretion of the Court, be ordered to pay costs.

Additional affidavits, determination of issue etc

8. (1) On the hearing of the application the Court may allow the applicant to use further affidavits upon such terms as to adjournment or costs as the Court thinks fit.

(2) Where the applicant intends to ask to be allowed to use further affidavits, he must give reasonable notice of his intention to every other party.

(3) When any question or issue of fact arises upon the affidavits the Court may give such directions as it thinks fit for the determination of the question or issue by trial or inquiry.

Order absolute, costs

9. (1) An order absolute must be served.

(2) When an order nisi is made absolute the Court may dispose of the costs of the proceedings either by the final judgment or by a separate order.

Issue and filing of writs

10. (1) A writ issued in proceedings to which this Order relates shall be issued out of the Central Office and must be prepared by the solicitor or party seeking to issue it, and shall, before being sealed, be indorsed with the name and address of that solicitor or party, and if issued out by the solicitor as agent, with the name and address of the principal also.

(2) Upon presentation of every such writ for sealing, a copy thereof signed by or on behalf of the solicitor for the party issuing it, or by the party, if he is proceeding in person, must be filed.

(3) Every such writ must be filed in the Central Office together with the return thereto and a copy of any order made thereon.

2.--Certiorari

Time for application

11. (1) An order nisi for a writ of Certiorari to remove a judgment, order, conviction or other proceeding of an inferior court or tribunal, or of a magistrate or justices, for the purpose of its being quashed, shall not be granted unless the application for the order is made within 6

months after the date of the judgment, order, conviction or other proceeding, or within such other period as may be prescribed by any enactment, or except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court to which the application is made.

(2) Where the judgment, order, conviction or other proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Court may adjourn the application for the order nisi until the appeal is determined or the time for appealing has expired.

Copy of warrant, order etc to be produced

12. An order nisi for a writ of Certiorari to remove any proceedings for the purpose of their being quashed, shall not be granted unless a copy of the warrant, order, conviction, inquisition or record, verified by affidavit has been filed, or the failure of the applicant to do so is accounted for to the satisfaction of the Court hearing the application.

Order to quash in the first instance

13. Where on the return of any order nisi the Court directs a writ of Certiorari to issue, or where an order absolute for a writ of Certiorari is granted in the first instance, the Court may by the same order, direct that the judgment, order, conviction or decision of the inferior court or tribunal shall be quashed on the return without further order, and in that case the judgment, order, conviction, or decision is quashed upon the return without further order.

Forms

14. A writ of Certiorari must be in Form No.67 or Form No.68, with such variations as the circumstances may require.

3.--Mandamus

Prosecutor to show interest

15. (1) An order nisi for a writ of Mandamus, or for relief of a like nature shall be granted only on the application of a person who is interested in the relief sought.

(2) Subject to paragraph (3), the applicant must state by affidavit that the application is made at his instance as applicant.

(3) When the applicant is a corporation an officer or agent of the corporation must state by affidavit that the application is to be made by the corporation as applicant.

Form of writ

16. (1) Unless otherwise ordered by the Court, a writ of Mandamus shall command the person to whom it is addressed to do the act in question, or show cause why he has not done it.

(2) The Court may direct that the command shall be peremptory in the first instance.

(3) A writ of Mandamus must be in Form No. 69 with such variations as the circumstances may require.

Time for return of writ

17. Unless otherwise ordered by the Court, the writ shall be returnable within the same time after service as is allowed for appearance in the case of a writ of summons.

Service

18. Unless the Court otherwise directs -

- (a) Where a writ of Mandamus is directed to one person only, the original writ shall be personally served upon him by delivering it to him; and
- (b) Where the writ is directed to two or more persons, it shall be personally served upon all of them but one in the manner prescribed for personal service of a writ of summons, and shall be served upon the remaining one by delivering the original writ to him.

Service on corporate body, or justices

19. Unless otherwise directed by the Court, when a writ of Mandamus is directed to justices, or to a corporation, or a company, or a public authority, it shall be served on so many of the justices, or of the officers or members of the corporation or company or public authority as are competent to do the act commanded, unless by law some other mode of service is sufficient.

Return and service

20. (1) The persons to whom a writ of Mandamus is directed shall, within the time allowed by the writ, file the writ or a copy of the writ in the Central Office, together with a certificate indorsed thereon or annexed thereto and signed by them, stating that they have done the act commanded by the writ, or stating the reason why they have not done so.

(2) A copy of the return must be served on the applicant on the day on which it is filed.

Pleading to return

21. If the return does not certify that the act commanded has been done, the same proceedings shall be had and taken, and within the same time as if the return were a defence in an action in which the applicant was the plaintiff, and the persons to whom the writ is directed were the defendants and had pleaded the return as their defence.

No motion for judgment

22. When a point of law is raised in answer to a return or another pleading in Mandamus, and there is no issue of fact to be decided, the Court shall, on the argument of the point of law, give judgment for the successful party without a motion for judgment being made or required.

Peremptory writ

23. If the questions of fact and law, if any, raised by the return are determined in favour of the applicant by judgment of the Court or otherwise, the applicant shall be entitled to a peremptory writ of Mandamus commanding the persons to whom the first writ was directed to do the act commanded therein and the peremptory writ shall be awarded by the judgment or if there is no judgment, by a separate order.

Costs where peremptory writ awarded in first instance, or on obedience

24. (1) Where a peremptory writ is awarded in the first instance, the Court shall, at the time of granting the writ, direct by and to whom the costs of the proceedings shall be paid.

(2) Where a peremptory writ is not awarded in the first instance, and the return to the writ certifies that the person to whom it is addressed has done the act commanded by the writ,

an application for an order for the costs of the proceedings may be made at any time within one month after the return is filed.

(3) The application shall be made to the Court and, if it is reasonably possible, to the Judge by whom the writ was awarded.

Proceedings in nature of interpleader

25. When upon an application for a writ of Mandamus it appears that some person other than the applicant claims that the person to whom it is proposed to direct the writ shall do some act inconsistent with the act which the applicant claims to have done, the person to whom the order nisi or writ is directed may apply to the Court for an order that the last-named person be substituted for him or joined with him in all subsequent proceedings up to the issue of a peremptory writ of Mandamus, and the Court may make such order on the application as is just.

Proceedings not to abate

26. Proceedings upon an application for a writ of Mandamus shall not abate or be discontinued by reason of the death, resignation, retirement or removal from office of the person to whom the notice of motion, order nisi or writ is directed, but may be continued and carried on either in his name or otherwise, and if a peremptory writ is awarded, it shall be directed to the successor in office or right of that person.

Time

27. An application for a writ of Mandamus, or an order in the nature of Mandamus, to a judicial tribunal to hear and determine a matter must be made within 2 months after the date of the refusal to hear, or within such further time as is, under special circumstances, allowed by the Court.

Mandamus by order

28. In any case in which the Court directs the issue of a peremptory writ of Mandamus in the first instance, the command may be expressed in an order of the Court without the issue of a writ, and the order shall have the same effect as a peremptory writ of Mandamus.

No action against party obeying writ or order

29. An action or proceeding shall not be commenced or prosecuted against any person in respect of anything done in obedience to a writ of Mandamus or an order of the Court for relief of the like nature issued by the Court.

4. --Prohibition

Pleadings in prohibition

30. The Court may in any case, instead of directing the issue of a writ of Prohibition, direct the applicant to deliver to the opposite party a statement of claim setting forth the facts upon which his claim to the writ is founded, and thereupon the same proceedings shall be had and taken in all respects as in an action.

Proceedings on judgment

31. If judgment is given for the applicant, the judgment shall include a direction that a writ of Prohibition shall issue.

Writ of Procedendo

32. (1) Where a writ of Prohibition has been issued and it is afterwards made to appear to the Court that relief ought to be given against the judgment or order by which the writ was awarded on a ground on which relief might be given against a judgment in an action, the Court may direct that a writ of Procedendo shall be issued commanding the judicial tribunal to which the writ of Prohibition was issued to proceed to hear or determine the matter in question or otherwise proceed therein as if the writ of Prohibition had not been issued.

(2) A writ of Procedendo shall be in Form No 70.

Prohibition by order

33. (1) The prohibition may be expressed in an order of the Court without the issue of a writ, and such order shall have the same effect as a writ of Prohibition.

(2) A writ of Prohibition shall be in Form No 71.

5. --Quo Warranto

Rules of Court applicable

34. Subject to this Order, and to any direction as to practice or procedure given by the Court, the Rules of the Supreme Court apply, so far as they are relevant, to informations of Quo Warranto.

Signature and service of information

35. (1) The information shall be in the name of the Attorney-General or the applicant, as the case may be, on behalf of Her Majesty, and shall be signed by the Attorney-General or the applicant.

(2) A copy of the information must be served upon the defendant, or, if at the return of the order nisi he appeared by solicitor, then upon his solicitor.

ORDER 57
Habeas Corpus

Application for writ of habeas corpus

1. (1) An application for a writ of habeas corpus ad subjiciendum may be made in the first instance to the Full Court, or to a Judge sitting in court or in chambers, unless the application is made on behalf of an infant, in which case it must be made in the first instance to a Judge sitting in chambers.

(2) The application may be made *ex parte*, and subject to paragraph (3) must be supported by an affidavit by the person restrained showing that the application is made at his instance and setting out the nature of the restraint.

(3) Paragraph (2) does not apply -

- (a) to an application made on behalf of an infant; or
- (b) when the person restrained is unable to make the affidavit.

(4) Where the person restrained is unable to make the affidavit required by paragraph (2) the affidavit may be made by some other person on his behalf and must state that the person restrained is unable to make the affidavit himself and for what reason.

Power of Court when *ex parte* application made

2. (1) The Court or Judge to whom an application under Rule 1 is made *ex parte* may -
- (a) make an order forthwith for the writ to issue; or
 - (b) where the application is made to a Judge otherwise than in Court, direct that a summons for the writ be issued or that an application be made by originating motion to the Full Court or to a Judge in court;
 - (c) where the application is made to a Judge in court, adjourn the application so that notice thereof may be given, or direct that application be made by originating motion to the Full Court;
 - (d) where the application is made to the Full Court, adjourn the application so that notice thereof may be given.

(2) The summons or notice of motion must be served on the person against whom the issue of the writ is sought, and on such other persons as the Court or Judge may direct, and unless the Court or Judge otherwise directs, there must be at least 4 clear days between the service of the summons or notice and the date named therein for the hearing of the application.

Copies of the affidavits to be supplied

3. Every party to an application under Rule 1 must supply to every other party on demand and on payment of the proper charges, copies of the affidavits which he proposes to use at the hearing of the application.

Power to order release of person restrained

4. (1) Without prejudice to Rule 2(1) the Court or Judge hearing an application for a writ of habeas corpus ad subjiciendum may, in its or his discretion, order that the person restrained be released, and such order shall be a sufficient warrant to any gaoler, constable or other person for the release of the person under restraint.

(2) Where such an application in a criminal cause or matter is heard by a Judge, and the Judge does not order the release of the person restrained, he shall direct that the application be made by originating motion to the Full Court.

Signed copy of writ to be filed

5. When a writ of habeas corpus is presented for sealing, the person presenting it must at the same time file a copy of the writ signed by or on behalf of the solicitor for the party issuing it, or by the party himself if he is proceeding in person.

Directions as to return of writ

6. Where a writ of habeas corpus is ordered to issue, the Court or Judge by whom the order is made shall give directions as to the Court or Judge before whom, and the date on which, the writ is returnable.

Service of writ and notice

7. (1) Subject to paragraphs (2) and (3) a writ of habeas corpus ad subjiciendum must be served personally on the person to whom it is directed.

(2) If it is not possible to serve such writ personally, or if it is directed to the superintendent or keeper of a prison, or other government official, it must be served by leaving it with a servant, officer, or agent of the person to whom the writ is directed at the place where the person restrained is confined or restrained.

(3) If the writ is directed to more than one person, the writ must be served in the manner provided by this Rule on the person first named in the writ, and copies must be served on each of the other persons in the same manner as the writ.

(4) Together with the writ there must be served a notice (in Form 72) stating the Court or Judge before whom and the date on which the person restrained is to be brought and that in default of obedience proceedings for committal of the party disobeying will be taken.

Return to writ of habeas corpus

8. (1) The person to whom a writ of habeas corpus ad subjiciendum is directed must at the time and place specified in the writ, make his return to the writ.

(2) The return must be indorsed on or attached to the writ and must state all the causes of the detention of the person restrained.

(3) The return must be filed.

(4) The return may be amended, or another return substituted for it, by leave of the Court or a Judge.

Procedure on hearing

9. (1) Upon the return of a writ of habeas corpus ad subjiciendum, the return shall first be read, and a motion shall then be made for discharging or remanding the person restrained or for amending or quashing the return.

(2) Where the person restrained is brought up in accordance with the writ, he or his counsel shall first be heard, then the person denying his right to be discharged, or his counsel, and then the person restrained, or his counsel in reply.

Form of writ

10. A writ of habeas corpus must be in Form No 73.

APPENDIX III

RULES OF THE SUPREME COURT 1965-1979 (ENG), ORDER 53

ORDER 53

(Substituted by R.S.C. (Amendment No.3) 1977) (S.I. 1977 No. 1955)

Applications for Judicial Review

Cases appropriate for application for judicial review

1. (1) An application for -
 - (a) an order of mandamus, prohibition or certiorari, or
 - (b) an injunction under section 9 of the *Administration of Justice (Miscellaneous Provisions) Act 1938* restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -

- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari ,
- (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
- (c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Joinder of claims for relief

2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

Grant of leave to apply for judicial review

3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Divisional Court of the Queen's Bench Division, except in vacation when it may be made to a judge in chambers, and must be supported -

- (a) by a statement, setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and
- (b) by affidavit, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application to the Crown Office not later than the day before the application is made and must at the same time lodge in that Office copies of the statement and every affidavit in support.

(4) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(6) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(7) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

(8) Where an application for leave is refused by a judge in chambers, the applicant may make a fresh application to a Divisional Court.

(9) An application to a Divisional Court under paragraph (8) must be made within 10 days after the judges refusal to give leave or, if a Divisional Court does not sit within that period, on the first day on which it sits thereafter.

(10) Where leave to apply for judicial review is granted, then -

- (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
- (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

Delay in applying for relief

4. (1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant -

- (a) leave for the making of the application, or
- (b) any relief sought on the application,

if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

Mode of applying for judicial review

5. (1) Subject to paragraph (2), when leave has been granted to make an application for judicial review, the application shall be made by originating motion to a Divisional Court of the Queen's Bench Division, except in vacation when it may be made by originating summons to a judge in chambers.

(2) Where leave has been granted by a Divisional Court and the Court so directs, the application may be made by motion to a judge sitting in open court or, if so directed and without prejudice to Order 32, rule 13, by originating summons to a judge in chambers.

(3) The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the clerk or registrar of the court and, where any objection to the conduct of the judge is to be made, on the judge.

(4) Unless the Court granting leave has otherwise directed, there must be at least 10 days between the service of the notice of motion or summons and the day named therein for the hearing.

(5) A motion must be entered for hearing within 14 days after the grant of leave.

(6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is entered for hearing and, if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing of the motion or summons.

(7) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.

Statements and affidavits

6. (1) Copies of the statement in support of an application for leave under rule 3 must be served with the notice of motion or summons and, subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and the relief set out in the statement.

(2) The Court may on the hearing of the motion or summons allow the applicant to amend his statement, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application .

(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

(4) Each party to the application must supply to every other party on demand and on payment of the proper charges copies of every affidavit which he proposes to use at the hearing, including, in the case of the applicant, the affidavit in support of the application for leave under rule 3.

Claim for damages

7. (1) On an application for judicial review the Court may, subject to paragraph (2) , award damages to the applicant if -

- (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates , and
- (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

Application for discovery, interrogatories, cross-examination, etc

8. (1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to any judge or a master of the Queen's Bench Division, notwithstanding that the application for judicial review has been made by motion and is to be heard by a Divisional Court.

In this paragraph "interlocutory application" includes an application for an order under Order 24 or 26 or Order 38, rule 2(3), or for an order dismissing the proceedings by consent of the parties.

(2) In relation to an order made by a master pursuant to paragraph (1), Order 58, rule 1, shall, where the application for judicial review is to be heard by a Divisional Court, have effect as if a reference to that Court were substituted for the reference to a judge in chambers .

(3) This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the Crown.

Hearing of application for judicial review

9. (1) On the hearing of any motion or summons under rule 5, any person who desires to be heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.

(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion or summons he has lodged in the Crown Office a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the Court hearing the motion or summons.

(3) Where an order of certiorari is made in any such case as is referred to in paragraph (2), the order shall, subject to paragraph (4), direct that the proceedings shall be quashed forthwith on their removal into the Queen's Bench Division.

(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if, in the case of an application made by motion, it had been made by summons.

Saving for person acting in obedience to mandamus

10. No action or proceeding shall be begun or prosecuted against any person in respect of anything done in obedience to an order of mandamus.

Proceedings for disqualification of member of local authority

11. (1) Proceedings under section 92 of the *Local Government Act 1972* must be begun by originating motion to a Divisional Court of the Queen's Bench Division, except in vacation when they may be begun by originating summons to a judge in chambers and, unless otherwise directed, there must be at least 10 days between the service of the notice of motion or summons and the day named therein for the hearing.

(2) Without prejudice to Order 7, rule 3, and Order 8, rule 3, the notice of motion or summons must set out the name and description of the applicant, the relief sought and the grounds on which it is sought, and must be supported by affidavit verifying the facts relied on.

(3) Copies of every supporting affidavit must be lodged in the Crown Office before the motion is entered for hearing or the summons is issued and must be supplied to any other party on demand and on payment of the proper charges.

(4) The provisions of rules 5, 6 and 9(1) as to the persons on whom the notice or summons is to be served and as to the proceedings at the hearing shall apply, with the

necessary modifications, to proceedings under the said section 92 as they apply to an application for judicial review.

Consolidation of applications

12. Where there is more than one application pending under section 9 of the *Administration of Justice (Miscellaneous Provisions) Act 1938*, or section 92 of the *Local Government Act 1972*, against several persons in respect of the same office, and on the same grounds, the Court may order the applications to be consolidated.

Order made by judge in chambers may be set aside, etc

13. (1) Subject to section 31(3) of the Act (which provides for appeals to the Court of Appeal in matters of practice and procedure), no appeal shall lie from an order of a judge in chambers granting or refusing an application for leave under rule 3 or an application for judicial review.

(2) An application may be made to a Divisional Court of the Queen's Bench Division to set aside or discharge any such order and to substitute such order as ought to have been made:

Provided that, in the case of an order made with the consent of the parties or as to costs only which by law are left to the discretion of the judge, no such application shall be made without the leave of the judge making the order.

(3) An application to a Divisional Court under this rule must be made by motion within 10 days after the date on which a copy of the judge's order was filed in the Crown Office or, if a Divisional Court does not sit within that period, on the first day on which it sits thereafter.

Meaning of "Court"

14. In relation to the hearing by a judge of an application for leave under rule 3 or of an application for judicial review, any reference, in this Order to "the Court" shall, unless the context otherwise requires, be construed as a reference to the judge.

APPENDIX IV

JUDICATURE AMENDMENT ACT 1972-1977 (NZ)*

1972, No 130

An Act to amend the Judicature Act 1908

[20 October 1972]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the *Judicature Amendment Act 1972*, and shall be read together with and deemed part of the *Judicature Act 1908* (hereinafter referred to as the principal Act).

PART I

SINGLE PROCEDURE FOR THE JUDICIAL REVIEW OF THE EXERCISE OF OR FAILURE TO EXERCISE A STATUTORY POWER

Relation to Part I of principal Act and commencement of this Part

2. (1) This Part of this Act shall be deemed part of Part I of the principal Act.

(2) This Part of this Act shall come into force on the 1st day of January 1973.

Interpretation

3. In this Part of this Act, unless the context otherwise requires, -

“Application for review” means an application under subsection (1) of section 4 of this Act:

“Decision” includes a determination or order:

“Licence” includes any permit, warrant, authorisation, registration, certificate, approval, or similar form of authority required by law:

“Person” includes a corporation sole, and also a body of persons whether incorporated or not; and, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power of decision, includes a Magistrate's Court,

the Court of Arbitration, the Compensation Court, the Maori Land Court, and the Maori Appellate Court:

“Statutory power” means a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate -

- (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
- (b) To exercise a statutory power of decision; or
- (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
- (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
- (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person:

* This is an unofficial consolidation of Part I of this Act.

“Statutory power of decision” means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting -

- (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
- (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

Application for review

4. (1) On an application which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in anyone or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

(2) Where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid, the Court may, instead of making such a declaration, set aside the decision.

(2A) Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section.

(3) Where in any of the proceedings referred to in subsection (1) of this section the Court had, before the commencement of this Part of this Act, a discretion to refuse to grant relief on any grounds, it shall have the like discretion, on like grounds, to refuse to grant any relief on an application for review.

(4) Subsection (3) of this section shall not apply to the discretion of the Court, before the commencement of this Part of this Act, to refuse to grant relief in any of the said proceedings on the ground that the relief should have been sought in any other of the said proceedings.

(5) Without limiting the generality of the foregoing provisions of this section, on an application for review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision the Court if it is satisfied that the applicant is entitled to relief under subsection (1) of this section, may, in addition to or instead of granting any other relief under the foregoing provisions of this section, direct any person whose act or omission is the subject-matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates. In giving any such direction the Court shall -

- (a) Advise the person of its reasons for so doing; and
- (b) Give to him such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(5A) If the Court gives a direction under subsection (5) of this section it may make any order that it could make by way of interim order under section 8 of this Act, and that section shall apply accordingly, so far as it is applicable and with all necessary modifications.

(5B) Where any matter is referred back to any person under subsection (5) of this section, that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court's direction notwithstanding anything in any other enactment.

(5C) Where any matter is referred back to any person under subsection (5) of this section, the act or omission that is to be reconsidered shall, subject to any interim order made by the Court under subsection (5A) of this section, continue to have effect according to its tenor unless and until it is revoked or amended by that person.

(6) In reconsidering any matter referred back to him under subsection (5) of this section the person to whom it is so referred shall have regard to the Court's reasons for giving the direction and to the Court's directions.

Defects in form, or technical irregularities

5. On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

Disposal of proceedings for mandamus, prohibition, or certiorari

6. Where proceedings are commenced for a writ or order of or in the nature of mandamus, prohibition, or certiorari, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the proceedings shall be treated and disposed of as if they were an application for review.

Disposal of proceedings for declaration or injunction

7. Where proceedings are commenced for a declaration or injunction, or both, whether with or without a claim for other relief, and the exercise, refusal to exercise, or proposed or purported exercise of a statutory power is an issue in the proceedings, the Court on the application of any party to the proceedings may, if it considers it appropriate, direct that the proceedings be treated and disposed of, so far as they relate to that issue, as if they were an application for review.

Interim orders

8. (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:

- (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:
- (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
- (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

(2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order, -

- (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power:
- (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue

in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

Procedure

9. (1) An application for review shall be made by motion accompanied by a statement of claim.

(2) The statement of claim shall -

(a) State the facts on which the applicant bases his claim to relief:

(b) State the grounds on which the applicant seeks relief:

(c) State the relief sought.

(3) It shall not be necessary for the statement of claim to specify the proceedings referred to in section 4(1) of this Act in which the claim would have been made before the commencement of this Part of this Act.

(4) The person whose act or omission is the subject-matter of the application for review, and, subject to any direction given by a Judge under section 10 of this Act, every party to the proceedings (if any) in which any decision to which the application relates was made, shall be cited as a respondent.

(5) For the purposes of subsection (4) of this section, where the act or omission is that of any 2 or more persons acting together under a collective title, they shall be cited by their collective title.

(6) Subject to any direction given by a Judge under section 10 of this Act, every respondent to the application for review shall file a statement of his defence to the statement of claim.

(7) Subject to this Part of this Act, the procedure in respect of any application for review shall be in accordance with rules of Court.

Powers of Judge to call conference and give directions

10. (1) For the purpose of ensuring that any application or intended application for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, and on such terms as he thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.

(2) At any such conference the Judge presiding may -

(a) Settle the issues to be determined:

(b) Direct what persons shall be cited, or need not be cited, as respondents to the application for review, or direct that the name of any party be added or struck out:

(c) Direct what parties shall be served:

(d) Direct by whom and within what time any statement of defence shall be filed:

(e) Require any party to make admissions in respect of questions of fact; and, if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge by whom the application for review is finally determined is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs:

(f) Fix a time by which any affidavits or other documents shall be filed:

(g) Fix a time and place for the hearing of the application for review:

(h) Require further or better particulars of any facts, or of the grounds for relief, or of the relief sought, or of the grounds of defence, or of any other circumstances connected with the application for review:

(i) Require any party to make discovery of documents, or permit any party to administer interrogatories:

(j) In the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing:

(k) Exercise any powers of direction or appointment vested in the Court or a Judge by the rules of Court in respect of originating applications:

(l) Give such consequential directions as may be necessary.

(3) Notwithstanding any of the foregoing provisions of this section, a Judge may, at any time before the hearing of an application for review has been commenced, exercise any of the powers specified in subsection (2) of this section without holding a conference under subsection (1) of this section.

Appeals

11. Any party to an application for review who is dissatisfied with any final or interlocutory order in respect of the application may appeal to the Court of Appeal; and section 66 of the principal Act shall apply to any such appeal.

12. [Repealed by No 32 of 1977, s 13(2)(b).]

This Part to bind the Crown

13. Subject to section 14 of this Act, this Part of this Act shall bind the Crown.

Application of Crown Proceedings Act 1950

14. (1) Section 2 of the *Crown Proceedings Act 1950* is hereby amended by adding to the definition of the term “civil proceedings”, in subsection (1), the words “or proceedings by way of an application for review under Part I of the *Judicature Amendment Act 1972* to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari.”

(2) In its application to the Crown, this Part of this Act shall be read subject to the *Crown Proceedings Act 1950*, as amended by subsection (1) of this section.

Jurisdiction of Administrative Division

15. Section 26 of the principal Act (as inserted by section 2 of the *Judicature Amendment Act 1968*) is hereby amended by inserting in paragraph (c) of subsection (1), after the word “injunctions”, the words “and such applications or classes of application to the Court for review under Part I of the *Judicature Amendment Act 1972*,”.

References in enactments

16. Subject to sections 14 and 15 of this Act, every reference in any enactment (other than this Act), or in any regulation, to any of the proceedings referred to in subsection (1) of section 4 of this Act shall hereafter, unless the context otherwise requires, be read as including a reference to an application for review.

APPENDIX V

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977-1980 (CTH)*

AN ACT

Relating to the review on questions of law of certain administrative decisions

[Assented to 16 June 1977]

BE IT ENACTED by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows -

Short title

1. This Act may be cited as the *Administrative Decisions (Judicial Review) Act 1977*.

Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears –
“Court” means the Federal Court of Australia;
“decision to which this Act applies” means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1;
“duty” includes a duty imposed on a person in his capacity as a servant of the Crown;
“enactment” means –
 - (a) an Act other than the *Commonwealth Places (Application of Laws) Act 1970* or the *Northern Territory (Self-Government) Act 1978*;
 - (b) an Ordinance of a Territory other than the Northern Territory;
 - (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance; or

* This is an unofficial consolidation of the Act.

(d) a law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act,

and, for the purposes of paragraph (a), (b) or (c), includes a part of an enactment;

“failure”, in relation to the making of a decision, includes a refusal to make the decision;

“order of review”, in relation to a decision, in relation to conduct engaged in for the purpose of making a decision or in relation to a failure to make a decision, means an order on an application made under section 5, 6 or 7 in respect of the decision, conduct or failure;

“Rules of Court” means Rules of Court made under the *Federal Court of Australia Act 1976*;

“the Court or a Judge” has the same meaning as in the *Federal Court of Australia Act 1976*.

(2) In this Act, a reference to the making of a decision includes a reference to -

(a) making, suspending, revoking or refusing to make an order, award or determination;

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;

(e) making a declaration, demand or requirement;

(f) retaining or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing,

and a reference to a failure to make a decision shall be construed accordingly.

(3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

(4) In this Act -

(a) a reference to a person aggrieved by a decision includes a reference -

- (i) to a person whose interests are adversely affected by the decision; or
- (ii) in the case of a decision by way of the making of a report or recommendation - to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and

(b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

(5) A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation.

(6) A document or a statement that is required by this Act to be furnished to a person or a notice that is required by this Act to be given to a person may be posted to the person by a pre-paid letter -

- (a) where the person has furnished an address at which documents may be served - to that address; or
- (b) where no such address has been furnished –
 - (i) in the case of a person not being a company - to the address of his place of residence or business last known to the person posting the document, statement or notice; or
 - (ii) in the case of a company - to the address of the registered office of the company,

and, if a document, statement or notice is so posted, then, for the purposes of this Act, the document or statement shall be deemed to be furnished, or the notice shall be deemed to be given, as the case may be, at the time when the document, statement or notice is so posted.

(7) A reference in a Schedule to this Act to another Act or a provision of another Act shall be read as including a reference to regulations or by-laws in force under that other Act or for the purposes of that provision, as the case may be.

(8) For the purposes of a Schedule to this Act -

- (a) a decision made, proposed to be made, or required to be made, as the case may be, by a person acting as the delegate of another person, or by a person otherwise lawfully authorised to act on behalf of another person, shall be deemed to be a decision by that other person; and
- (b) a decision made, proposed to be made, or required to be made, as the case may be, by a person for the time being acting in, or performing any of the duties of, an office or appointment shall be deemed to be a decision by the holder of that office or appointment.

(9) In a Schedule to this Act -

“air force law”, “military law” and “naval law” have the same respective meanings as in the *Courts-Martial Appeals Act 1955*;

“Commonwealth authority” means an authority or other body (whether incorporated or not) that is established by an enactment;

“Service” includes the Australian Federal Police.

Act to operate notwithstanding anything in existing laws

4. This Act has effect notwithstanding anything contained in any law in force at the commencement of this Act.

Applications for review of decisions

5. (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Court for an order of review in respect of the decision on any one or more of the following grounds: -

- (a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;
- (b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;

- (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (j) that the decision was otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to -

- (a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless -

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Applications for review of conduct related to making of decision

6. (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Court for an order of review in respect of the conduct on any one or more of the following grounds: -

- (a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connexion with the conduct;
- (b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;
- (c) that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;
- (d) that the enactment in pursuance of which the decision is proposed to be made does not authorise the making of the proposed decision;
- (e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
- (f) that an error of law has been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;
- (g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;
- (h) that there is no evidence or other material to justify the making of the proposed decision;
- (j) that the making of the proposed decision would be otherwise contrary to law.

(2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to -

- (a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;

- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (j) any other exercise of a power in a way that constitutes abuse of the power.

(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless -

- (a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he is entitled to take notice) from which he can reasonably be satisfied that the matter is established; or
- (b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

Applications in respect of failures to make decisions

7. (1) Where -

- (a) a person has a duty to make a decision to which this Act applies;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision,

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) Where -

- (a) a person has a duty to make a decision to which this Act applies;
- (b) a law prescribes a period within which the person is required to make that decision; and
- (c) the person failed to make that decision before the expiration of that period,

a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Court for an order of review in respect of the failure to

make the decision within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

Jurisdiction of Federal Court of Australia

8. The Court has jurisdiction to hear and determine applications made to the Court under this Act.

Limitation of jurisdiction of State courts

9. (1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review -

- (a) a decision to which this section applies that is made after the commencement of this Act;
- (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
- (c) a failure to make a decision to which this section applies; or
- (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.

(2) In this section -

“decision to which this section applies” means -

- (a) a decision that is a decision to which this Act applies; or
- (b) a decision of an administrative character that is included in any of the classes of decisions set out in Schedule 1, other than paragraphs (m) and (n);

“officer of the Commonwealth” has the same meaning as in paragraph 75(v) of the Constitution;

“review” means review by way of -

- (a) the grant of an injunction ;
- (b) the grant of a prerogative or statutory writ (other than a writ of habeas corpus) or the making of any order of the same nature or having the same effect as , or of a similar nature or having a similar effect to, any such writ; or
- (c) the making of a declaratory order.

(3) For the purposes of this section, any decision given, or any order made, by a member, or a member of the staff, or a delegate, of the National Companies and Securities Commission, or any other conduct that has been, is being, or is proposed to be, engaged in by such a member or delegate, in the performance of a function, or the exercise of a power, conferred, or expressed to be conferred, upon the Commission by a State Act or a law of the Northern Territory shall be deemed not to be a decision given, or an order made or conduct that has been, is being or is proposed to be, engaged in , as the case may be, by an officer of the Commonwealth.

(4) This section does not affect -

- (a) the jurisdiction vested in a court of a State by the *Bankruptcy Act 1966*;
- (b) the jurisdiction conferred on the Supreme Court of a State by section 32A of the *Federal Court of Australia Act 1976*; or
- (c) the jurisdiction of a court of a State in respect of any matter that is pending before it at the commencement of this Act.

Rights conferred by this Act to be additional to other rights

10. (1) The rights conferred by sections 5, 6 and 7 on a person to make an application to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision or in respect of a failure to make a decision -

- (a) are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure; and
- (b) shall be disregarded for the purposes of the application of sub-section 6(3) of the *Ombudsman Act 1976*.

(2) Notwithstanding sub-section (1) -

- (a) the Court, or any other court, may, in a proceeding instituted otherwise than under this Act, in its discretion, refuse to grant an application for a review of a decision , conduct engaged in for the purpose of making a decision, or a failure to make a decision, for the reason that an application has been made to the Court under section 5, 6 or 7 in respect of that decision, conduct or failure; and

- (b) the Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason -
 - (i) that the applicant has sought a review by the Court, or by another court, of that decision, conduct or failure otherwise than under this Act; or
 - (ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.

(3) In this section, "review" includes a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order.

Manner of making applications

11. (1) An application to the Court for an order of review -
- (a) shall be made in such manner as is prescribed by *Rules of Court*;
 - (b) shall set out the grounds of the application; and
 - (c) shall be lodged with a Registry of the Court and, in the case of an application in relation to a decision that has been made and the terms of which were recorded in writing and set out in a document that was furnished to the applicant, including such a decision that a person purported to make after the expiration of the period within which it was required to be made, shall be so lodged within the prescribed period or within such further time as the Court (whether before or after the expiration of the prescribed period) allows.

(2) Any other application to the Court under this Act shall be made as prescribed by *Rules of Court*.

(3) The prescribed period for the purposes of paragraph (1)(c) is the period commencing on the day on which the decision is made and ending on the twenty-eighth day after -

- (a) if the decision sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the

reasons for the decision - the day on which a document setting out the terms of the decision is furnished to the applicant; or

- (b) in a case to which paragraph (a) does not apply -
 - (i) if a statement in writing setting out those findings, referring to that evidence or other material and giving those reasons is furnished to the applicant otherwise than in pursuance of a request under sub-section 13(1) not later than the twenty-eighth day after the day on which a document setting out the terms of the decision is furnished to the applicant - the day on which the statement is so furnished;
 - (ii) if the applicant, in accordance with sub-section 13(1), requests the person who made the decision to furnish a statement as mentioned in that sub-section - the day on which the statement is furnished, the applicant is notified in accordance with sub-section 13(3) of the opinion that the applicant was not entitled to make the request, the Court makes an order under sub-section 13(4A) declaring that the applicant was not entitled to make the request or the applicant is notified in accordance with sub-section 13A(3) or 14(3) that the statement will not be furnished; or
 - (iii) in any other case - the day on which a document setting out the terms of the decision is furnished to the applicant.

(4) Where -

- (a) no period is prescribed for the making of applications for orders of review in relation to a particular decision; or
- (b) no period is prescribed for the making of an application by a particular person for an order of review in relation to a particular decision,

the Court may -

- (c) in a case to which paragraph (a) applies - refuse to entertain an application for an order of review in relation to the decision referred to in that paragraph; or

- (d) in a case to which paragraph (b) applies - refuse to entertain an application by the person referred to in that paragraph for an order of review in relation to the decision so referred to,

if the Court is of the opinion that the application was not made within a reasonable time after the decision was made.

(5) In forming an opinion for the purposes of sub-section (4), the Court shall have regard to -

- (a) the time when the applicant became aware of the making of the decision; and
- (b) in a case to which paragraph (4)(b) applies - the period or periods prescribed for the making by another person or other persons of an application or applications for an order or orders of review in relation to the decision.

and may have regard to such other matters as it considers relevant.

(6) The applicant for an order of review is not limited to the grounds set out in the application but, if he wishes to rely on a ground not so set out, the Court may direct that the application be amended to specify that ground.

(7) The Court may, on such terms as it thinks fit, permit a document lodged with a Registry of the Court in connexion with an application under this Act to be amended and may, if it thinks fit, direct such a document to be amended in a manner specified by the Court.

(8) The Rules of Court may make provision for and in relation to service on appropriate persons of copies of documents lodged with a Registry of the Court under this Act.

(9) Strict compliance with Rules of Court made for the purposes of this section is not required and substantial compliance is sufficient.

Application to be made a party to a proceeding

12. (1) A person interested in a decision, in conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision, or in a failure to make a decision, being a decision, conduct or failure in relation to which an application has been made to the Court under this Act, may apply to the Court to be made a party to the application.

- (2) The Court may, in its discretion -
 - (a) grant the application either unconditionally or subject to such conditions as it thinks fit; or
 - (b) refuse the application.

Person entitled to apply for review of decision may obtain reasons for decision

13. (1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.

(3) Where a person to whom a request is made under sub-section (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request -

- (a) give to the second-mentioned person notice in writing of his opinion; or
- (b) apply to the Court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request.

(4) Where a person gives a notice under sub-section (3), or applies to the Court under sub-section (4A), with respect to a request, the person is not required to comply with the request unless -

- (a) the Court, on an application under sub-section (4A), declares that the person who made the request was entitled to make the request; or
- (b) the person who gave the notice under sub-section (3) has applied to the Court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request and the Court refuses that application,

and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the Court.

(4A) The Court may, on the application of -

- (a) a person to whom a request is made under sub-section (1); or
- (b) a person who has received a notice under sub-section (3),

make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.

(5) A person to whom a request for a statement in relation to a decision is made under sub-section (1) may refuse to prepare and furnish the statement if -

- (a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request - the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or
- (b) in any other case - the request was not made within a reasonable time after the decision was made,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished.

(6) For the purposes of paragraph (5)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.

(7) If the Court, upon application for an order under this sub-section made to it by a person to whom a statement has been furnished in pursuance of a request under sub-section (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or

additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.

(8) The regulations may declare a class or classes of decisions to be decisions that are not decisions to which this section applies.

(9) Regulations made under sub-section (8) may specify a class of decisions in any way, whether by reference to the nature or subject matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(10) A regulation made under sub-section (8) applies only in relation to decisions made after the regulation takes effect.

(11) In this section, "decision to which section applies" means a decision that is a decision to which this Act applies, but does not include -

- (a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;
- (b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or
- (c) a decision included in any of the classes of decision set out in Schedule 2.

Certain information not required to be disclosed

13A. (1) This section applies in relation to any information to which a request made to a person under sub-section 13(1) relates, being information that -

- (a) relates to the personal affairs or business affairs of a person, other than the person making the request; and
- (b) is information -
 - (i) that was supplied in confidence;
 - (ii) the publication of which would reveal a trade secret;
 - (iii) that was furnished in compliance with a duty imposed by an enactment;or

- (iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

(2) Where a person has been requested in accordance with sub-section 13(1) to furnish a statement to a person -

- (a) the first-mentioned person is not required to include in the statement any information in relation to which this section applies; and
- (b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by section 13 to furnish the statement.

(3) Where, by reason of sub-section (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -

- (a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or
- (b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

Certain information not required to be disclosed

14. (1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to the public interest -

- (a) by reason that it would prejudice the security, defence or international relations in Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or

(c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed, the following provisions of this section have effect.

(2) Where a person has been requested in accordance with section 13 to furnish a statement to a person -

- (a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with sub-section (1) of this section; and
- (b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by that section to furnish the statement.

(3) Where, by reason of sub-section (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -

- (a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or
- (b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

Stay of proceedings

15. (1) The making of an application to the Court under section 5 in relation to a decision does not affect the operation of the decision or prevent the taking of action to implement the decision but -

- (a) the Court or a Judge may, by order, on such conditions (if any) as it or he thinks fit, suspend the operation of the decision; and
- (b) the Court or a Judge may order, on such conditions (if any) as it or he thinks fit, a stay of all or any proceedings under the decision.

(2) The Court or a Judge may make an order under sub-section (1) of its or his own motion or on the application of the person who made the application under section 5.

Powers of the Court in respect of applications for order of review

16. (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:-

- (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies;
- (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
- (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
- (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Court may, in its discretion, make either or both of the following orders:-

- (a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;
- (b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Court may, in its discretion, make all or any of the following orders:-

- (a) an order directing the making of the decision;
- (b) an order declaring the rights of the parties in relation to the making of the decision;

- (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

(4) The Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section.

Change in occupancy of office

17. Where -

- (a) a person has, in the performance of the duties of an office, made a decision in respect of which an application may be made to the Court under this Act; and
- (b) the person no longer holds, or, for whatever reason, is not performing the duties of that office,

this Act has effect as if the decision had been made by -

- (c) the person for the time being holding or performing the duties of that office; or
- (d) if there is no person for the time being holding or performing the duties of that office or that office no longer exists - such person as the Minister administering the enactment under which the decision was made, or a person authorised by him, specifies.

Intervention by Attorney-General

18. (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding before the Court under this Act.

(2) Where the Attorney-General intervenes in a proceeding in pursuance of this section, the Court may, in the proceeding, make such order as to costs against the Commonwealth as the Court thinks fit.

(3) Where the Attorney-General intervenes in a proceeding in pursuance of this section, he shall be deemed to be a party to the proceeding.

Act not to apply in relation to certain decisions

19. (1) The regulations may declare a class or classes of decisions to be decisions that are not subject to judicial review by the Court under this Act.

- (2) If a regulation is so made in relation to a class of decisions -
- (a) section 5 does not apply in relation to a decision included in that class;
 - (b) section 6 does not apply in relation to conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision included in that class; and
 - (c) section 7 does not apply in relation to a failure to make a decision included in that class,

but the making of the regulation does not affect the exclusion by section 9 of the jurisdiction of the courts of the States in relation to such a decision, such conduct or such a failure.

(3) Regulations made for the purposes of sub-section (1) may specify a class of decisions in any way, whether by reference to the nature or subject-matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(4) A regulation made in pursuance of sub-section (1) applies only in relation to decisions made after the regulation takes effect.

Act to apply in relation to certain Northern Territory laws

19A. (1) The regulations may declare a law, or a part of a law, of the Northern Territory, other than a law, or a part of a law, relating to matters in respect of which the Ministers of the Northern Territory have executive authority under the *Northern Territory (Self- Government) Act 1978*, to be an enactment for the purposes of this Act.

(2) Regulations made for the purposes of this section have effect notwithstanding anything contained in the law of the Northern Territory concerned or in any other law of the Northern Territory.

Regulations

20. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed by regulations or necessary or convenient to be prescribed by regulations for carrying out or giving effect to this Act.

SCHEDULE 1

Section 3

CLASSES OF DECISIONS THAT ARE NOT DECISIONS TO WHICH THIS ACT APPLIES

- (a) decisions under the *Conciliation and Arbitration Act 1904*, other than decisions of the Director of the Industrial Relations Bureau made on behalf of the Bureau;
- (b) decisions under the *Public Service Arbitration Act 1920*;
- (c) decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;
- (d) decisions under any of the following Acts:
 - Australian Security Intelligence Organisation Act 1956*
 - Australian Security Intelligence Organisation Act 1979*
 - Telecommunications (Interception) Act 1979*
 - Telephonic Communications (Interception) Act 1960*;
- (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty, or decisions disallowing objections to assessments or calculations of tax or duty, or decisions amending, or refusing to amend, assessments or calculations of tax or duty, under any of the following Acts:
 - Australian Capital Territory Taxation (Administration) Act 1969*
 - Coal Excise Act 1949*
 - Customs Act 1901*
 - Customs Tariff Act 1966*
 - Estate Duty Assessment Act 1914*
 - Excise Act 1901*
 - Gift Duty Assessment Act 1941*
 - Income Tax Assessment Act 1936*
 - Pay-roll Tax Assessment Act 1941*
 - Pay-roll Tax (Territories) Assessment Act 1971*
 - Sales Tax Assessment Act (No 1) 1930*
 - Sales Tax Assessment Act (No 2) 1930*
 - Sales Tax Assessment Act (No 3) 1930*

Sales Tax Assessment Act (No 4) 1930

Sales Tax Assessment Act (No 5) 1930

Sales Tax Assessment Act (No 6) 1930

Sales Tax Assessment Act (No 7) 1930

Sales Tax Assessment Act (No 8) 1930

Sales Tax Assessment Act (No 9) 1930

State Receipts Duties (Administration) Act 1970

Wool Tax (Administration) Act 1964;

- (f) decisions of Taxation Boards of Review;
- (g) decisions under Part IV of the *Taxation Administration Act 1953*;
- (h) decisions under the *Foreign Takeovers Act 1975*;
- (j) decisions, or decisions included in a class of decisions, under the *Banking (Foreign Exchange) Regulations* in respect of which the Treasurer has certified, by instrument in writing, that the decision or any decision included in the class, as the case may be, is a decision giving effect to the foreign investment policy of the Commonwealth Government;
- (k) decisions under regulations 7, 11 or 12 of the *Passport Regulations*, other than decisions relating to Australian passports;
- (l) decisions of the National Labour Consultative Council;
- (m) decisions of the National Companies and Securities Commission made in the performance of a function, or the exercise of a power, conferred, or expressed to be conferred, upon it by any State Act or a law of the Northern Territory;
- (n) decisions of the Ministerial Council for Companies and Securities established by Part VII of the agreement between the Commonwealth and the States a copy of which is set out in the Schedule to the *National Companies and Securities Commission Act 1979*;
- (o) decisions under naval law, military law or air force law, being -
 - (i) decisions in connection with charges (including decisions made in the course of investigation of charges and decisions to lay charges);
 - (ii) decisions in connection with the taking of summaries of evidence;
 - (iii) decisions in connection with the convening or ordering of courts-martial;
 - (iv) decisions in connection with the conduct of proceedings before commanding officers or other officers or courts-martial (including decisions making findings);
 - (v) decisions in connection with the awarding of sentences or punishments;

- (vi) decisions in connection with the confirmation or review of findings or sentences; or
- (vii) decisions in connection with the remission, commutation or substitution of sentences or punishments.

SCHEDULE 2

Section 13

CLASSES OF DECISIONS THAT ARE NOT DECISIONS TO WHICH SECTION 13 APPLIES

- (a) decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force;
- (b) decisions in connection with personnel management (including recruitment, training, promotion and organisation) with respect to the Defence Force, including decisions relating to particular persons;
- (c) decisions under any of the following Acts:
 - Consular Privileges and Immunities Act 1972*
 - Diplomatic Privileges and Immunities Act 1967*
 - Extradition (Commonwealth Countries) Act 1966*
 - Extradition (Foreign States) Act 1966*
 - International Organisations (Privileges and Immunities) Act 1963;*
- (d) decisions under the *Migration Act 1958*, being –
 - (i) decisions under section 6, other than -
 - (A) a decision relating to a person who, at the time of the decision, was a person in respect of whom there was in force a visa or return endorsement under that Act; or
 - (B) a decision relating to a person who, having entered Australia within the meaning of that Act, was in Australia at the time of the decision;
 - (ii) decisions in connection with the issue or cancellation of visas;
 - (iii) decisions under section 8 relating to whether a person has diplomatic or consular status; or
 - (iv) decisions relating to a person who, having entered Australia, within the meaning of that Act, as a diplomatic or consular representative of another country, a member of the staff of such a representative or the spouse or a

dependent relative of such a representative, was in Australia at the time of the decision;

- (e) decisions relating to the administration of criminal justice, and, in particular -
 - (i) decisions in connection with the investigation or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants under a law of the Commonwealth or of a Territory;
 - (iv) decisions in connection with the issue of Writs of Assistance, or Custom Warrants, under the *Customs Act 1901*; and
 - (v) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular -
 - (i) decisions in connection with the investigation of persons for such contraventions;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants, Writs of Assistance or Customs Warrants under enactments; and
 - (iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (g) decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year;
- (h) decisions under section 32 or 36A of the *Audit Act 1901*;
- (i) decisions of the Commonwealth Grants Commission relating to the allocation of funds.
- (j) decisions of any of the following Tribunals:
 - Academic Salaries Tribunal

Federal Police Arbitral Tribunal

Remuneration Tribunal;

(k) decisions of any of the following authorities in respect of their commercial activities:

Australian Canned Fruits Corporation

Australian Dairy Corporation

Australian Egg Board

Australian Honey Board

Australian Industry Development Corporation

Australian Meat and Livestock Corporation

Australian National Airlines Commission

Australian National Railways Commission

Australian Shipping Commission

Australian Wheat Board

Australian Wool Corporation

Canberra Commercial Development Authority

Christmas Island Phosphate Commission

Commonwealth Banking Corporation

Commonwealth Development Bank of Australia

Commonwealth Savings Bank of Australia

Commonwealth Serum Laboratories Commission

Commonwealth Trading Bank of Australia

Health Insurance Commission

Housing Loan Insurance Corporation;

(l) decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings);

(m) decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth;

(n) decisions of Distribution Commissioners under the Commonwealth *Electoral Act 1918*;

(o) decisions of the National Director of the Commonwealth Employment Service made on behalf of that Service to refer, or not to refer, particular clients to particular employers;

(p) decisions under the *Air Navigation Act 1920* that –

- (i) relate to aircraft design, the construction or maintenance of aircraft or the safe operation of aircraft or otherwise relate to aviation safety; and
- (ii) arise out of findings on material questions of fact based on evidence, or other material -
 - (A) that was supplied in confidence; or
 - (B) the publication of which would reveal information that is a trade secret;
- (q) decisions in connection with personnel management (including recruitment, training, promotion and organisation) with respect to the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority, other than a decision relating to, and having regard to the particular characteristics of, or other circumstances relating to, a particular person;
- (r) decisions made before the expiration of a period of 12 months, or such longer period as is prescribed, commencing on the date of commencement of this Act that relate to promotions, transfers (being transfers that are subject to appeal) or appeals against promotions or transfers, of individual members of the Australian Public Service or of any other Service established by an enactment or of the staff of a Commonwealth authority;
- (s) decisions relating to promotions in accordance with section 53B or 53C of the *Public Service Act 1922*;
- (t) decisions relating to –
 - (i) the making of appointments in the Australian Public Service or any other Service established by an enactment or to the staff of a Commonwealth authority;
 - (ii) the engagement of persons as employees under the *Public Service Act 1922* or under any other enactment that establishes a Service or by a Commonwealth authority; or
 - (iii) the making of appointments under an enactment or to an office established by, or under, an enactment;
- (u) decisions in connection with the prevention or settlement of industrial disputes, or otherwise relating to industrial matters, in respect of the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority.

APPENDIX VI

ADMINISTRATIVE LAW ACT 1978-1980 (VIC)*

An Act to make Provision with respect to the Review of certain Decisions made by certain
Administrative Tribunals, and for other purposes

[19th December, 1978.]

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say): -

Short title

1. (1) This Act may be cited as the *Administrative Law Act 1978*.

(2) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the Government Gazette.

Interpretation

2. In this Act unless the context or subject-matter otherwise requires -

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

“Person affected” in relation to a decision, means a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal.

“Tribunal” means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to

* This is an unofficial consolidation of the Act.

act in a judicial manner to the extent of observing one or more of the rules of natural justice.

Tribunal decisions may be reviewed

3. Any person affected by a decision of a tribunal may make application (hereinafter called an application for review) to the Supreme Court or a Judge thereof for an order calling on the tribunal or the members thereof (hereinafter called an order for review) and also any party interested in maintaining the decision to show cause why the same should not be reviewed.

Procedure for review

4. (1) An application for review shall be made *ex parte* not later than thirty days after the giving of notification of the decision or the reasons therefor (whichever is the later) supported by evidence on affidavit showing a *prima facie* case for relief under section 7.

(2) The Court or Judge, notwithstanding that a *prima facie* case for relief is disclosed, may refuse any such application if satisfied that no matter of substantial importance is involved or that in all the circumstances such refusal will impose no substantial injustice upon the applicant.

(3) Where the application for review relates to a proceeding taken or to be taken by or before a Small Claims Tribunal the Court or Judge shall refuse the application unless it or he is satisfied that the applicant has made out a *prima facie* case for relief under section 7 on the ground that the Tribunal had or has no jurisdiction under the *Small Claims Tribunals Act 1973* in relation to the matter or that there has been a denial of natural justice to a party in the proceedings before the Tribunal.

(4) Where an application for review relates to an application to, proceedings before or a determination of, the Residential Tenancies Tribunal, the Court or Judge shall refuse the application unless it or he is satisfied that the applicant has made out a *prima facie* case for relief under section 7 on the ground that the Tribunal had or has no jurisdiction under the *Residential Tenancies Act 1980* in relation to the matter or that there has been a denial of natural justice to the applicant or to a party to the proceedings before the Tribunal.

As to orders for review

5. (1) An order for review may be made returnable before the Supreme Court sitting as the Full Court or before a single Judge sitting in court or in chambers.

(2) An order for review shall contain such directions as the Court or Judge thinks fit with respect to the service of the order nisi for review, and as to its return, but unless for good cause shown shall be expressed to be returnable either -

- (a) on a date not more than thirty days after its pronouncement; or
- (b) at the next sittings of the Full Court following its pronouncement.

(3) The order for review shall state the grounds upon which it is sought to review the decision, but on the return of the order the Court or Judge shall have power to amend any of such grounds or to allow such additional grounds as to it or him seems fit.

Power to impose terms on granting an order for review

6. The Court or Judge in granting an order for review may grant it on such terms as to costs or security as to it or him seems fit and may provide for the stay of any proceedings on the decision and may order any implementation of the decision to be restrained.

Powers of Court

7. Upon the return of the order to review, the Court or Judge may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in an action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy.

Reasons for decision to be furnished by tribunal on request by party concerned

8. (1) A tribunal shall, if requested to do so by any person affected by a decision made or to be made by it, furnish him with a statement of its reasons for the decision.

(2) The request may be made orally or in writing to the tribunal or to any member or officer thereof but must be made, in case of a Small Claims Tribunal either before or at the time of the giving or notification of the decision, and in any other case either before the giving or notification of the decision or else within thirty days after the decision has come to the knowledge of the person making the request and in any event not later than ninety days after the giving or notification of the decision.

(3) The statement of reasons shall be in writing and furnished within a reasonable time.

(4) The Supreme Court or a Judge thereof, upon being satisfied by the person making the request that a reasonable time has elapsed without any such statement of reasons for the decision having been furnished or that the only statement furnished is not adequate to enable a Court to see whether the decision does or does not involve any error of law, may order the tribunal to furnish, within a time specified in the order, a statement or further statement of its reasons and if the order is not complied with the Court or Judge, in addition to or in lieu of any order to enforce compliance by the tribunal or any member thereof, may make any such order as might have been made if error of law had appeared on the face of the record.

(5) Notwithstanding anything in this section a tribunal shall not be bound to furnish a statement of reasons, and the Court or Judge shall not be bound to order it to do so, where to furnish the reasons would, in the opinion of the Court or Judge, be against public policy, or the person making the request is not a person primarily concerned with the decision and to furnish the reasons would, in the opinion of the Court or Judge, be against the interests of a person primarily concerned.

Interim relief

9. The Supreme Court or a Judge thereof, in order to prevent irreparable damage pending judicial review, may by order suspend the operation, or postpone the coming into effect, of a decision made or to be made by a tribunal or restrain the implementing thereof until the expiration of fourteen days from the furnishing by the tribunal of a statement of reasons as provided by sub-section (1) of section 8 or for such further time as the Court or Judge shall deem fit.

Reasons to be part of record

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

As to who may seek prerogative writ declaration or injunction

11. Any person affected by the decision of a tribunal or inferior court shall have sufficient standing to maintain proceedings for certiorari, prohibition, mandamus, a declaration of invalidity or an injunction in relation to the decision but nothing in this section shall take away or impair any right to relief otherwise existing or the discretion to refuse any such relief.

Provisions excluding jurisdiction by Court not to prevail

12. Any provision in an Act passed before the commencement of this Act that any proceedings shall not be removed or that any decision of a tribunal or inferior court shall be final or shall not be quashed or shall not be called in question, and any provision in any such Act which by any similar words excludes any of the powers of the Supreme Court, shall not, as from the commencement of this Act, prevent the removal of proceedings of a tribunal or inferior court into the Supreme Court, nor the quashing of a decision of a tribunal or inferior court by that Court, whether for error of law on the face of the record or otherwise, in proceedings for certiorari, nor prejudice the powers of that Court to grant relief by way of prohibition, mandamus, declaration of invalidity or injunction in relation to a decision of a tribunal or inferior court or to make any order for review or other order provided for in this Act.