Statutory Judicial Review and Human Rights

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Introduction

The place of human rights within Australian judicial review is uncertain. Public officials clearly may consider human rights issues when exercising discretionary powers but it is not clear whether they must do so. Until that crucial point is settled, we can never be sure when or why the remedies of judicial review might issue against officials who do not take account of human rights issues. As is the case with so many thorny issues in Australian public law, the High Court has sent mixed signals. The suggestion in Teoh’s case that some officials might have to consider some international human rights instruments in some instances was pointedly wound back, but not overruled, in Lam’s case. While the High Court has raised human rights issues in many other judicial review cases, Teoh and Lam exemplify the nebulous connections between judicial review, human rights and administrative decision making.

This paper examines the solution offered by the Human Rights Consultation Committee [‘the Brennan Report’]. That Report recommended amending the Administrative Decisions (Judicial Review) Act 1977 (Cth) [‘the ADJR Act’] ‘in such a way as to make the definitive list of Australia’s international human rights obligations a relevant consideration in government decision making.’ This recommendation was one of several changes to public administration, designed to accompany a federal human rights statute. The Brennan Report also suggested that amendment of the ADJR Act could be part of a ‘fall back’ position, if a human rights statute was not introduced. Many observers wondered whether such a reform would make administrative law a Trojan horse that would silently allow the human rights vanguard to slip past our defences, just as happened on Troy. This paper will argue that this recommendation is a misguided one though for different reasons. The reform proposed by the Brennan Report would introduce a substantive reform for which the ADJR Act is structurally unsuited. Public law and public administration would not be improved by a reform that further fragmented Australia’s already complex scheme of judicial review. Those arguments require an examination of the ADJR Act, its obvious flaws and the legacy of Teoh and Lam.

The ADJR Act and the limits of statutory judicial review

1 Monash University.
3 Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1.
4 Human Rights Consultation Committee, Report (2010). The Report shall be referred to as the Brennan Report, in acknowledgement of Father Frank Brennan who was chair of the Consultation Committee.
5 Ibid, xxxii (recommendation 11).

The Brennan Report expressly canvassed the possibility of amending the ADJR Act whether or not a human rights statute was enacted: ibid, 183.
The ADJR Act was a striking innovation in its day and greatly changed judicial review. It introduced many important substantive and procedural changes, including a uniform test for standing\(^6\) and a streamlined remedy in the form of an order to review that could be invoked to perform the functions of one or more of the prerogative or equitable writs traditionally sought in administrative law proceedings.\(^7\) The Act also introduced a general right to reasons for decision to which the Act applied and a procedure to rectify inadequate reasons, without the need to commence a substantive application for review.\(^8\) This simpler statutory form of judicial review increased access to the courts and enabled people to challenge adverse administrative action.\(^9\) During the first decade after its enactment the ADJR Act became the leading avenue of judicial review and exerted great influence over Australian administrative law.\(^10\) By contrast, the limitations or defects in the ADJR Act were less obvious and took some time to become fully apparent.\(^11\) These difficulties may be conveniently divided into the following three categories: the scope of the Act, which includes the statutory formula to determine decisions that are amenable to review and also the express exclusion of some decisions and decision makers from the Act; the codification of the grounds of review; and the absence of any guiding philosophy or overarching principle within the Act.

The various problems with the jurisdictional formula of the ADJR Act have been well documented elsewhere, particularly those which have arisen in recent years.\(^12\) Suffice to say that the ADJR Act formula which allows review of conduct or decisions made under an enactment has proved complex and attracted judicially created limitations that remain complex and contested. These problems have ironically introduced a different form of the sort of technical problems the ADJR Act was intended to overcome.\(^13\)

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6 ADJR Act s 3(4) (‘a person aggrieved’).
7 ADJR Act s 16.
8 ADJR Act s 13. This aspect of the ADJR Act was amplified by subsequent law confirming that the statutory right to reasons should be interpreted liberally. See, eg, Minister for Immigration v Taveli (1990) 94 ALR 177, 192-4; Allen Allen & Hemsley v ASC (1992) 27 ALD 296. It is also clear that the exceptions to the right to reasons under the ADJR Act (which are contained in schedule 2 of the Act) are interpreted narrowly: Secretary, Department of Foreign Affairs v Boswell (1992) 108 ALR 77.
10 A slightly different view is taken by Peter Cane and Leighton McDonald, Principles of Administrative Law – The Legal Regulation of Governance (2008) 96. Those authors suggest that while the ADJR Act model has ‘deeply influenced the way administrative lawyers think about judicial review, it has not supplanted the common law remedial model...’
11 Though the decline in use of the ADJR Act may have been due in large part to the increased restrictions placed on the scope of that Act, particularly successive migration statutes which precluded recourse to the ADJR Act. See Re Minister for Immigration and Multicultural Affairs; Ex parte S20 (2003) 77 ALJR 1165 [157] (Kirby J).
An aspect of the ADJR Act that has received considerably less attention is the lengthy list of grounds of review available to challenge decisions and conduct. A striking exception is the ground of no evidence, which is subject to an extended statutory definition: ADJR Act, ss 5(1)(h), (3) [covering review of decisions on the ground of no evidence] and ss 6(1)(h), (3) [covering review of conduct on the ground of no evidence]. There are equivalent statutory definitions of this ground in the statutes modelled on the ADJR Act: Administrative Decisions (Judicial Review) Act 1989 (ACT) ss 5(1)(h), (3), 6(1)(h), (3); Judicial Review Act 1991 (Qld) ss 20(2)(h), 21(2)(h), 24 ; Judicial Review Act 2000 (Tas) ss 17(2)(h), 18(2)(h), 21. The precise meaning of this statutory formula, and therefore the extent to which it modifies the common law, is not entirely settled. See Mark Aronson, Bruce Dyer and Matthew Groves, Judicial Review of Administrative Action (4th ed, 2009) 261-5; William Lane, ‘The “no evidence” rule’ in Matthew Groves and HP Lee (eds), Australian Administrative Law – Fundamentals, Principles and Doctrines (2007) 233, 242-52.
grounds of unreasonableness and relevant/irrelevant considerations were ‘substantially declaratory of the common law’.21

Although such cases indicate that the ADJR Act had codified the law in a fairly literal sense it could be argued that the architects of the Act and its subsequent copies in other jurisdictions sought to accommodate innovation in judicial review by the inclusion of two novel and open ended grounds that enable review of a decision that is ‘otherwise contrary to law’ or is ‘an exercise of power in a way that constitutes an abuse of the power’.22 Aronson, Dyer and Groves suggest that the inclusion of these grounds ‘acknowledges the common law’s capacity to develop new grounds’23 but those authors do not indicate whether and how Australia’s common law might do so.24 In the 30 years since these grounds were first enacted they have not been widely relied upon by applicants and have received virtually no detailed consideration by the courts. These grounds are so under-used and under-theorised that they may fairly be described as ‘dead letters’.25

Why has this happened? The Queensland discussion paper that led to that State’s adoption of the ADJR Act model explained that one possible disadvantage of codification of the grounds of review was the ‘natural preference’ of many lawyers to place their trust in the common law by reason of:

...its ability to grow and adapt through tentatively testing the boundaries of established principles and gradually extending and enlarging them on a case by case basis. There may be a distrust of codification because a code can limit the

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21 Ibid 39-42. Mason CJ adopted a similar approach to the ‘no evidence’ ground of judicial review in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, 358 when he determined the meaning of the statutory ground of no evidence with reference to the ground ‘as it was accepted and applied in Australian before enactment of the ADJR Act’.

22 These grounds are ss 5(1)(j), 6(1)(j) (otherwise contrary to law) and ss 5(2)(j), 6(2)(j) (abuse of power) in the ADJR Act. Similar grounds are included in the State and Territory versions of the ADJR Act: Administrative Decisions (Judicial Review) Act 1989 (ACT) ss 5(1)(i), 6(1)(i) (otherwise contrary to law), ss 5(1)(e), 5(2)(i), 6(2)(e), 6(2)(i) (abuse of power); Judicial Review Act 1991 (Qld) ss 20(2)(j), 21(2)(j) (otherwise contrary to law), ss 29(2)(e), 21(2)(e), 23(i) (abuse of power); Judicial Review Act 2000 (Tas) ss 17(2)(i), 18(2)(i) (otherwise contrary to law), ss 17(2)(e), 18(2)(e), 20(i) (abuse of power). The ground of ‘otherwise contrary to law’ was included at the suggestion of Sir William Wade. See Report of the Committee of Review, Prerogative Writ Procedures (Parl Paper, 56/1973) [41]-[43].

23 Aronson, Dyer and Groves, above n15, 124. See also Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002 (2003) 198 ALR 59 [156] where Kirby J referred to the ‘inherent capacity of the common law for progress and relevancy.’

24 Aronson has described these two grounds as ‘invitations to the Federal Court to add different or newer common law grounds’, though he does not specify how that invitation might be taken up: Mark Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (2005) 12 Australian Journal of Administrative Law 79, 80. Wade had much earlier offered a similar assessment of these two new grounds: HWR Wade, Constitutional Fundamentals (revised ed, 1989) 90.

ability of courts to change the law to meet new circumstances, and a code can bring with it its own problems of statutory interpretation.26

On this view, the statutory licence for common law innovation contained in the open ended grounds in the ADJR Act may have failed because it is counterintuitive.

The Law Reform Commission of Western Australia reached the opposite conclusion when it recommended the adoption of an ADJR Act model in Western Australia. The Commission doubted that Australian judicial review law had been shackled by codification of the grounds of review, though it did not examine the point in detail.27 The Commission used ground of denial of natural justice. It noted that the ADJR Act did not define the rules of natural justice and concluded that:

the ambit and content of those rules are left to be filled by the general law as enunciated by the courts from time to time. There is thus ample scope for judicial development of the substantive law relating to natural justice within the statutory ground of review.28

The Commission unsurprisingly accepted that any inhibiting effect that codification might have upon judicial review could be overcome by an open ended ground enabling review of decisions that were ‘otherwise contrary to law’.29 The failure of the Commission to provide examples of principle or case law where this ground had been invoked leaves the question of why or how it felt a generalised ground of review might pave the way to innovation unanswered.

A review of Victorian law, which also recommended the adoption of the ADJR Act model, appeared much less certain about this aspect of the ADJR Act. While the review supported codification of the grounds of review, largely in the format used by the ADJR Act, it also recommended the inclusion of an additional ground enabling the grant of relief on a ground not specifically included in the statutory list but which might be available at common law.30 This ‘common law’ ground appeared to offer a more explicit recognition that new grounds of review might evolve outside any statutory framework for review and should be able to be adopted within that framework. It is worth noting,

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27 Law Reform Commission of Western Australia, above n, 23.
28 Ibid.
29 Ibid 23-4. The Queensland and Electoral Review Commission also acknowledged that codification might inhibit the development of new principles of review but suggested this problem could be overcome by legislative amendments ‘to meet changing circumstances...’
   The Commission conceded that this assumed ‘developments in the law are kept under review, and Parliament is prodded when the need for amendment becomes apparent’: [Queensland] Electoral and Administrative Review Commission, Judicial Review of Administrative Decisions and Actions (Issues Paper No 4, 1990) 37. This suggestion implies that innovation in codified grounds of review might occur through the enactment of specific new grounds rather than the general ones included in the ADJR Act.
however, that the Victorian review was as short on detail on this issue as the arguably equivalent open ended grounds in the ADJR Act that it proposed to replicate.

There is much to be said for an amendment to the ADJR Act to adopt a ‘common law’ ground, to provide an alternative to those grounds in the ADJR Act which arguably could have fostered new principles. Those grounds have not proven successful. If innovation might arise in the common law, and the very nature of the common law suggests that is likely, it would hardly be assisted by the inclusion of a statutory ground that has proven a failure elsewhere. One option would be to include the ‘common law’ ground of review though expressed in a way that made the purpose of the ground more apparent. The ground could, for example, be expressed as allowing review ‘on any common law ground of review that exists before or after the commencement of this Act’. A provision drafted along these lines would make clear that innovation in judicial review is expected to occur in the common law and that when this happens it could and should be able to be adopted within the statutory framework for judicial review. A statutory framework of judicial review might encourage innovation if it made clear that innovation in judicial review is expected to arise from its traditional common law home but would be equally welcome in a new statutory home if need be.

However the ADJR Act model might be changed, there is no doubt that it has not provided the basis for significant doctrinal innovations in the grounds of review. It follows that any significant reform to the substantive principles must come from elsewhere, be it the common law or legislative reform.

What is the purpose of the ADJR Act?

One little noticed feature of the ADJR Act and its subsequent copies is the absence of a statutory statement of objectives or some form of guiding principle. Aronson has suggested that this apparent gap in the ADJR Act reflects the absence of any wider philosophy in the Act itself.31 He noted that both the ADJR Act and its many grounds of review:

say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations. Nor does ADJR mention the Thatcher era’s over-arching goals of efficiency, effectiveness and economy … ADJR’s grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security.

31 The problem is not unique to the ADJR Act. Gageler has suggested that judicial review of administrative action in Australia is essentially a ‘bottom up’ affair, in which principles are fashioned in a relatively ad hoc manner in individual cases rather than by reference to an overarching or unifying principle: Stephen Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?’ (2000) 28 Federal Law Review 303. On this view, the absence of any guiding principle in the ADJR Act can be understood as a specific example of the wider absence of such principles in Australian judicial review doctrine.
Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.\textsuperscript{32}

Aronson did not believe the ADJR Act should be amended to include a guiding or overarching principle. He also doubted whether such principles were possible or desirable, largely because of the difficulty in devising grand or unifying principles that were coherent, workable and of significant value.\textsuperscript{33} It could be argued this problem does not arise by reason of Australia’s constitutional framework but is instead related to the protean nature of the substantive principles of administrative law more generally, which an American commentator recently described as a body of doctrine ‘built around a series of open-ended standards or adjustable parameters’.\textsuperscript{34} On this view, the protean nature of the core principles of judicial review may simply not be capable of yielding a cohesive statement of principle. Another possibility is that the core values or apparent goals of judicial review, and administrative law more generally, which appear to have gained wide acceptance are fairly vague. These values include transparency, participation and accountability.\textsuperscript{35} Such protean concepts may not be capable of easy translation into coherent legal principles.

Even if such guiding principles were drafted, any attempt to devise a general or guiding principle to the ADJR Act, or any other statutory vehicle for judicial review, would face an uncertain fate in the courts. The history of Australia’s migration legislation in recent years indicates that legislation designed to limit or control judicial review will rarely have its desired effect and may even achieve the opposite of its intended result.\textsuperscript{36} A legislative statement of principle to guide the ADJR Act could easily meet the same fate if it was perceived by the courts as an attempt to limit or control judicial review. If that was the case, the important question would not be what the judicial response to a legislative

\textsuperscript{32} 94.
\textsuperscript{33} Ibid.
\textsuperscript{35} Harlow has suggested that these three principles appear to have wide acceptance as desirable or guiding ones of administrative law: Carol Harlow, ‘Global Administrative Law: The Quest for Values’ (2006) 17 European Journal of International Law 187. The Administrative Review Council has adopted a similar but slightly larger set of principles that it described as a ‘public law values’, which are fairness, lawfulness, rationality, openness (or transparency) and efficiency; Administrative Review Council, The Scope of Judicial Review (Report No 47, 2006) 30 (fn76). Dame Sian Elias has suggested that another value of administrative law might be ‘human rights, and in so far is as it is not a separate human right, the notion of equality before the law’: ‘Administrative Law for “Living People”’ (2009) 68 Cambridge Law Journal 47, 59. In Corporation of the City of Enfield v Development Assessment Committee (2000) 199 CLR 135, 157 [55] Gaudron J suggested that statutory schemes that enabled review of administrative and executive decisions was informed by notions of accountability. Gaudron J did not suggest that accountability was the only value or principle that underpinned administrative law remedies, though the absence of any reference to other principles arguably implies that her Honour considered accountability to be the primary principle.
\textsuperscript{36} An obvious example is the series of attempts to codify the requirements of hearings before the Refugee Review Tribunal and exclude the rules of natural justice. An overview of that issue is given in Alice Ashbolt, ‘Taming the Beast: Why a Return to Common Law Procedural Fairness Would Help Curb Migration Litigation’ (2009) 20 Public Law Review 264.
attempt to introduce a guiding principle to statutory judicial review might be, but rather how quickly that legislation might be judicially eviscerated as has been done by the High Court with successive privative clauses of recent times.\footnote{37}

Aronson doubted whether the courts might fare any better than the parliamentary drafters in any attempt to devise overarching principles to guide judicial review.\footnote{38} This problem is not unique to administrative law. Rather it is a specific illustration of more general questions of whether judges can or should articulate moral values. These questions are far less problematic if moral or normative values are accepted as being objective rather than subjective, though that possibility itself is a difficult one.\footnote{39} The more obvious problem with any attempt by the courts to engage in devising or answering significant moral questions is the suitability of the judicial model of decision making for such an exercise.\footnote{40} In the context of judicial review of administrative action, Aronson posed those questions in the following terms:

To what extent might it be the judiciary’s role (or even duty) to explore, deduce, describe, articulate or promote a normative framework for judicial review of administrative action? This is not to question the judiciary’s role in articulating general doctrinal principle, but the question being asked here concerns a much deeper level of public law theory. … [Is it the judge’s] duty to explore and

\footnote{37}{The description of the High Court’s interpretation of privative clauses is taken from David Dyzenhaus, Constitution of Law – Legality in a Time of Emergency (2006) 113.}


\footnote{40}{See Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 International Journal of Constitutional Law 2 where it is argued that the legislative model of decision making may provide a more suitable forum for considering moral issues than the judicial model. Waldron argues the judicial model can be limited by the influence of precedent, the narrow nature of many legal disputes and the small number of judges who determine any one case. He also argues that the legislative model can take account of a wider range of views and may be better able to consider issues afresh. Waldron’s argument is mainly directed to judicial review of legislation for constitutional validity but it is equally relevant to any attempt by judges to devise overarching principles for judicial review of administrative action in the sense considered by Aronson.}
expound his or her philosophical underpinnings, and when they do it, are their conclusions ‘law’?\textsuperscript{41}

Aronson reasoned that any conclusions the courts might reach on the grand ideals of judicial review ‘would necessarily be piecemeal, fairly vague, and subject to legislative reversal, unless of course, it were sought to embed these theories into the Constitution.’\textsuperscript{42}

The important points for present purposes are firstly that the ADJR Act does not have an overt statement of purpose. That may be understandable if one accepts that the procedural simplification created by the Act in its early years was sufficiently obvious that it was not thought necessary to state openly. The ADJR Act was not amended to take account of the deregulatory fervour that swept through Australia and other western nations during the 1980’s. One can question whether it is too late to change. That is not intended to suggest that the ADJR Act should not be amended to align its purposes with the more recent rise of human rights in much of society but rather to ask whether the ADJR Act can and should be amended to embed this and other concerns a part of its purpose. Even if that were done, could we agree on how those purposes would be expressed? And would that change the substantive nature of review? The answer is likely no to both questions.

\textit{Common law competition to the ADJR Act}

A separate problem arose which was outside the ADJR Act and which ultimately may prove to be the most significant challenge to the Act is the jurisdiction granted to the High Court by ss 75(iii) and (v) of the Constitution.\textsuperscript{43} This avenue of review invests the High Court with a judicial review jurisdiction that parallels, and in many aspects, exceeds that of the ADJR Act. These avenues of judicial review have assumed a central role in federal administrative law proceedings with the increasing use of privative clauses in federal legislation.\textsuperscript{44} The constitutionally entrenched right to relief in s 75(v) of the Constitution provides an ‘entrenched minimum provision of judicial review’ that cannot be narrowed or removed by legislation.\textsuperscript{45} Accordingly, it applies to cases that fall outside

\textsuperscript{41} Aronson, above n24, 96 (emphasis in original).
\textsuperscript{42} Ibid.
\textsuperscript{43} This federal jurisdiction, and the associated and accrued jurisdiction that accompanies it, is explained in Aronson, Dyer and Groves, above n15, 29-52.
\textsuperscript{44} During this time the remedies issued under s 75 became commonly described as constitutional writs. One feature of the rising importance of s 75 is the possible relationship between ss 75(iii) and 75(v). The question of whether the latter might not significantly adds to the former was raised by Gaudron and Gummow JJ \textit{Re Refugee Review Tribunal; Ex parte Aala} (2000) 204 CLR 82, 92 [18]. It is useful to note that the jurisdiction conferred upon the Federal Court by s 39B(1A) of the \textit{Judiciary Act 1903} (Cth) adopts the language of both clauses of s 75 of the Constitution.
\textsuperscript{45} \textit{Plaintiff S157/2002 v Commonwealth} (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). The High Court has since made clear that an equivalent of this minimum entrenched standard of review also applies at the State level because the integrated nature of Australia’s judicial system precludes the States from either altering their constitutions or the essential character of their Supreme Courts so that they no longer fulfil the requirements of a ‘Supreme Court of a State’ for the purposes of the appellate jurisdiction of the High Court in s 73 of the Constitution: \textit{Kirk Industrial Relations Commission of New South
the jurisdictional formula of the ADJR Act and instances where the ADJR Act has been expressly excluded. A parallel right of review is vested in the Federal Court by s 39B(1A) of the *Judiciary Act 1903* (Cth).46 The crucial part of that jurisdiction for judicial review of administrative action is that which grants the Federal Court original jurisdiction ‘in any matter...arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is constituted or any other criminal matter’.47

Both avenues of review are not limited by the jurisdictional formula of the ADJR Act, which are explained in later sections of this article, and can therefore be invoked in more situations than the ADJR Act. In particular, each can apply beyond the category of administrative decisions to which the ADJR Act is limited. But each has disadvantages. Neither avenue provides a right to reasons for decisions or actions to which they apply.48 Neither has given rise to innovative new principles of review or a body of doctrine that might guide the development of the substantive principles of judicial review.49 Many aspects of each avenue of review are uncertain. Some are relatively technical issues, such as the precise scope of the Federal Court’s remedial powers under the *Judiciary Act 1903* (Cth).50 But other more substantive issues also remain unsettled, such as the exact relationship of the High Court’s original jurisdiction under s 75(v) of the Constitution to other aspects of the Court’s jurisdiction.51 These various uncertainties and the different formula of each avenue of review add a technical and complex overlay to judicial review.

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47 *Judiciary Act 1903* (Cth) s 39(1A)(c).

48 This is a principle of common law that could be overturned, either by statute or a direct challenge to current common law authority.

49 A point conceded in John Basten, ‘Constitutional Elements of Judicial Review’ (2004) 15 Public Law Review 187, 201. Basten concludes that the High Court’s interpretive approach enables it construe legislation so as to avoid many difficult questions which thereby relieves it of the need to directly confront the question of whether the Constitution contains ‘some immutable core of administrative justice...’

50 One is how the remedial powers granted to the Federal Court under the ADJR Act and s 39(1A)(c) of the *Judiciary Act 1903* (Cth) compare. In *McGowan v Migration Agents’ Registration Authority* (2003) 129 FCR 118, 125-8 [21]-[35] Branson J suggested that the court’s remedial powers under the *Judiciary Act* might be wider. The Australian Law Reform Commission has made various recommendations to clarify aspects of the jurisdiction invested in the Federal Court in the *Judiciary Act 1903* (Cth): Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (Report 92, 2001) ch4. These recommendations have not been enacted. There are many judicial remarks suggesting a possible overlap between ss 75(iii) and 75(v) of the Constitution. See, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179 (Mason CJ), 204 (Deane and Gaudron JJ), 221 (Dawson J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 (Gaudron and Gummow JJ).
at the federal level.\textsuperscript{52} At the same time, however, it is plain that each avenue of review is important and often far more so than the ADJR Act.\textsuperscript{53} The following analysis of the ADJR Act must be considered against this background of the flaws in that Act which have become apparent over time and the constitutionally based jurisdiction that operates in parallel to it at the federal level.\textsuperscript{54}

The Teoh Solution (and the Lam Response)

\textit{Teoh} arrived at a curious point in Australian administrative law. In the years preceding \textit{Teoh} the High Court has adopted an expansive approach to the rules of natural justice, culminating with a broad ranging rule that natural justice applied to the exercise of \textit{any} public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations.’\textsuperscript{55} The Court simultaneously adopted a stricter approach to legislative attempts to limit or exclude natural justice.\textsuperscript{56} The combined effect of these principles was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57} The function of the legitimate expectation, which had essentially been to bolster claims to public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations,’ was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57} The function of the legitimate expectation, which had essentially been to bolster claims to public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations,’ was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57} The function of the legitimate expectation, which had essentially been to bolster claims to public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations,’ was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57} The function of the legitimate expectation, which had essentially been to bolster claims to public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations,’ was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57} The function of the legitimate expectation, which had essentially been to bolster claims to public power that might ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations,’ was to amplify the duty to observe natural justice and limit possible exclusions of that duty. The scales were clearly set in favour of citizens and against governments.\textsuperscript{57}

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\textsuperscript{53} Justice Allsop has explained extra-judicially that the rights conferred by the \textit{Judiciary Act 1903} (Cth) means that the ADJR Act ‘is not as important as inexperienced pleaders appear to think’: Allsop, above n 46, 100.

\textsuperscript{54} The jurisdiction invested in federal courts by ss 39-39B of the \textit{Judiciary Act 1903} (Cth) is not of course constitutionally entrenched but it is clearly modelled on the jurisdiction in s 75(v) of the Constitution. The sections are part of a wider scheme to enable matters to that do not contain a question or constitutional or other general important to be either remitted to lower federal court, if commenced in the original jurisdiction of the High Court, or commenced directly in those courts. It appears that any power of remittal must have a statutory basis. A majority of the High Court rejected an argument that there may be an implied constitutional basis for the High Court’s power of remittal of matters to lower courts in \textit{MZXOT v Minister for Immigration and Citizenship} (2008) 233 CLR 601, 621-5 [32]-[47] (Gleeson CJ, Gummow and Hayne J J), 656-7 [172]-[177], 659-63 [184]-[199] (Heydon, Creman and Keifel JJ). Kirby J accepted that such an implied power was an arguable concept but ultimately found the argument was not made out in the case at hand: 643-4 [116]-[119].

\textit{Annetts v McCann} (1990) 170 CLR 596, 598; \textit{Ainsworth v Criminal Justice Commission} (1992) 175 CLR 564, 577.

\textit{Annetts v McCann} (1990) 170 CLR 596, 598-9; \textit{Re Minister for Immigration and Multicultural Affairs; Ex parte Miah} (2001) 206 CLR 57, 73-5, 84-5, 94-5, 111-5.

\textsuperscript{55} Legislative attempts to exclude the duty to observe natural justice abound in Australian migration law, in the form of schemes that seek to create an exhaustive framework intended to exclude recourse to the common law. The High Court invariably finds schemes are not sufficiently clear or exhaustive. See, eg, \textit{Saeed v Minister for Immigration and Citizenship} (2010) 241 CLR 252.

\textsuperscript{56} \textit{Teoh} (1995) 183 CLR 273, 311-2 (McHugh).
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At this unlikely doctrinal point in time, Mr Teoh’s case arrived before the High Court. Teoh essentially claimed a legitimate expectation arising from a treaty he admitted ignorance of, at least until late in the proceedings when his lawyers alerted him to it. He also conceded that the official who decided to revoke his visa had neither adopted a policy nor made a representation based upon the Convention on the Rights of the Child. A majority of the High Court instead accepted that the ratification of the Convention was sufficient to create a legitimate expectation that public officials would normally act in accordance with the Convention. This expectation was held to apply when officials proposed to act contrary to the Convention, to require that people affected be given notice of this intention and a chance to argue against it. Mason CJ and Deane J reasoned that such an expectation could arise because:

...ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory of executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.

On this view, ratification of an international instrument was a sufficiently clear and serious statement to both the international community and the Australian public to support a legitimate expectation. It might differ to the behaviour that had traditionally supported a legitimate expectation, such as the public promulgation by ministerial policy or a promise or representation made by a public official, but it was deemed to have the same basic character and should therefore be given the same basic effect.

The vigorous dissent of McHugh J questioned both the effect given to unincorporated treaties and the coherence of any legitimate expectation founded upon them. His Honour held that the recognition of a legitimate expectation would breach rather than simply circumvent the traditional rule that treaties gained no domestic force until they were given legislative effect. McHugh J also reasoned that any recognition of expectations based upon unincorporated treaties would essentially enable the executive to bypass the parliamentary process and confer a de facto force upon treaties without the use of legislation. His Honour also fired what would prove to be two prophetic salvos at the reliance the majority judges placed on natural justice. McHugh doubted that any legitimate expectation could provide a significant procedural benefit because the wide application of natural justice in Australia required officials to provide notice of any key issue upon which a decision might turn to the attention of a person affected and provide an opportunity to respond. In that case, his Honour reasoned, the legitimate expectation gave way to the more practical question of ‘what does fairness require in all the circumstances of the case?’ McHugh J also highlighted the circular nature of an expectation in the circumstances that the majority judges accepted it could be evaded.

60 Ibid 291.
62 Ibid 316.
63 Ibid 312.
Officials could be required to provide notice that they do not intend to follow a treaty, which they are not strictly obliged to follow in any case, to a person who knows nothing of the treaty that will in any event not be considered. That absurd possibility greatly diminishes any claim that Teoh might foster greater respect for rights or good administration.

Teoh is so regularly misunderstood or misused it is useful recall two key limits in its reasoning. First, the majority judges rejected any suggestion that the novel legitimate expectation they had recognised made the Convention a part of domestic law or somehow directly enforceable. They pointedly affirmed the orthodox principle that international instruments are not directly enforceable in domestic law unless and until they are given legislative effect. The High Court made clear that ratification of a treaty did not confer it with a direct or enforceable quality. Any procedural expectation that administrative officials would normally act in accordance with the terms of a treaty was exactly that: a procedural presumption that could be rebutted generally by the executive or in particular instances by decision makers. In theory the requirements of Teoh can be satisfied if decision makers provide notice that they do not intend to take notice of a principle contained in an unincorporated treaty and provide an opportunity to a person affected to argue why this course should not be taken. The regular suggestion by courts of other jurisdictions that Teoh enables a treaty to ‘be directly enforceable in domestic law’ clearly therefore overstate and oversimplify a central element of the case.

The second important feature of Teoh was its uncertain scope. Mason CJ and Deane J stressed that ratification of a treaty could give rise to a legitimate expectation ‘particularly when the instruments evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children.’ In the immediate aftermath of Teoh some commentators argued that this passage confirmed the limited scope of Teoh and that the step taken by the majority judges was an incremental rather than radical step. Upon closer inspection, the passage quoted is not so limited. It simply states that a legitimate expectation is more likely to be triggered by ratification of a particular form of human rights treaty, but does not disclaim the possibility that expectations may arise from other

64 Ibid 314.
65 Ibid 287-8, 291 (Mason CJ and Deane J, (Gaudron J agreeing on this point), 302 (Toohey J).
67 European Roma Rights Centre v Immigration Officer at Prague Airport [2003] EWCA Civ 666 [2003] 4 All ER 247, [101] per Laws LJ. The description is particularly inapt for Teoh, given the explanation below that Australian law does not allow substantive expectations of any form.
68 Ibid 291. Gaudron J agreed generally with Mason CJ and Deane J but placed greater weight on the separate citizenship rights she accorded to Mr Teoh’s children: 304. While this reasoning identifies a quite separate base for the expectation, her Honour’s strong reliance on the vulnerable status of the children and the impact of the deportation of their father upon the wider family reinforce is broadly consistent the focus of Mason CJ and Deane J upon specific categories of treaties. Later cases have acknowledged that this possibility has not taken root. See, eg, Lam v Minister for Immigration and Multicultural Affairs (2006) 157 FCR 215, [35].
human rights instruments or those outside the area of human rights. That possible uncertainty provides a major flaw in *Teoh* because there is little to indicate when, why or how expectations are more or less likely to arise.\(^{70}\)

Any judicial suggestion that legitimate expectations might arise only, or are more likely to arise from, human rights instruments is also problematic. Lord Steyn favoured this view in *Re McKerr*\(^{71}\) when he noted the ‘growing support for the view that human rights treaties enjoy a special status.’\(^{72}\) Sales and Clement have argued that the scholarly authority relied upon by Lord Steyn provided no real basis for such a sweeping distinction between human rights and other treaties.\(^{73}\) The absence of judicial authority alone may not preclude the adoption of such a principle, particularly if judges are able to construct the first footholds from scholarly sources. The distinct and more difficult question which arises from the suggestion by Lord Steyn and *Teoh* more generally is upon what basis judges can judges claim the expertise and authority to categorise international instruments? Why are some treaties or the rights they cover sufficiently fundamental to support a legitimate expectation? Any attempt to do so by reliance on *Teoh* would require the courts to sift through the many ratifications of treaties by the executive to determine which ones provided a sufficiently ‘positive statement’ to require judicial action.\(^{74}\) Lord Steyn’s suggestion would require the equally difficult process of devising a judicial taxonomy to determine which unincorporated treaties may have a domestic effect. Neither option would be attractive.

*Teoh* was followed by two ministerial statements from two governments, both of which sought to exploit the suggestion of Mason CJ and Deane J the ratification of a treaty could generate a legitimate expectation ‘absent statutory or executive indications to the contrary…’\(^{75}\) The joint statements boldly declared that the ratification of a treaty had not ever been and was not now intended to be capable of generating any form of legitimate expectation on the part of administrative officials in the federal government.\(^{76}\) These statements were never considered by the High Court, so their precise status remains unsettled but it seems clear they did not inflict death by press release upon *Teoh*. Some decision of the Federal Court doubted the efficacy of the statements, holding they must be

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\(^{70}\) For a quite different view, which argues how for a widening of the reasoning of *Teoh*, see Sanjay Patel, ‘Founding Legitimate Expectations on Unincorporated Treaties’ [2010] *Judicial Review* 74.

\(^{71}\) Ibid [51].


\(^{73}\) McHugh J expressed a similar concern on the difficulties that bureaucrats would face in deciding, first, which treaties to consider and, secondly, whether and how particular treaties might give rise to legitimate expectations: *Teoh* (1995) 183 CLR 273 at 316-7. His Honour also noted that the task was made more difficult by the more than 900 treaties to which Australia was a party at that time. The same problems could easily vex judges.

\(^{74}\) Ibid 291.

\(^{75}\) Joint Statement by the Minister for Foreign Affairs and the Attorney-General, ‘International Treaties and the High Court Decision in *Teoh*’ (10 May 1995) and ‘The Effect of Treaties in Administrative Decision-Making’ (25 February 1997). The first statement was issued by a Labour government and the second by a conservative Liberal government.
timely and precise in order to stymie any legitimate expectation arising from a treaty.77 Statements with the breadth such as those issued might not be sufficient,78 because they did not ‘direct attention to the manner in which decision-makers are required to undertake the task of making particular decisions.’79 This reasoning suggests that the executive statements must reflect with some precision the environment in which an expectation they seek to frustrate will be administered.80 It also highlights the curious result that ratification of a treaty may be deemed to create an expectation in general terms which could only be removed by much more precisely focussed behaviour by the executive.

*Lam*81 was an unlikely vehicle to revisit the issue because the applicant claimed a denial of natural justice in a very limited basis. Lam was eligible for deportation by reason of his criminal offences and interviewed at length while in prison about his circumstances. He provided detailed information, material from relatives and friends and a letter from the person caring for his children. Officials sought further information, including contact details for the carer of the children so that the officials could assess Lam’s relationship with the children and the effect his deportation might have upon them. The officials did not contact the carer. They instead collated the information and provided a detailed brief of advice to the Minister who decided to cancel’s Lam’s visa. Lam claimed a denial of procedural fairness and argued that the letter he received created a legitimate expectation that the Minister would not decide the case until his subordinates had spoken to the carer of Lam’s children. This claim seemed stronger than one than *Teoh* because it was based upon a direct representation and it did not depend on any treaty. For this reason, Lam did not rely directly upon either *Teoh* or the newly established substantive expectation of *Coughlan*82 but the High Court took the occasion to strongly disapprove of both.

The key findings into *Lam* can be divided into three convenient parts. The first concerned *Teoh* and legitimate expectations more generally. Four of the five members of the High Court expressed strong reservations about *Teoh* but the case was not overruled.83 McHugh and Gummow JJ doubted whether the ratification of a treaty could provide a ‘positive statement’ of the sort accepted in *Teoh* and questioned whether courts should interpret or accord meaning to the ratification of treaties. McHugh and Gummow JJ reasoned that the courts also should not ‘add to or vary’ the powers granted to administrative officials ‘by taking a particular view of the conduct of the Executive of external affairs.’ The judicial arm of government, they cautioned, should ‘declare and

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78 *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80 at 103.
80 See also *Tien v Minister for Immigration and Multicultural Affairs* [1998] FCA 1552 (1998) 89 FCR 80 at 103; *Browne v Minister for Immigration and Multicultural Affairs* (1998) 27 AAR 353, 369.
81 *Minister for Immigration and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR 1.
82 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
83 *Teoh* was likely saved because *Lam* was only heard by a bench of five of the seven members of the High Court. Any decision to overrule a relatively recent case of the High Court would clearly have required all of its members to preside.
enforce the limits of the power conferred by statute upon administrative decision-makers, but not by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.\textsuperscript{84} Callinan J held similar doubts about the judicial invocation of treaties that were ratified but not enacted. His Honour was concerned that judicial use of treaties might overlook important issues about the treaty process, such as whether parliament might enact the treaty in whole or in part or whether parliament believed any obligations arising from the treaty might be satisfied by existing domestic law.\textsuperscript{85} The underlying concern of Callinan J, which was the potential that judicial recognition of expectation based upon the executive ratification of a treaty might underline the role of parliament, echoed similar concerns of McHugh J’s dissent in \textit{Teoh}.

These aspects of the reasoning of McHugh, Gummow and Callinan JJ cast clear doubt over the possibility that ratification of a treaty can and should provide the foundation for a legitimate expectation. Importantly, however, McHugh and Gummow JJ placed considerable reliance on the principles that flow from the structure of the Australian Constitution in this part of their reasoning. Whether that might provide a coherent point of limitation is another matter because the concerns of Callinan J, which question the wisdom of courts ascribing a particular meaning to the ratification of treaties, clearly cannot be confined to Australia.

McHugh and Gummow JJ also expressed grave doubt about the continued value of legitimate expectations. Their Honours thought the concept was at best of ‘limited utility’ in light of wider evolution of natural justice. McHugh and Gummow JJ suggested that the legitimate expectation required further consideration if it was to remain a useful legal concept.\textsuperscript{86} Hayne and Callinan JJ both also doubted the continued value of legitimate expectations, though to differing extents. Hayne J did not express a concluded view but suggested the concept should not be used ‘without careful articulation of the content of the principle which is said to be engaged’ in any case.\textsuperscript{87} Callinan J was openly sceptical about the ‘invention’ of the legitimate expectation and reasoned that the concept was ‘an unfortunate one, and apt to mislead’.\textsuperscript{88} His Honour concluded that \textit{Teoh} probably represented the ‘high watermark’ of the doctrine, which should in future at least be restricted to cases where people had turned their mind ‘consciously to the matter...[and] reasonably have believe and expected that certain procedures would be follows.’\textsuperscript{89}

These various remarks are at least cautious and often sceptical of the legitimate expectation. They clearly doubt a central theme of \textit{Teoh}, which was that government actions such as the ratification of a treaty may provide a signal to the world or the domestic population sufficient to support a legitimate expectation in a particular person. While they did not eradicate the legitimate expectation they clearly confine its use in many situations, including those like \textit{Teoh}. The logical question that follows is whether that limited room leaves any room at all for the legitimate expectation. Gleeson CJ offered a conception of natural justice that suggested not.

\begin{itemize}
  \item \textsuperscript{84} Lam (2003) 214 CLR 1, 33-4 [102].
  \item \textsuperscript{85} Ibid 49 [152].
  \item \textsuperscript{86} Ibid 16 [61]-[64].
  \item \textsuperscript{87} Ibid 37 [119].
  \item \textsuperscript{88} Ibid 45-6 [140]-[141].
  \item \textsuperscript{89} Ibid 47 [145].
\end{itemize}
Just as Teoh and its particular legitimate expectation were not relied upon in Lam, the doctrine of substantive unfairness recognised in Coughlan was also not raised directly by the parties. Nonetheless the High Court signalled the serious constitutional obstacles that lay before any Australian adoption of Coughlan. The English notion of substantive unfairness is difficult to describe in an outside view but the main concern arises in the third category recognised by the Court of Appeal. This was a promise or practice where the benefit is substantive rather than procedural and the court ‘will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.’

Neither this passage nor the many later cases that have sought to explain it appear to offer a clear method to determine when or how official behaviour becomes ‘so unfair’ that it requires enforcement. A separate but related concern is that the balancing exercise, to weigh individual and wider public interests, which the Court of Appeal suggested would guide this exercise, appears to edge close or even into merits review.

Four members of the High Court hinted that Coughlan was clearly beyond the constitutional reach of Australian courts. Gleeson CJ reasoned that the constitutional jurisdiction granted to the courts ‘does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration.’ On this view, the normative concepts of good administration and the like that have been offered in cases following Coughlan to explain the ultimate foundation of substantive unfairness are ones which the judicial branch of Australian government cannot enter. McHugh and Gummow JJ, with whom Callinan J agreed on this point, similarly reasoned that Coughlan and later cases appeared...

...concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome...this represents an attempted assimilation into the English common law of doctrines derived from European civilian systems.

Their Honours continued:

In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems...An aspect of the rule of law under the Constitution is that the role or function of Ch III courts

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91 That difficult was amplified by the Court of Appeal’s assertion that it was clearly for the court to pronounce ‘whether the consequent frustration of the individual’s expectation is so unfair as to be a misuse...of power’: Coughlan [2001] 1 QB 213, 251. This approach appears to offer little more than the court’s own opinion as a touchstone.
92 A pointed tacitly conceded when the Court of Appeal acknowledged it would take account of the fairness of any outcome: Coughlan [2001] 1 QB 213, 246.
93 Lam (2003) 213 CLR 1, 11-12 [32].
94 Ibid 23-4 [73].
does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.⁹⁵

These passages draw together several threads. One is that English and Australian public law have clearly separated and will remain so for the foreseeable future. Perhaps this separation is due to the ‘tectonic shifts’ caused by the increasing influence of European principles on English law.⁹⁶ Perhaps the United Kingdom and other Commonwealth countries are now guided by different principles and the combined effect of those principles is to draw both bodies of law in different directions. In the case of Australia, the dominant influence in public law is clearly the Constitution. Any principle of judicial review must conform to constitutional doctrine or face inevitable rejection. The Constitution entrenches not only a minimum protected level of judicial review of administrative action but has also given rise to a form of judicial power with clear limits. They demarcate the boundaries within which the judicial function is necessarily exclusive and secure but they also mark out other boundaries beyond which the courts cannot step. The most obvious is the traditional divide between judicial and merits review but, according to Lam, this almost certainly includes those grounds of judicial review such as substantive unfairness that draw the courts uncomfortably close to merits review. Proportionality would also almost certainly fall within the same prohibited category. Put simply, the price of secured judicial power may be the effective surrender of some of the more recently developed grounds of review.

Professor Taggart long ago pointed to a possible solution when he acknowledged the many internal contradictions of Teoh and suggested that the case might provide a ‘wobbly stepping stone’ to a more coherent principle in which treaty issues could become relevant considerations in some administrative decision making.⁹⁷ To regard treaty issues as relevant considerations would overcome any artificial connection between treaties and legitimate expectations, or natural justice more generally. McHugh and Gummow JJ were plainly unsympathetic to this possibility in Lam,⁹⁸ mainly because their Honours thought the possibility was also implicitly rejected in Teoh. It is also worth noting that Taggart did not explain when or how treaty considerations might become relevant. Perhaps the solution might be to regard treaty issues relevant considerations when they deal with fundamental rights or freedoms. This possibility would admittedly require further consideration of what treaties do and do not concern fundamental rights or freedoms and also the argument of Sales and Clement that no such taxonomy in treaties does or can exist.

The Brennan Report Solution

⁹⁵ Ibid 24-5 [76].
⁹⁸ Lam (2003) 213 CLR 1, 24-5 [76].
The Brennan Report proposed a reform that appeared to intersect with many of the issues raised in Teoh and Lam though not in the guise of a legitimate expectation or procedural fairness more generally. The Brennan Report recommended that the ADJR Act be amended so that decisions could be subject to judicial review if administrative officials failed to take account of human rights considerations. The precise recommendation was to amend the ADJR Act ‘in such a way as to make the definitive list of Australia’s international human rights obligations a relevant consideration in government decision making.’\(^\text{99}\) Importantly, this recommendation was expressed as one that could and should be introduced irrespective of whether a human rights statute of any form was introduced.\(^\text{100}\) The scope and nature of this reform raise separate and problematic issues.

The limited scope of the proposal of the Brennan Report

The scope of any reform to the ADJR Act would necessarily be limited in scope. The ADJR Act does not enable judicial review of all decisions made at the federal level. One limitation to the scope of the Act arises from its jurisdictional formula, which is enabled review of decisions of conduct of an administrative character made under an enactment. A range of decision inevitably fall outside the scope of this formula, most notably decisions which are necessarily legislative or judicial in character. More importantly, the strained and dubious interpretation of the scope of ‘under an enactment’ reached by the High Court in Tang’s case\(^\text{101}\) essentially precludes review of decisions made under soft law.\(^\text{102}\) Aside from the foibles of interpretation of this formula the scope of the ADJR Act is limited more substantively by the express exclusion of vice regal decisions and the ability to wholly exclude designated decisions by adding to a schedule of exclusions appended to the Act.\(^\text{103}\) This schedule of exclusions covers decisions made under a wide range of statutes and decisions of many particular classes. Many of the exclusions such as taxation decisions and those made during criminal prosecutions are arguably unexceptional because they are subject to other more suitable rights of redress. Importantly, however, many migration decisions are excluded from the ADJR Act. That means that the single largest source of administrative law jurisprudence in the federal courts of recent decades, including the High Court, is excluded from the ADJR Act. So it would be from any amendment of the type recommended by the Brennan Report. Any amendment of the type proposed by the Brennan Report would therefore be as limited as the ADJR Act itself, and that is quite limited. It would not apply to federal officials or

\(^{99}\) Brennan Report, above n3, recommendation 11.

\(^{100}\) Ibid 186.


\(^{103}\) ADJR Act, schedule 1.
their decisions more generally, but rather only to the extent that they were subject to the AJDR Act. That is a particularly unsatisfactory way to introduce the normative reforms the Brennan Report clearly sought to achieve.

One must also ask whether reforms to administrative decision making which are implemented by attachment to judicial review can hope to be effective if it is divorced from the original jurisdiction of the High Court, which has been the mechanism by which so many landmark judicial review cases of recent times have proceeded.

**What is the effect of a definitive list?**

Other aspects of the amendment to the ADJR Act proposed by the Brennan Report are equally problematic. The notion of a ‘definitive list’ of ‘international human rights’ might both address and continue the problems that flow from *Teoh*. One the one hand, such a reform would answer a key criticism of *Teoh*’s case because it would give legislative endorsement to the rights to be considered. While it would not directly enact those rights, it would clearly give legislative approval of the rights required to be considered by administrative officials. But the Brennan Report left many questions unanswered. It did not explain what was meant by a ‘definitive’ list of human rights obligations, so one might simply take that word at its obvious meaning. A definitive list is one that includes all important rights that should be considered and, just as importantly, necessarily excludes other rights. If a list is definitive and the rights it contains must be considered by federal officials, it follows that the rights not mentioned are not so important and most clearly do not need to be considered by federal officials in administrative decision making. One could also suggest that the failure of the legislature to include specific rights in the definitive list could inevitably provoke a submission that those rights should be disregarded by administrative officials. *Teoh*’s case cannot provide some form of fall back coverage for those rights not included in the definitive list of human rights obligations. If *Teoh* was thought to still be of any real force, why did the Brennan Report recommend any amendment to the ADJR Act? Surely it did so in the belief that *Teoh* was a spent force. The Brennan Report appeared to accept that view by acknowledging that the principle established in *Teoh* ‘does not prevent decision makers from departing from that expectation: it merely means that if they propose to depart from it they must give the person affected an opportunity to make submissions against the proposed.’

The Report also conceded the doubt that *Lam* had clearly cast over *Teoh.*

A separate but closely related problem is precisely how such a list is devised. The Brennan Report gave little indication how the definitive list of human rights obligations would be drawn up, though its suggestion that the *Acts Interpretation Act 1901* (Cth) should be amended to take account of an interim and then definitive list of Australia’s human rights obligations,

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104 Brennan Report, 118.

105 Ibid.

106 Ibid, recommendation 12. The Report did not mention use of an interim list in its proposed amendment of the ADJR Act.
Perhaps the most difficult aspect of the proposed reform to the ADJR Act is its failure to explain exactly how administrative officials should consider the nominated rights. The Brennan Report recommended that these rights be ‘a’ consideration. There is an obvious difference between a definitive list of rights and making those rights a definitive consideration. The proposal was therefore one to make specified rights one of the many things that administrative officials should take account of in their decision making. That does not explain how officials should interpret and apply those rights. It also fails to explain how they should balance those rights against other issues that arise. How, for example, should an official balance rights issues against budgetary ones? Should one prevail over the other? Who should decide that? Can and should an administrative official make a decision sensitive to rights without any reference to its financial implications? These are the very considerations of competing issues, infused with normative qualities, that several judges in Lam cautioned lay outside the reach of judicial power as it is currently understood.

The Victorian Charter

Although this paper was intended to consider the proposed amendment to the ADJR Act, there are several reasons to consider the remedial provision of the Charter of Human Rights and Responsibilities 2006 (Vic) ['the Victorian Charter']. The main reason is that a visitor from Victoria might be expected to offer an opinion on the matter. While I would much prefer to speak on other Victorian matters, particularly why we have created a version of football that is of the only one truly worthy of the title ‘Australian rules football’, I will offer some thoughts on statutory judicial review from a Victorian perspective and what our Charter might illuminate about statutory judicial review and the path suggested by the Brennan Report. The answer is very little. The simple reason is that Victoria has a badly drafted judicial review statute that preceded its badly drafted charter of rights.

The short term problem created by the statutory regime of judicial review created by the Administrative Law Act 1978 (Vic) is a simple one. It is entirely different to the ADJR Act model and for that reason alone could not have the reform proposed by the Brennan Report grafted onto it. The statutory regime of judicial review in Victoria is so deficient that human rights would almost certainly not be advanced by reforms that sought to align statutory judicial review and the protection of human rights. The many defects in the Administrative Law Act 1978 (Vic) include an uncertain scope, an even more uncertain right to reasons and a time limit within which proceedings must be commenced which is so inflexible it has virtually consigned the Act to the dustbin. The Administrative Law Act 1978 (Vic) is so flawed and difficult to use that it has largely fallen into disuse. Any amendment of the type proposed by the Brennan Report would therefore be pointless. Grafting a new branch onto a dead tree can only have one result.


108 The Supreme Court of Victoria does not maintain statistics which distinguish between the judicial review proceedings commenced under the Administrative Law Act 1978 (Vic) and O 56 RSC but a cursory reading of reported and unreported cases over the last decade reveals very few proceedings commenced under the Act.
The connection between the Victorian Charter and judicial review more generally is a more complex journey. The Victorian Charter contains no overt connection to judicial review but its early proponents argued for the contrary. A brief explanation of the Charter’s key remedial provisions is necessary. The Victorian does not create a direct remedy for a breach of any of its terms but it contains several provisions which, when read together, enables a person to eventually seek remedies. Section 32(1) of the Charter provides that:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 38 (1) of the Charter the following mandate to public authorities, to whom the Charter is currently directed:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

These two clauses are ones that most would expect in any statutory charter or statute governing human rights. The same cannot be said of s 39 which introduces a unique remedial qualification to the Victorian Charter. The relevant parts of s 39 for present purposes provide:

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief of remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

(a) To seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and

(b) To seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

There are some necessary preliminary issues about the Victorian Charter to address because discussing these particular provisions and the relationship between the Charter and judicial review. The most obvious preliminary issue is that the Charter appears to be constitutionally valid. I say ‘appears’ because the outcome of *Momcilovic*109 is not entirely clear. In that case only Heydon J went so far as to hold the entire Victorian Charter invalid, while a bare majority of the court upheld the constitutional validity of ss 32 and 36.110 Gummow and Hayne JJ held that key interpretive provision of the Charter (s 32)

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109 *Momcilovic v The Queen* [2011] HCA 34.
110 Ibid [439].
was not invalid, but that the key remedial provisions (s 36) was invalid but severable from the remainder of the Charter.

Crennan and Keifel JJ did not find any provisions of the Charter invalid. French CJ adopted a curious middle position on key provisions of the Charter, with which Bell J agreed. While his Honour did not find any provision of the Charter invalid, he concluded that the issue of a grant of inconsistent interpretation made under s 36 of the Victorian Charter ‘does not involve the exercise of a judicial function’ or incidental to the judicial function. What made the Chief Justice’s position curious was that his Honour held that the non-judicial nature of the declaration was not fatal to its validity by use of the Kable principle, though it was clearly beyond the scope of federal judicial power. The Chief Justice also held that the character of a declaration issued under s 36 of the Victorian Charter was such that it did not engage the appellate jurisdiction of the High Court under s 73 of the Constitution.

In my view, the position of French CJ is the least satisfactory. No one can seriously argue that a statutory charter of rights does not elicit divergent views. That is well illustrated by the differing conclusions of Hayne, Gummow and Heydon JJ on the one hand and Crennan and Kiefel JJ on the other. The difficulty I have with the reasoning and ultimate conclusion of the Chief Justice is not simply the refined form of fence sitting that his Honour adopted but the strange destination it lead his Honour to and the disregard for one of his Honour’s one recent decision. The bizarre outcome lies in French CJ’s belief that the remedial declaration confers a non-judicial function upon the Supreme Court of Victoria but does not offend the Kable principle. That surely marginalises the remedial function. Even worse was his Honour’s suggestion that this function did not engage the appellate jurisdiction of the High Court. Is it possible that the Kable principle can operate to allow the conferral of a supposedly non-judicial function on a Supreme Court that is beyond the appellate reach of the High Court?

What is most puzzling about the winding road of this reasoning is the utter disregard for the underlying principle established only last year in Kirk v Industrial Relations Court of New South Wales (‘Kirk’). In simple terms, Kirk latched onto s 73 of the Constitution to align the constitutional function and protection of State Supreme Courts much closer to that of the High Court that had previously been the case. The High Court placed much reliance on the need to avoid ‘islands create islands of power immune from [judicial] supervision and restraint.’ The Court was also mindful to avoid ‘distorted positions’ within the unified judicial system within the integrated federal judicature

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112 Ibid [172]-[188] (Gummow J, Hayne J agreeing).
113 Ibid [189] (Gummow J, Hayne J agreeing).
114 Ibid [661] (Bell J).
115 Ibid [89]-[90].
116 Ibid [93]-[97]. Bell J also agreed with this aspect of French CJ’s reasoning: [661].
117 Ibid [98]-[100].
118 Ibid [101].
120 Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Heydon J agreed with the majority of this and other substantive issues: 585 [113]. His Honour issued separate reasoning on evidentiary issues.
created by the Constitution. The reasoning of French CJ does precisely the sort of thing that Kirk sought to eliminate.

The federal implications of the different views of the High Court suggest that a statutory charter that adopts the declaratory remedy of the Victorian Charter would be unconstitutional. There can be little doubt that Gummow, Hayne and Heydon JJ would hold an equivalent regime invalid if enacted at the federal level. The reasoning of the Chief Justice, and agreement of Bell J on this issue, leaves little doubt that their Honours would reach the same conclusion. The reasoning of the Chief Justice does not, however, preclude other remedial options within a statutory charter of rights.

Interpreting the Victorian Charter

Heydon J rightly noted that none of the large number of parties who appeared before the High Court in that case made a frontal attack on the constitutional validity of the Charter. His Honour noted, perhaps wistfully, that the Attorney-General for Western Australia, and sometimes also the Attorney-General for the Commonwealth, appeared at times ‘to hover on the brink of attack’ but never quite bared their teeth. It is therefore not entirely impossible that a revised and more direct constitutional attack may be made on the Charter, though for the moment it appears somewhat safe and also likely (though not entirely certain) to survive such an attack.

Accepting that the Victorian Charter is valid does not help determine what it actually means. On that note there is much to commend the criticism that Heydon J made of s 7(2) of the Charter as indicative of wider problems. His Honour complained that s 7(2) was drafted in language that was ‘highly general, indeterminable, lofty, aspirational and abstract. It is nebulous, turbid and cloudy.’ There are echoes of this view in all of the other judgments in Momcilovic on the interpretive clause which, ironically, itself presented the High Court with many interpretive difficulties. It appears that s 32 is valid though its potential purpose has been clearly narrowed. Section 38 was not considered in the same detail though it appears to have largely escaped unscathed by the majority judgments. The immediate relevance of s 38(1) is that it bears a striking resemblance to the reform that the Brennan Report recommended to the ADJR Act. It essentially required public officials to take account of the human rights issues specified in other parts of the Charter. Where the Charter departs significantly from the recommendation of the Brennan Report is not simply that such a provision is located in a human rights statute but also the curious melding of human rights and other remedies in s 39(1)(2) of the Charter. The curious relationship that these provisions create between any cause of action based on a breach of human rights and judicial review was not directly before the High Court in Momcilovic but it is directly relevant to this paper.

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121 Ibid 581 [99], citing Louis Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 Harvard Law Review 953, 963. I should add the disclaimer that, in my view, this use of Jaffe is one taken out of context of the wider series of articles Jaffe published. More particularly, it invoked Jaffe to essentially make a point within a federalist context that Jaffe did not.

122 Momcilovic v The Queen [2011] HCA 34, [379].

123 Ibid [379].

124 Ibid [429].
What does s 39 of the Victorian Charter mean?

Section 39 has a tortured history that has been well documented by Jeremy Gans.\(^\text{125}\) For this paper it is sufficient to note that the provision must be understood as one statement of the strongly expressed view of the government of the day that that litigation was to be the vehicle of last resort in the promotion of human rights.\(^\text{126}\) One senior judge recently translated that intention more frankly to be that the Charter should not become a ‘lawyer’s picnic’.\(^\text{127}\) To this end s 39(3) of the Victorian Charter expressly precludes any remedy of compensation arising from a breach of human rights.\(^\text{128}\) Some commentators have devised quite ingenious logic to argue that s 39(3) may not present the total obstacle to the development of a remedy in damages as first appears.\(^\text{129}\) In light of the various statements in Momcilovic which indicate the High Court’s aversion to strained interpretation of the Victorian Charter, such arguments have surely lost the little chance they ever had of judicial acceptance. More generally, the design of the Charter appears to be structured against the creation of new rights of action. On one reading, s 39(1) might mean that any right to relief arising from a claim of unlawfulness in other avenues can be rebadged as used as a means to gain relief under the Charter. That interpretation does not sit easily with s 39(2), which provides that the section does not affect the right to seek relief in judicial review. If that is true, surely relief available by way of judicial review cannot be rebadged under s 39(1). The permutations of meaning of s 39 are almost endless. Most of the ones aired so far do little to clarify the issues. Professor Williams conceded the problematic nature of s 39 but did so with a cryptic explanation that was buried in a footnote of an article extolling the virtues of the Charter. He accepted the ‘awkward wording’ of s 39 and explained that ‘No blame can be attributed to the drafter. The provision went through many version, but this was the best that the collective wisdom of a number of people, including myself.’\(^\text{130}\) To an outside observer this might seem an evasive, even astonishing, explanation for bad drafting. As someone with experience of legislative drafting in the Victorian government, to me it seems utterly plausible.

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\(^\text{126}\) The Victorian government which introduced the Charter made utterly clear in various documents issued before its enactment According to this view, the preferred ‘approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation. It is through such mechanisms that acceptance and support of human rights will be promoted in the community’: Victoria, Department of Justice, Human Rights in Victoria: Statement of Intent (2005), available at http://www.justice.vic.gov.au/wps/wcm/connect/e184f20040a3f5ea283f5f2791d4a/statemnt_of_intent.htm?MOD=AJPERES (viewed 8 September 2011).

\(^\text{127}\) Director of Housing v Sudi (Residential Tenancies) [2011] VSCA 266, [212] (Weinberg JA).

\(^\text{128}\) Section 39(4) provides that the section does not affect other rights to damages apart from s 39.


Bell J gave some useful guidance earlier this year in *Patrick’s case*. That case involved the appointment of a guardian to a person suffering mental illness. A guardian was appointed in the guardianship division of the Victorian Civil and Administrative Tribunal (‘VCAT’) because that appointment was resisted by the person over whom it was made. Bell J, who is both President of VCAT and a Justice of the Supreme Court of Victoria heard an appeal from the decision of VCAT in the Supreme Court. His Honour explained that s 39(1):

...does not create a new cause of action or other proceeding for obtaining a relief or remedy in respect of unlawfulness arising under the Charter. It attaches unlawfulness arising under the Charter as a ground to existing causes of action or proceedings by which relief or remedy may be obtained in respect of the act or decision on a ground of unlawfulness arising otherwise than because of the Charter. It then operates to make that relief or remedy available in that cause of action or proceeding on the ground of unlawfulness arising under the Charter, whether or not that relief or remedy is granted on a ground of unlawfulness not arising in that way. The capacity of parties to rely on incompatibility with human rights in legal proceedings, the authority of courts and tribunals (having the jurisdiction) to grant relief or remedy where unlawfulness on that ground is established and the human rights protection of the community have been enhanced to that significant extent.

Bell J then reasoned that s 39(1) allowed:

...in judicial review proceedings in which any relief or remedy may be sought on [established grounds of review] s 39(1) permits the applicant to rely on a ground of unlawfulness arising under the Charter. Where Charter unlawfulness is established, the relief or remedy which could be sought on [an established ground of review] can be granted by the court on a ground of unlawfulness arising under the Charter, whether or not the [judicial review] ground is determined.

In simple terms this approach appears to resolve the rather circular analysis previously given to s 39 by holding that it enables an applicant in human rights proceedings to gain relief that would be available in a successful claim for judicial review. Conversely, an applicant in judicial review proceedings could gain relief in that avenue if a breach of the Charter was established. This is clearly a strange regime but surely one that is no stranger than s 39 itself. There has, however, been a significant recent addition to the interpretation of s 39 arising from another decision of Bell J. The result has been an emphatic divorce of judicial review and human rights proceedings and a pointed trimming of the remedial powers of VCAT under s 39.

These new principles arose in a tenancy dispute heard in VCAT. The Director of Housing sought an order of possession under the *Residential Tenancies Act 1997* (Vic) to

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132 Ibid [297] (citations omitted).
133 Ibid [299] (citations omitted).
evict Wafa Sudi. Importantly, the Director did not lead a substantive case in VCAT and instead relied on the undeniable fact that Sudi was not a party to the tenancy agreement, which obliged VCAT to grant an order of possession. The Director indicated that she would offer a substantive case in the Supreme Court, if Sudi sought judicial review of her decision. Sudi argued that the eviction contravened the Victorian Charter and sought relief directly in VCAT. Bell J accepted that the Director was entitled to possession of the premises as ‘an incident of...ownership’ that should be determined according to property law, but his Honour decided that the Director’s decision to seek the order was made in breach of Sudi’s human rights and therefore unlawful. This finding was surprising because neither the Victorian Charter nor the Victorian Civil and Administrative Tribunal Act 1998 (Vic) provided VCAT with a clear power to decide a human rights claim in this case. Bell J held that VCAT had an implied power to do so, by use of some novel reasoning, which can be summarised as follows.

VCAT is a tribunal rather than a court and is not granted any jurisdiction to conduct judicial review, but the absence of a judicial review jurisdiction does not preclude an administrative tribunal from determining issues of law that arise in valid proceedings before VCAT. An example is an invalid decision that is subject to an application for review. In effect, a valid application can be made for review of an invalid decision. This confirms to the broader principle that, when exercising its jurisdiction, VCAT ‘can determine all issues of jurisdiction, fact and law which legitimately arise for its determination. The decision of the Director to seek an order of possession could be challenged in judicial review but the validity of the decision could and should also be determined by VCAT in the course of its merits review jurisdiction over tenancies. That process in VCAT has ‘some analytical similarities with judicial review’ but is different because VCAT would ultimately be determining the human rights standards applicable to the Director. These issues ‘are mixed questions of fact and law arising in the course of determining an application within the tribunal’s original jurisdiction. It is entirely appropriate for the tribunal to be determining such questions, which come well within its expertise, subject of course to the supervisory jurisdiction of the Supreme Court.’

134 The Residential Tenancies Act 1997 (Vic) s 344 effectively allows for an order of possession if the tenant occupies premises without consent of the landlord. Mr Sudi was not the named tenant, so an order under s 344 was plainly available under that Act.
135 Residential Tenancies Act 1997 (Vic) s 345 provides that VCAT ‘must’ make an order of possession if the applicant is entitled to the order and that are reasonable grounds for believing that the person against whom the order is sought is occupying the premises without authority.
136 It was claimed that the Director’s decision breached ss 13(a) (right to privacy, family and home), 17 (protection of families and children) and 19 cultural rights).
137 Director of Housing v Sudi (Residential Tenancies) [2010] VCAT 328, [139].
138 Ibid [103].
139 Ibid [129].
140 Ibid [126].
141 Ibid [127].
142 Ibid [128]-[129].
143 Ibid [130].
144 Ibid.
A determination by VCAT that the Director had breached the Charter, that decision would make her decision unlawful by virtue of s 38(1) of the Victorian Charter.¹⁴⁵ That could trigger s 39. That section does not create new rights or remedies but instead adds to existing rights. Section 39 is not confined to a single court or even courts more generally. It can be interpreted an applying to VCAT and such an interpretation would be consistent with the ‘enabling and beneficial’ nature of the provision.¹⁴⁶ Such an interpretation of s 39 is consistent with s 38 because the latter extends human rights and ‘does not at the same time constrain the existing and powers of courts or tribunals...’¹⁴⁷ This reasoning does not necessarily mark the outer reaches of s 39.¹⁴⁸

Bell J also concluded that this reasoning also provided a functional structure to determine human rights. His Honour rejected submissions that judicial review and human rights proceedings should remain separate and that Sudi should first seek judicial review in the Supreme Court and then relief in VCAT. Bell J reasoned that

From the view of ensuring equal access to justice, which is an important value and purpose of the Charter, this would be a bad outcome. The tribunal is the most suitable forum at first instance. Its expertise and procedures are especially adapted for the resolution of disputes of this nature. Moreover, it is the only forum which can deal with the entirety of the dispute and determine all the issues at the one time. Finality and complete dispute resolution are fundamental purposes of justice.¹⁴⁹

He continued:

The Supreme Court is the highest court in the State of Victoria. It has very significant judicial responsibilities, including the exercise of the jurisdictions which are supervisory of the tribunal. For the court to deal with such applications at first instance, without the benefit of the tribunal’s determination, is hardly an effective use of its scarce resources.¹⁵⁰

The reasoning of Bell was remarkable on several counts. His Honour identified an implied human rights jurisdiction in VCAT. Bell J relied on ss 38 and 39 of the Charter to anchor this implied human rights jurisdiction and effectively signalled that other such trails might be blazed. Bell J also acknowledged the ostensible similarities between his scrutiny of the validity of the Director’s decision and supervisory review but sought to distinguish the two. The decision was also infused with apparent pragmatism, in the form of the assertion that the resolution of disputes in VCAT, without the need for supervisory review, fostered the aims of the Charter and helpfully relieved the Supreme Court of unnecessary judicial review. A more cynical interpretation might be that Bell J made a bold claim to extend the tribunal of which he was the head, made a separate but

¹⁴⁵ Ibid [130].
¹⁴⁶ Ibid [132].
¹⁴⁷ Ibid [134].
¹⁴⁸ Ibid [136].
¹⁴⁹ Ibid [143].
¹⁵⁰ Ibid [144].
related decision about case management for the court of which he was also a member without consultation with other members of that court.

_Sudi in the Court of Appeal – no Charter, no supervisory review, no way!_

A unanimous Court of Appeal emphatically overturned each one of Bell J’s key findings. The Court emphasised the distinct nature of proceedings for judicial review and a breach of human rights, rejected the novel use of s 39 of the Charter and pointedly reinforced its over primary over supervisory review and VCAT itself. Much of the reasoning of the Court of Appeal can only be understood in light of the concession made by counsel for Sudi, which was that the orders of Bell J ‘had, in substance, the same effect as the prerogative relief exercisable by the Supreme Court of Victoria...the substantive consequence of the orders was in the nature of certiorari...’\(^{151}\) The decision of the Court of Appeal might be understood as simply a stern reminder to VCAT that it lacked the power to undertake supervisory review, or adjudication that sailed too close to that wind of that jurisdiction, though the Court of Appeal clearly trimmed the sails of VCAT in other important respects.

The potential jurisdiction granted to VCAT under the tenancies legislation provides a useful point to start. The Court of Appeal could simply have held that the _Residential Tenancies Act 1997_ (Vic) granted VCAT a narrow original jurisdiction to determine applications for possession orders, but all members of the Court rejected the wider proposition that the tenancies legislation did not confer any express or implied power upon VCAT to undertake collateral review.\(^{152}\) Each member of the Court of Appeal also gave differing explanations as why they believed VCAT could or should not exercise any power of collateral review.

Warren CJ held that the unique position occupied by the Supreme Court and the historically important function of supervisory review made it unlikely that parliament could have replicated parts of that jurisdiction in a tribunal.\(^{153}\) Her Honour considered that under state constitutional arrangements it ‘technically...might be possible’ to confer supervisory jurisdiction and the power to grant prerogative writs upon a tribunal but seemed to set a high benchmark for the legislative intention required to create such an arrangement.\(^{154}\) Maxwell P set a similarly high hurdle but did not dismiss the possibility of a legislative conferral of a power of collateral review upon VCAT. His Honour’s concerns were essentially practical and had a ring of the floodgates that haunt courtrooms at strategic moments. Maxwell P reasoned that any jurisdiction to undertake collateral review ‘would encompass the full range of conventional judicial review grounds’ and would enable judicial review challenges in VCAT ‘of any decision by the Director to institute a proceeding of any kind in the Tribunal.’\(^{155}\) Weinberg JA adopted a middle ground. His Honour had ‘misgivings’ about the finding of Bell J that VCAT was ‘the most forum’ for Sudi’s claim.\(^{156}\) His Honour thought otherwise because the increasingly complex principles governing judicial review were now ‘highly complex and...best

\(^{151}\) _Director of Housing v Sudi (Residential Tenancies) [2011] VSCA 266, [15] (Warren CJ)._  
\(^{152}\) Ibid [33]-[45] (Warren CJ), [70]-[90] (Maxwell P), [211]-[264] (Weinberg JA).  
\(^{153}\) Ibid [17]-[19].  
\(^{154}\) Ibid [17]-[20].  
\(^{155}\) Ibid [80]-[81].  
\(^{156}\) Ibid [209].
administered by those courts with experience, and expertise to engage in this role.\textsuperscript{157} Weinberg JA thought it would ‘hardly likely to be catastrophic’ if applicants had to navigate proceedings for both human rights and judicial review because Victorian lawyers had shown ‘a ready willingness to provide assistance’ in Charter case.\textsuperscript{158}

An interesting feature of this aspect of \textit{Sudi} is that no judge clearly excluded the possibility that supervisory review or an equivalent form of power could be conferred upon a tribunal. One could suggest that the Court of Appeal tacitly excluded this possibility by requiring that any such legislation should be expressed in very clear terms. If the recent history of migration litigation demonstrates anything it is that the clarity of language required to reach some legislative goals can remain forever beyond the reach of parliament. The reproduction of the supervisory jurisdiction of superior courts is surely a candidate for that problem. The refusal of Maxwell P and Weinberg JA to accept that VCAT was an appropriate forum for supervisory review is also instructive. VCAT has a large and complex jurisdiction. If judges are not satisfied that this jurisdiction provides a suitable training ground for the exercise of some version of supervisory review, it is unlikely any other Victorian forum would do so.

What is even more interesting about this aspect of \textit{Sudi} is that the Court of Appeal seriously contemplated the possibility of a legislative grant of supervisory jurisdiction to a tribunal.\textsuperscript{159} That jurisdiction has only recently been confirmed by the High Court in \textit{Kirk}\textsuperscript{160} as one that now attracts constitutional protection which precludes legislative interference with or diminution of the core supervisory jurisdiction of a State Supreme Court for ‘enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court.’\textsuperscript{161} Strictly speaking \textit{Kirk} did not address the extension of that jurisdiction, or parts of it, to another body but it beggars belief that the High Court would identify a constitutionally protected supervisory jurisdiction in State Supreme Courts and then sanction a legislative conferral of that jurisdiction to a non-judicial body. There is also a more immediate problem in \textit{Sidi} arising from the Court of Appeal’s consideration of a possible legislative grant of judicial review jurisdiction to VCAT. The failure of the Court to clearly preclude the possibility does not sit easily with the various statements made about the complexities of judicial review and the particular expertise of that the Supreme Court possesses over the area.

The Court of Appeal may have been distracted by the suggestion in \textit{Kirk} that the closer alignment that case essentially drew between the constitutional position and protection of federal and state courts did not necessarily preclude the continuation of

\textsuperscript{157} \textit{Ibid} [225]. Weinberg JA elsewhere noted that many VCAT members were not required to be legally qualified: [165].

\textsuperscript{158} \textit{Ibid} [303].

\textsuperscript{159} Both Warren CJ and Weinberg JA expressly held that VCAT was not a court: \textit{Director of Housing v Sudi (Residential Tenancies)} [2011] VSCA 266, [29] (Warren CJ), [126], [155], [182], [203] (Weinberg JA). Weinberg JA also held that VCAT was not a court for the purposes of s 77(iii) of the Constitution: [182]. Warren CJ expressly left that point open: [29]. Maxwell P was silent on both issues.

\textsuperscript{160} \textit{Kirk} (2010) 239 CLR 531.

\textsuperscript{161} \textit{Ibid} 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing on this point).
differences between State and federal tribunals. That possibility may simply have been a pragmatic concession to allow the procedural innovations that exist in many State tribunals, but it was surely not intended to signal permission for the conferral of substantive judicial powers upon tribunals. It must be conceded that the possibility of legislative conferral of supervisory jurisdiction upon tribunals is not technically at odds with the key point in *Kirk*, which was to preclude the removal of that jurisdiction from the courts, but the possibility is counterintuitive to the previous quality that *Kirk* presumes of that jurisdiction. It also seems astonishing that the courts could simultaneously preclude any legislative interference with the supervisory jurisdiction of Supreme Courts while also preserving a power to imply an intention on the part of the legislature to possibly extend that jurisdiction to other bodies.

An important aspect of the finding of the Court of Appeal that VCAT had no power to undertake collateral review was the narrow reading given to ss 38-9 of the Charter. Some significant differences arose within the Court. Warren CJ examined the sections in a fairly narrow manner and simply held that, as VCAT had no power to examine the lawfulness of the Director’s decision, s 39(1) did not trigger any jurisdiction for VCAT to issue relief on the ground of unlawfulness. Her Honour appeared to proceed on the assumption that s 39 necessarily would operate as an addition to s 38 and would have no application where s 38 was not available.

Maxwell P held more explicitly that s 39 ‘has an operation which is both conditional and supplementary’ upon s 38. The condition was that relief was available under s 38, namely where a public authority had been found to have acted ‘unlawfully’. Where that condition was met, s 39(1) provided ‘a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter’. Maxwell P accepted that a successful application for judicial review would clearly provide a trigger to invoke s 39(1) but was less certain whether that would be the case where review was sought in a collateral rather than direct manner. His Honour ultimately side stepped that question by holding that the absence of any power of collateral review in the VCAT proceedings made it unnecessary to decide. In doing so, Maxwell P also distinguished the similar recent decision of the United Kingdom Supreme Court in *Pinnock*. *Pinnock* was another application for possession of a public housing residence but, importantly, a unanimous the Supreme Court flatly rejected the argument made in *Sudi* that the requisite unlawfulness in seeking the order of possession could only be sought by way of judicial

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162 Ibid 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing on this point).
163 Ibid [96].
164 Ibid [96].
165 Ibid [97].
166 Ibid [97].
167 Ibid [97].
168 Ibid [96].
review. The Supreme Court accepted that the County Court, which exercised a jurisdiction not unlike that of VCAT in Sudi, had jurisdiction to determine the tenant’s Convention rights.\textsuperscript{170} Maxwell P held that the differences between the legislation each case examined were ‘quite dramatic’ and left no doubt that ‘a decision under one set of provisions creates no precedent when the like question arises under a different set of provisions.’\textsuperscript{171} His Honour’s reasoning on this issue was as blunt was it was brief and appears to greatly narrow the potential use of English precedents, and almost certainly those of other apparently comparable jurisdictions, in the resolution of the finer points of the remedial provisions of the Victorian Charter.

Weinberg JA undertook the most detailed analysis of ss 38-9 of the Charter, though much of it lamented the problems of the ‘convoluted and extraordinarily difficult to follow’ nature of those provisions.\textsuperscript{172} Weinberg JA ultimately held that s 39(1) provided no jurisdiction to VCAT because it neither provided nor expanded upon any power enabling VCAT to undertake collateral review.\textsuperscript{173} At the same time, his Honour appeared less certain about the wider principles governing s 39. Weinberg JA acknowledged that the Charter did not itself create new remedies and reasoned the ‘implication of s 39 is that there is new cause of action for breach of any Charter right.’\textsuperscript{174} He then added cryptically that ‘[C]ourts are under no obligation under the Charter to create any new remedies,’\textsuperscript{175} this statement does not actually deny the power of courts to do so and arguably therefore leaves the possible judicial creation of a new remedy for another day.

Weinberg JA was, however, quite emphatic about the reach of the Charter and its remedies into judicial review. He reasoned that the Charter seemed to lay the way for ‘some expansion in the field of existing administrative law remedies as the basis upon which human rights could be enforced.’ That, he continued, ‘effectively means that the supervisory jurisdiction of the Supreme Court...as well as this Court’s powers to grant declaratory and injunctive relief, can be invoked by way of Charter protection.’\textsuperscript{176} According to this view, the remedial scope of the Charter enables the Supreme Court and Court of Appeal to effectively add the contravention of the Charter to the grounds upon which they may grant relief in their supervisory jurisdiction, though the converse was clearly not true of inferior courts or VCAT.\textsuperscript{177} His Honour also rejected any suggestion that s 39 had impliedly overruled existing Australian law, which essentially provides a narrow scope for operation of collateral challenge.\textsuperscript{178} Weinberg JA may not have been unsure of the precise effect of s 39 but he was in no doubt that it neither granted VCAT any semblance of a judicial review jurisdiction nor added to any powers that tribunal might have to undertake some form of collateral review as a necessary part of its functions.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{170} Ibid [80].
\item \textsuperscript{171} Director of Housing v Sudi (Residential Tenancies) [2011] VSCA 266, [102]-[103].
\item \textsuperscript{172} Ibid [214].
\item \textsuperscript{173} Ibid [281].
\item \textsuperscript{174} Ibid [215].
\item \textsuperscript{175} Ibid [216].
\item \textsuperscript{176} Ibid [217].
\item \textsuperscript{177} Ibid [218].
\item \textsuperscript{178} Most of those limitations flow from Ousley v R (1997) 192 CLR 69.
\item \textsuperscript{179} Director of Housing v Sudi (Residential Tenancies) [2011] VSCA 266, [281].
\end{itemize}
Although the review of the Charter, which was released only two days ago, seemed to pay scant attention to *Sudi*, the reforms it proposed to s 39 seem to follow inevitably from the decision of the Court of Appeal. Recommendation 32 of that review suggested that, if s 38 was retained (and that appears open to question) that

(a) Charter s 39 be repealed and replaced by a provision that states that, except where a statute expressly provides otherwise, nothing in Charter s 38 creates in any person any legal right, gives rise to any civil cause of action or affects the rights or liabilities of a public authority, and

(b) If any existing relief or remedy in Victorian law is to be made available for a breach of Charter s 38, it should be provided for by an express amendment to the statute that provides for that relief or remedy.180

Several comments can be made about this recommendation. First, there can be little cause to keep s 39 in its present form. It is unclear at best and so far has added nothing of value to the Charter. Secondly, the proposed amendment must be commended for its clarity. It would essentially provide an addendum to s 38 which both confirms what is already clear, which is that s 38 creates no cause of action, but also makes clear that s 30 does likewise. The related recommendation that any existing relief or remedy that is to be made available should be done by way of express statutory amendment at least makes clear that the creation of new remedies lies in the hands of the legislature rather than the courts. That is at least clear.

**Concluding Observations**

Much of this paper has been directed to the flaws of the ADJR Act and the added problems that might arise if the Act were amended to require public officials to take account of specified human rights instruments. Those arguments are not intended to suggest that judicial review should be divorced from the specific human rights instruments listed in the Brennan Report or human rights more generally. The main arguments of this paper were much more confined. Any amendment of the ADJR Act, or any other judicial review statute, would have the same scope as the Act into which it was inserted. History shows that scope could be very narrow indeed. Since almost the time the ADJR Act began, governments of all persuasions have been eager to create or expand exclusions from the Act. That is hardly likely to change if those exclusions would also serve to remove review for a failure to take account of human rights instruments. That possibility might simply provide another reason for governments to restrict statutory judicial review. The ease with which governments can and do create exclusions from statutory judicial review highlights another paradox in any amendment of the type suggested by the Brennan Report. The proposal to make a failure to take proper consideration of specified human rights instruments surely assumes those instruments and the rights they seek to foster have special importance. That assumption does not sit easily with the possibility that any requirement that decision makers take account of those instruments can, and almost certainly would, be wound back by ordinary legislation.

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Amendments to the ADJR Act would also create yet another divergence between statutory and common law judicial review. Several key differences already exist between the two and there must be serious question whether either avenue, or judicial review more generally, would benefit from the deliberate introduction of more. Any amendment to the ADJR Act would not change the common law and would be unlikely to provide a solid foundation to somehow coax the courts into significant doctrinal change. At the same time, the amendments recommended by the Brennan Report might stretch the ADJR Act to breaking point. After all, it would provide a remedy for a failure to consider specified human rights instruments without any positive guidance on how or why that consideration should occur. A prohibitive ground of review without positive guidance is equally from a human rights perspective. If international human rights instruments are to become something that government officials can and should consider as part of the administrative process, the better solution is surely separate legislation that directly adopts those rights and includes some clear means by which they are integrated into the administrative process. Those who seek to use the ADJR Act for this purpose may find that instead of harnessing a Trojan horse, they are flogging a dead one.