

18. Judicial Review

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A common law principle

18.1 Judicial review is about setting the boundaries of government power.¹ It is about ensuring government officials obey the law and act within their prescribed powers.² Access to the courts for the purpose of judicial review is an important common law right. Sir William Wade stated that ‘to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power’.³

18.2 In his *Introduction to Australian Public Law*, David Clark gives a brief history of judicial review of administrative action:

Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts... By the late 17th century the

1 ‘The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed’: *R v Kirby; ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

2 ‘The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them’: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

3 Sir William Wade, *Constitutional Fundamentals*, Hamlyn Lectures, 32nd Series, 1980 <<http://socialsciences.exeter.ac.uk/law/hamlyn/lectures/>>.

writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.

The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.⁴

18.3 In *Church of Scientology v Woodward*, Brennan J said:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.⁵

18.4 In Australia, an 'entrenched minimum provision of judicial review'⁶ by the High Court is conferred under s 75 of the *Constitution* (discussed below) and s 39B of the *Judiciary Act 1903* (Cth), which extends the constitutional jurisdiction to the Federal Court. The framework for judicial review also spans a number of legislative schemes. The primary statutory source of judicial review is the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), which contains broader grounds for review, and is more accessible than constitutional review. Additionally, some judicial review schemes are contained in specific statutes, and regulate review of decisions made under those statutes—for example, in the areas of migration and taxation.

18.5 However, as noted further below, statutes sometimes provide that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial review of administrative decisions. They are 'essentially a legislative attempt to limit or exclude judicial intervention in a certain field'.⁷ Additionally, judicial review of some decisions may be excluded from the operation of statutory schemes such as the *ADJR Act*.

18.6 This chapter discusses how access to the courts is protected from statutory encroachment; laws which restrict access to the courts; and when laws that restrict access to the courts may be justified. It is about judicial review, rather than merits review.⁸

4 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

5 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

6 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

7 Simon Young, 'Privative Clauses: Politics, Legality and the Constitutional Dimension' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014), 277.

8 Merits review is concerned with a person or body—other than the primary decision maker—considering the facts, law and policy underlying the original decision, and substituting a fresh decision where the new

Protections from statutory encroachment

Principle of legality

18.7 The principle of legality provides protection to judicial review.⁹ When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.¹⁰ For example, in *Magrath v Goldsbrough Mort & Co Ltd*, Dixon J said:

The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.¹¹

18.8 In *Public Service Association (SA) v Federated Clerks' Union*, Dawson and Gaudron JJ said:

Privative clauses... are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.¹²

18.9 Dawson and Gaudron JJ went on to say:

Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.¹³

18.10 *Hockey v Yelland* also concerned a privative clause—specifically, a Queensland statute that provided that determinations by a medical board ‘shall be final and conclusive’ and the claimant ‘shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever’.¹⁴ Gibbs CJ said that this provision did not ‘oust the jurisdiction of the Supreme Court to issue writs of certiorari’:

It is a well recognized principle that the subject’s right of recourse to the courts is not to be taken away except by clear words... The provision that the board’s determination shall be final and conclusive is not enough to exclude certiorari... The words of the further provision... are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record.¹⁵

decision is correct or preferable. By contrast, judicial review is concerned with the lawfulness of a decision, whether by reference to whether the decision maker had the power to make the decision, a legal error has occurred in making the decision, or where necessary, whether the rules of procedural fairness were complied with.

9 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

10 *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).

11 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

12 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30]–[32] (Gleeson CJ).

13 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, [18] (Dawson and Gaudron JJ).

14 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

15 *Ibid.*

Australian Constitution

18.11 Where a statute purports to make it ‘unambiguously clear’ that Parliament intends to restrict access to the courts, the *Constitution* provides further protection. It provides for an ‘entrenched minimum provision of judicial review’,¹⁶ which cannot be removed by statute. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’.¹⁷ Gleeson CJ said that this provision ‘secures a basic element of the rule of law’:

The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.¹⁸

18.12 In light of this constitutional jurisdiction, courts may construe privative clauses much more narrowly than the text of the provision suggests. So much more narrowly in fact, that such clauses may sometimes be largely or even entirely deprived of effect.¹⁹ The courts have justified such interpretive approaches by reference to the assumption that legislation should, as far as reasonably possible, be interpreted in a way that favours constitutional validity.²⁰

Laws that restrict access to the courts

18.13 Restrictions on access to the courts arise in many forms. A common method of restricting access to the courts is to exclude a decision from review under the *ADJR Act*,²¹ or restrict judicial review according to procedures under a particular legislative framework.²² The most controversial method of restricting access to the courts is the

16 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

17 *Australian Constitution* s 75(v).

18 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [5] (Gleeson CJ).

19 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Section 474 of the *Migration Act 1958* (Cth) purports to exclude challenging, appealing, reviewing, quashing or any calling into question a ‘privative clause decision’. It also purports to exclude prohibition, mandamus, injunction, declaration or certiorari as a remedy in any court. In *Plaintiff S157/2002* the High Court unanimously rejected the literal interpretation, and held that the writs of mandamus and prohibition were available for decisions involving jurisdictional error.

20 The long history of authority to this effect was noted in *Ibid* [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). While this approach may lead the courts to interpret privative clauses in a manner that gives them very limited scope, alternative approaches may be more likely to require courts to find that a privative clause was invalid on constitutional grounds. Once this possibility is recognised, the value of interpretive approaches that enable some effect to be given to privative clauses can be understood.

21 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1.

22 See, eg, *Migration Act 1958* (Cth) pt 8; *Taxation Administration Act 1953* (Cth) pt IVC.

inclusion of a privative or ouster clause which purports to significantly restrict or exclude judicial review.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

18.14 The Law Council of Australia submitted that decisions excluded from review under sch 1 of the *ADJR Act* should be examined, and the justification for their exclusion critically considered.²³ The Institute of Public Affairs noted that a large number of acts are excluded from review under the *ADJR Act*.²⁴

18.15 It can be argued that the removal of statutory avenues of review is not a restriction in the true sense, because it simply removes an avenue of review that exists only because the federal Parliament created it. However, the *ADJR Act* was part of a broader scheme to increase the rights of citizens to obtain information, lodge complaints and commence legal proceedings against government decisions.²⁵ The *ADJR Act* served the valuable function of providing a simpler alternative to the technical form of judicial review entrenched in the *Constitution*. While removing *ADJR Act* review may not exclude judicial review, it excludes a simpler and more accessible form of review.

18.16 Such restrictions on access to the courts arise in Commonwealth laws relating to a wide range of areas, including commercial and corporate regulation, workplace relations regulation, migration law, and counter-terrorism and national security legislation. Some examples are considered below.²⁶ The discussion is organised by subject matter. In 2012 the Administrative Review Council (ARC) 2012 into federal judicial review. The discussion in this chapter is informed by the ARC's report.

Foreign ownership

18.17 Decisions under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (*FATA*) and div 1 of pt 7.4 of the *Corporations Act 2001* (Cth) (*Corporations Act*) relating to foreign ownership are excluded from review under the *ADJR Act*.²⁷

18.18 Excluding decisions under *FATA* from judicial review under the *ADJR Act* was sought to be justified on the basis that determining whether an acquisition is in the national interest is exclusively the domain of government policy.²⁸ An additional

23 Law Council of Australia, *Submission 75*.

24 Institute of Public Affairs, *Submission 49*.

25 Other elements of the wider scheme of which the *ADJR Act* was one part include: *Administrative Appeals Tribunal Act 1975* (Cth); *Ombudsman Act 1976* (Cth); *Freedom of Information Act 1982* (Cth).

26 A number of decisions excluded from review under the *ADJR Act* are justified on the basis that adequate alternative review mechanisms are available, either under a separate statutory scheme, or under s 39B of the *Judiciary Act 1903* (Cth). The examples discussed in this chapter are focused on whether other policy rationales for excluding judicial review under the *ADJR Act* are justified.

27 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (h).

28 Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act' (Report No 32, 1989), [281].

justification provided was that proceedings for judicial review might result in public disclosure of classified and commercially confidential material.²⁹

18.19 The ARC concluded that, while the national interest is not sufficient grounds to justify restricting access to the courts, the potential disclosure of classified and commercially confidential information justifies such a restriction, on the basis that:

The most compelling reason for an exemption, in the Council's view, is the potential broad impacts on the national economy if applicants become less willing to share information due to a perceived likelihood of information being disclosed in ADJR Act proceedings.³⁰

18.20 By contrast, the ARC recommended that decisions relating to limits on share ownership under div 1 of pt 7.4 of the *Corporations Act* be subject to review under the *ADJR Act*. It stated that excluding review on the basis that these decisions consider the national interest cannot be supported, as a number of other categories of decisions which take into account the national interest are currently subject to review under the *ADJR Act*.³¹

18.21 Similarly, the ARC recommended that review should be available under the *ADJR Act* for decisions giving effect to the government's foreign investment policy under the *Banking (Foreign Exchange) Regulations 1959* (Cth). Some examples of such decisions relate to foreign currency exchanges, transfer of money outside Australia and proceeds of exports. The ARC concluded that restricting access to courts in relation to these decisions was not justified because a review under the *ADJR Act* would consider the legality of the decision, rather than the underlying policy.³²

Financial regulation

18.22 The Securities Exchange Guarantee Corporation (SEGC) is a company limited by guarantee, whose sole member is ASX Limited. It is the trustee of the National Guarantee Fund (NGF). Part 7.5 of the *Corporations Act* authorises the SEGC to make decisions about the NGF, including in relation to the imposition of levies on market operators and participants, and making operating rules about the NGF.³³

18.23 These decisions cannot be reviewed under the *ADJR Act*.³⁴ Claimants dissatisfied by decisions of the SEGC may seek a review under s 888H of the *Corporations Act*. The review mechanism under this provision is broader than that

29 Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act', above n 28, [278].

30 Administrative Review Council, 'Federal Judicial Review in Australia' (Report 50, September 2012) [B.60]. This contrasts with the ARC's position during its 1989 review of the ambit of judicial review, when the Council concluded that questions around the disclosure of confidential and classified material could be addressed by public interest immunity, and that the exclusion of decisions under *FATA* should be removed: Administrative Review Council, 'Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act', above n 28, [274].

31 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [B.62].

32 Ibid [B.76].

33 Ibid [B.64].

34 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (hb).

available under the *ADJR Act*, allowing the court to consider the merits of the decision.³⁵

18.24 The Treasurer advanced a number of justifications for restricting judicial review, including the commercial nature of the decisions, the availability of ministerial disallowance and scrutiny and the existence of review mechanisms under the *Corporations Act*.

18.25 The ARC stated that the commercial nature of a decision is not a rationale for restricting access to the courts, and ministerial disallowance and scrutiny are not a substitute for judicial review.³⁶ However, it concluded that s 888H of the *Corporations Act* provides for an efficient and effective review mechanism, and thus, the exclusion in sch 1 does not unjustifiably restrict access to the courts.³⁷

Workplace relations

18.26 Decisions under key pieces of workplace relations legislation³⁸ are exempt from review under the *ADJR Act*.³⁹ These exemptions have been in place, in various guises, since the *ADJR Act* came into force.

18.27 The ARC, in its 2012 review, concluded that excluding decisions by Fair Work Australia from judicial review under the *ADJR Act* is justified on the basis that these decisions affect the national economy, and are effectively legislative in character. They determine future rights and conduct, and are of general application.⁴⁰ The *ADJR Act*, it must be recalled, applies to ‘administrative’ decisions. While the courts have not devised a single or simple definition of that term, it has long been accepted that administrative decisions typically—though not always—affect one person to a much greater degree than other people. By contrast, legislative decisions or actions normally have general or very wide application. The restriction of review under the *ADJR Act* to administrative decisions reflects the focus of that Act on improving the rights of individuals to question decisions which affect them. The exclusion of decisions by Fair Work Australia from the *ADJR Act* reflects this longstanding focus of the *ADJR Act*.

18.28 By contrast, the ARC recommended that decisions of the Fair Work Ombudsman and the Fair Work Building Industry Inspectorate should be subject to review under the *ADJR Act*. The powers of both bodies are similar to the powers of many regulatory bodies whose decisions are subject to review under the *ADJR Act*. The ARC did not accept that the exclusion was justified on the basis that review under the *ADJR Act* would fragment enforcement proceedings. It noted that no other enforcement agencies are exempt from review on this basis, and further, the functions and powers of both bodies are regulatory and administrative in nature.⁴¹ This conclusion may be

35 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [B.65].

36 Ibid [B.67].

37 Ibid [B.68].

38 In particular, *Fair Work Act 2009* (Cth); *Fair Work (Registered Organisations) Act 2009* (Cth); *Fair Work (Building Industry) Act 2012* (Cth).

39 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (a).

40 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [B.11].

41 Ibid [B.12]–[B.21].

justified by the fact that such decisions are typically ones that affect individuals. It follows that making such decisions amenable to review under the *ADJR Act* aligns with its purpose, which is to increase the ability of citizens to challenge decisions which affect them.

Counter-terrorism and national security legislation

18.29 Several stakeholders raised concerns about restrictions on access to the courts in counter-terrorism and national security legislation. Australian Lawyers for Human Rights submitted that restrictions on judicial review arising from the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) are not justified.⁴² The Law Council of Australia submitted that judicial review under the *ADJR Act* of the validity of a preventative detention order should not be excluded.⁴³

18.30 Decisions under the following legislation are excluded from review under the *ADJR Act*:

- *Intelligence Services Act 2001* (Cth);
- *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*);
- *Inspector-General of Intelligence and Security Act 1986* (Cth) (*IGIS Act*);
- *Telecommunications (Interception and Access) Act 1979* (Cth);
- *Telecommunications Act 1997* (Cth)—ss 58A, 581(3), and cl 57A and 72A of sch 3A;
- *Criminal Code*⁴⁴—s 104.2 and div 105;
- *Australian Passports Act 2005* (Cth)—ss 22A and 24A; and
- *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth)—ss 15 and 16A.⁴⁵

18.31 The ARC recommended that a number of security exemptions under the *ADJR Act* should be reviewed or removed. In particular, it recommended reviewing the blanket exemption for all ASIO decisions, and removing exemptions under the *IGIS Act*, and div 105 of the *Criminal Code*.⁴⁶ These, and other restrictions on access to the courts arising in counter-terrorism and national security legislation are discussed below.

Criminal Code

18.32 In making its recommendation that div 105 of the *Criminal Code* should be subject to review under the *ADJR Act*, the ARC noted that, unlike interim control orders (which it recommended should not be excluded from review under the *ADJR*

42 Australian Lawyers for Human Rights, *Submission 43*.

43 Law Council of Australia, *Submission 75*.

44 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*).

45 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 paras (d)–(dac), (db)–(dd).

46 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, Appendix B.

Act), there is no court involvement in the making of a preventative detention order. Further, ‘as a general principle, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review’.⁴⁷

18.33 Additionally, the Council of Australian Governments (COAG) and the Independent National Security Legislation Monitor (INSLM) both recommended that div 105 of the *Criminal Code* be repealed.⁴⁸

18.34 COAG adopted the ARC’s recommendation that s 104.2 of the *Criminal Code* be excluded from review under the *ADJR Act*.⁴⁹ It noted that the final decision to impose an interim control order is made by a court, relying on a chain of decisions which require each decision maker to consider the decisions of previous decision makers.⁵⁰ The INSLM, on the other hand, recommended that div 104 as a whole be repealed, stating that interim control orders are not necessary.⁵¹

ASIO decisions

18.35 Generally, the ARC considered that the need to protect sensitive security information was an appropriate justification for excluding review under the *ADJR Act*.⁵² However, it stated that while the need to protect sensitive security information justifies exempting *some* decisions under the *ASIO Act*, the current exemption should be reviewed, as it excludes *all* decisions under the *ASIO Act*.⁵³

Foreign fighters

18.36 Amendments to sch 1 of the *ADJR Act* under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) exclude from review under the *ADJR Act*, decisions to suspend or require the surrender of a passport for 14 days where the Director-General of Security suspects, on reasonable grounds, that a person ‘may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country’.⁵⁴ The Explanatory Memorandum noted that the exclusion is necessary ‘as judicial review under the [ADJR] Act may compromise the operations of

47 Ibid [B.47].

48 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) rec III/4; ‘Review of Counter-Terrorism Legislation’ (Council of Australian Governments, 2013), [276].

49 Section 104.2 provides that the Australian Federal Police must not request an interim control order without the Attorney-General’s written consent. It also outlines the circumstances in which the Australian Federal Police may seek the Attorney-General’s written consent.

50 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [B.41]; ‘Review of Counter-Terrorism Legislation’, above n 48, [279].

51 Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (2012) 43.

52 See, eg, Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [B.38], [B.25].

53 Ibid rec B6, [B.28].

54 *Australian Passports Act 2005* (Cth) s 22A(2); *Foreign Passports (Law Enforcement and Security Act) 2005* (Cth) s 15A(1).

security agencies and defeat the national security purpose of the new mechanisms'.⁵⁵ Suspension is limited to a 14 day period, and further, the exclusion from review implements recommendations made by the INSLM.⁵⁶

18.37 The Inspector-General of Intelligence and Security submitted to the Intelligence Committee's review of this Bill that

limited access to review rights is not unreasonable where the suspension is for 14 days and there is opportunity for merits review of any subsequent cancellation decision.⁵⁷

18.38 The Parliamentary Joint Committee on Human Rights (Human Rights Committee), in concluding initially that the statement of compatibility did not demonstrate that the cancellation powers were proportionate, noted that the exclusion from review under the *ADJR Act* 'could potentially compound the limitation on the right to freedom of movement'.⁵⁸

18.39 This may be an issue on which reasonable minds differ. While some level of oversight and review may be desirable for all decisions, most would accept that limits can be justified in some cases. A notable aspect of the 14 day period under this legislation is that it is of limited duration and it is coupled with a right of merits review. The availability of merits review provides a reason for courts to refuse relief in judicial review on discretionary grounds.⁵⁹

Migration law

18.40 The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (*Resolving the Asylum Legacy Caseload Act*) introduced pt 8A into the *Maritime Powers Act 2013* (Cth) (*Maritime Powers Act*), which among other things, empowers the Minister to

- give a direction requiring that an officer exercise a power in a specified manner, or in specific circumstances or classes of circumstances;⁶⁰
- make a determination that a vessel or class of vessels may be used to place, restrain, remove or detain a person to take them to the destination;⁶¹ and

55 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

56 Ibid.

57 Inspector-General of Intelligence and Security, Submission No 1 to Parliamentary Joint Committee on Intelligence and Security *Inquiry into Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (1 October 2014).

58 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.245]. While the Human Rights Committee finally determined that the suspension powers were proportionate, it did not address the issue of review rights in coming to this conclusion: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Nineteenth Report of the 44th Parliament* (March 2015), [1.347]–[1.348].

59 The ground is that another, simpler right of review is available.

60 *Maritime Powers Act 2013* (Cth) s 75F.

61 Ibid s 75H.

- make a determination authorising the exercise of powers in relation to a foreign vessel outside territorial waters, relating to detaining, or taking a vessel to a destination, or the treatment of persons while doing so.⁶²

18.41 These decisions are excluded from review under sch 1 of the *ADJR Act*.⁶³ The Explanatory Memorandum states that the Bill seeks to deter ‘the making of unmeritorious claims as a means to delay an applicant’s departure from Australia, [and support] a more timely removal from Australia of those who do not engage Australia’s protection obligations’.⁶⁴

18.42 The Explanatory Memorandum further stated that the exclusion seeks to ‘ensure that decisions relating to operational matters cannot be inappropriately subject to the provisions of the ... *Judiciary Act 1903* (Cth), or the *ADJR Act*’.⁶⁵

18.43 The statement of compatibility stated:

The exclusion of judicial review under the *ADJR Act* is limited to circumstances in which, in the Government’s view, review by lower courts and on broader grounds would be inappropriate in respect of complex and highly sensitive operational matters. People who are affected by these measures will still have a judicial pathway through the constitutional writs and as such will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4) [of the ICCPR].⁶⁶

18.44 The Refugee Advice and Casework Service has stated that there should be

extreme caution in relation to legislation that proposes to allow the prolonged detention of any person in the absence of Parliamentary or judicial oversight.⁶⁷

18.45 The Department of Immigration and Border Protection submitted that

limited new powers are provided to the Minister personally to ensure that the executive has appropriate oversight of matters significant to Australia’s sovereignty, national security and overarching national interests.⁶⁸

62 Ibid s 75D.

63 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 1 para (pa). This was inserted by: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) s 31.

64 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

65 Ibid.

66 Ibid.

67 Refugee Advice and Casework Service, Submission No 134 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014. These concerns were echoed by the Law Council of Australia; the Institute of International Law and Humanities; and the Andrew and Renata Kaldor Centre for International Refugee Law.

68 Department of Immigration and Border Protection, Submission No 171 to the Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 2014.

18.46 The Legal and Constitutional Affairs Committee recommended that the Bill be passed, including the restrictions on judicial review. The Committee stated:

The government believes that legislative change is required to clear that backlog and the committee agrees. It is for that reason that the committee recommends that the Bill be passed.⁶⁹

18.47 By contrast, both the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee)⁷⁰ and the Human Rights Committee⁷¹ had serious reservations about restrictions on judicial review introduced by the *Resolving the Asylum Legacy Caseload Act*.

18.48 The Minister for Immigration and Border Protection, in his response to questions from the Scrutiny of Bills Committee, stated that given that the ministerial directions are made in the national interest, and are likely to involve complex and sensitive operational matters, ‘it is more appropriate that any judicial review be undertaken using a constitutional remedy, instead of under the [*ADJR Act*]’.⁷²

18.49 It is unclear why such decisions should be amenable to one form of judicial review, rather than another. In the absence of a rationale for this view, the Scrutiny of Bills Committee stated that it was ‘concerned that the leading and more accessible *ADJR Act* regime is not being utilised, which also has the effect of fragmenting the Commonwealth approach to judicial review’.⁷³

18.50 The Human Rights Committee stated that it is

concerned that the proposed statutory framework would limit judicial review, and, in particular, the ability of individuals to seek judicial review of executive decisions that may be inconsistent with [the] stated intention to comply with Australia’s non-refoulement obligations.⁷⁴

Separate statutory schemes

18.51 Part IVC of the *Taxation Administration Act 1953* (Cth) established a comprehensive system of internal and external merits review, as well as rights of appeal of taxation decisions in the Federal Court. This was adopted to facilitate ‘a quick and efficient mechanism for review of numerous decisions’.⁷⁵ Additionally, the separate regime allows an affected person to seek review of a decision, while

69 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999) [3.71].

70 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2015* (March 2015) 234.

71 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.373].

72 Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2014* (2014), 923.

73 Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2015* (March 2015), 234.

74 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.373].

75 Australian Taxation Office Submission No 13 to Administrative Review Council *Inquiry into Federal Judicial Review in Australia*, 1 July 2011.

preserving the Commissioner of Taxation's ability to seek recovery of debts relating to the decision.⁷⁶

18.52 Migration decisions, strictly speaking, do not fall under a separate statutory scheme. Instead, pt 8 of the *Migration Act 1958* (Cth) (*Migration Act*) incorporates constitutional review by conferring jurisdiction on the Federal Circuit Court, and the Federal Court.

18.53 In 2001, s 494AA was inserted into the *Migration Act*, excluding judicial review (except under the *Constitution*) of matters relating to the entry, processing and detention of asylum seekers arriving by boat, who landed at an 'excised offshore place'. The Explanatory Memorandum noted that this bar on proceedings sought to 'limit the potential for future abuse of legal proceedings'.⁷⁷ The Scrutiny of Bills Committee did not accept this justification, stating that 'such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights'.⁷⁸

18.54 In 2013, the bar on legal proceedings under s 494AA was extended to any asylum seeker who arrived by boat at any place on or after 1 June 2013. This was a response to the *Report of the Expert Panel on Asylum Seekers*,⁷⁹ and sought to ensure that 'all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive'.⁸⁰

18.55 Similar restrictions apply in relation to transitory persons.⁸¹ Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,⁸² including for example the safety of vessels used for such transportation, or the use of reasonable and necessary force.⁸³

18.56 Both statutory schemes include privative clauses. These are discussed in the next section.

Privative clauses

18.57 The classic example of restrictions on access to the courts arises where statutes restrict access to the courts by providing that certain administrative or judicial decisions may not be reviewed by courts. A privative clause—also known as an ouster clause—is a statutory provision that attempts to restrict access to the courts for judicial

76 Ibid.

77 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

78 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2002* (February 2002), 46.

79 Air Chief Marshal Angus Houston AC, AFC (Ret'd), Paris Aristotle AM, Professor Michael L'Estrange AO, 'Report of the Expert Panel on Asylum Seekers' (August 2012).

80 Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.

81 *Migration Act 1958* (Cth) s 494AB.

82 Ibid.

83 Ibid s 198B(2).

review of administrative decisions. They are ‘essentially a legislative attempt to limit or exclude judicial intervention in a certain field’.⁸⁴

18.58 Some examples of privative clauses include those which make orders, awards or other determinations final, clauses forbidding courts from granting remedies traditionally used in judicial review, no invalidity or conclusive evidence provisions, self-executing decisions—that is, a decision where the ‘decision’ follow automatically—and clauses prescribing time limits.⁸⁵

18.59 Generally, clauses which prescribe time limits for bringing an action, or stipulate an alternative procedure to judicial review to challenge decisions have generally been accepted by courts, as they still provide for judicial oversight.⁸⁶ Privative clauses which attempt to ‘restrict or exclude judicial review entirely will not be successful’.⁸⁷

18.60 The key argument against such privative clauses arises from the foundation of a free and democratic society protected by the rule of law. The right of judicial review entrenched in the *Constitution* embodies a broader notion that review of government decisions by independent courts is a valuable protection to citizens and an important form of oversight of administrative decision making. It promotes the rule of law by ensuring government power cannot operate without restriction, and improves the quality of government by enabling courts to better explain legislation (through their interpretive role) and decision makers (by findings that can explain when decision makers have fallen into legal error). To remove or significantly restrict judicial oversight allows governmental power without restriction, and is at odds with Australia's constitutional and Westminster traditions.

General corporate regulation

18.61 The Australian Securities and Investments Commission (ASIC) submitted that ss 1274(7A) and 659B of the *Corporations Act* are examples of provisions which restrict access to the courts.⁸⁸

18.62 Section 1274(7A) provides that a certificate of registration is conclusive evidence that the company is duly registered on the specified date, without recourse to judicial review which might invalidate the registration. ASIC submitted that this restriction was justified because the potential harm from setting aside the decision as a result of a review outweighs the public interest in the proper exercise of the power.⁸⁹

84 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014), 277.

85 Administrative Review Council, ‘The Scope of Judicial Review’ (Report 47, Australian Government, 2006), Appendix 2.

86 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012), [15.3.6].

87 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [6.15].

88 Australian Securities and Investments Commission, *Submission 74*.

89 *Ibid.*

18.63 Section 659B precludes persons other than ASIC or certain officers or government agencies from seeking judicial review, other than under s 75(v) of the *Constitution*, in relation to a takeover bid until the bid is complete. However, the Takeovers Panel may decide whether there has been unacceptable conduct and conduct merits review of ASIC decisions while the bid is ongoing. ASIC submitted that the potential harm from delays arising from a review process outweigh the public interest in the proper exercise of a power.⁹⁰

Taxation

18.64 The Tax Institute submitted that ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*)—as conclusive evidence provisions—restrict access to the courts.⁹¹ Under s 175, the validity of an assessment by the Commissioner of Taxation is not affected by non-compliance with provisions with the *ITAA*. Under s 177, the production of a notice of assessment is conclusive evidence of the due making of the assessment, and reviews of the assessment are only available under pt IVC of the *Taxation Administration Act 1953* (Cth). The High Court in *Commissioner of Taxation v Futuris Corporation Limited* held that the effect of s 175 of the *ITAA* is that relief under s 75(v) of the *Constitution* is available only if the assessment did not amount to a true assessment, because it is provisional, or not in good faith.⁹²

18.65 The ARC considered that the ‘no invalidity’ clause was justified, noting that ‘[t]he use of “no invalidity” clauses has ensured that, where appropriate, applicants are directed through the comprehensive merits review and appeal avenues in the taxation legislation’.⁹³ These avenues can lead affected people to the courts, though in the guise of statutory appeal, rather than judicial review. Once the full nature of these alternate rights is understood, the underlying point of the ARC may be that the de facto limitations imposed by ‘no invalidity clauses’ in the *ITAA* are ones of form rather than substance.

Migration Act 1958 (Cth)

18.66 Restrictions on access to the courts under the *Migration Act* began in 1992, with limits imposed on grounds for review and stricter time limits to bring an application for review.⁹⁴ A mandatory requirement to seek merits review before accessing judicial review was also introduced.⁹⁵

18.67 In 2001, s 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), seeking to oust the jurisdiction of the courts. It states that a privative clause decision

90 Ibid.

91 The Tax Institute, *Submission 68*.

92 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25].

93 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [6.8].

94 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.11].

95 Ibid.

must not be challenged, appealed against, reviewed, quashed or called in question in any court, and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.⁹⁶

18.68 The High Court, in *Plaintiff S157 v Commonwealth* read down this provision, stating that it does not apply to any decision involving jurisdictional error.⁹⁷ In *Re Refugee Tribunal, ex parte Aala*, the High Court held that a jurisdictional error arises when a decision maker ‘makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do’.⁹⁸ The High Court gave an expansive interpretation to the notion of jurisdictional error in this and later decisions, which means that the scope of decisions that may be infected with jurisdictional error—and thus not protected by a privative clause—is now very wide; so wide that it may be that a privative clause offers no real protection against any legal error.

18.69 One of the key rationales advanced for seeking to restrict access to the courts is that the volume and cost of litigation in the migration context is too high, and litigants seek to abuse the system to delay their removal from Australia.⁹⁹

18.70 The large volume of litigation may also be due to the limited availability of lawyers to assist applicants and the complexity of migration litigation.¹⁰⁰

18.71 The Minister for Immigration and Multicultural Affairs, in supporting the claim that much migration litigation represented an attempt to prolong an applicant’s stay in Australia, stated that

it is hard not to conclude that there is a substantial number of applicants who are using the legal process primarily in order to extend their stay in Australia, especially given that just less than half of all applicants withdraw from legal proceedings before hearing.¹⁰¹

18.72 The ALRC stated that high rates of withdrawal are the norm in all areas of litigation.¹⁰² It stated that ‘mischief is not indicated by leaving at the door of the court’.¹⁰³

18.73 Further, based on evidence given by the Federal Court, that 72.3% of migration cases were disposed of within nine months,¹⁰⁴ the Legal and Constitutional Affairs

96 *Migration Act 1958* (Cth) s 474(1).

97 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

98 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82, [163].

99 Commonwealth, *Parliamentary Debates* House of Representatives Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Minister Ruddock).

100 For a summary of these submissions, see: Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.52]–[1.56].

101 Commonwealth, *Parliamentary Debates* House of Representatives Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Minister Ruddock).

102 Australian Law Reform Commission, Submission No 14 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

103 Australian Law Reform Commission, Transcript of Evidence to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

104 Federal Court of Australia, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

Committee stated that ‘it also appears that the amount of time to be gained from drawing out appeals to the courts may not always be extended’.¹⁰⁵

18.74 While the Legal and Constitutional Affairs Committee ultimately supported the use of a privative clause,¹⁰⁶ it also recommended that the Government consider, as a matter of high priority, other avenues to address issues raised during hearings, including relating to the availability of assistance, and abuse of process.¹⁰⁷ It also concluded that case management measures were the solution to dealing with abuse of process issues.¹⁰⁸

18.75 The ARC, in its consideration of the ‘separate statutory scheme’ for review of migration decisions, concluded that case management measures and assistance to applicants are more appropriate measure—than excluding judicial review—to reduce the volume and cost of litigation in the context of migration proceedings.¹⁰⁹

Other issues

18.76 Stakeholders submitted that narrow standing provisions are not justified, noting that it may be difficult for representative organisations to demonstrate that they have standing to bring a claim.¹¹⁰

18.77 Standing does not constitute a restriction on access to the courts. It determines whether a person or organisation can commence or participate in legal proceedings. However, standing was considered by the ARC in its 2012 report on judicial review, and it recommended that a standing test be adopted, modelled on s 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*),¹¹¹ to provide greater clarity on when representative organisations have standing to bring an application for review.¹¹² It rejected adopting an open standing test, a test supported by a number of submissions to this ALRC inquiry.¹¹³

18.78 By contrast, the ALRC in its 1996 report into standing in public interest litigation, recommended the adoption of open standing, allowing any person to commence and maintain public law proceedings, unless:

- the relevant legislation clearly excludes the class of persons of which the applicant is one; or

105 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.70].

106 Ibid rec 4.

107 Ibid rec 1.

108 Ibid [3.40].

109 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [6.16]; Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999) rec 2, [3.40].

110 Public Interest Advocacy Centre, *Submission 55*; Law Council of Australia, *Submission 75*.

111 An organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association: *Administrative Appeals Tribunal Act 1975* (Cth) s 37(2).

112 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [8.21].

113 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defender’s Offices, *Submission 60*; Public Interest Advocacy Centre, *Submission 55*.

- it would not be in the public interest in all the circumstances, because it unreasonably interferes with a person with a private interest's ability to act differently.¹¹⁴

18.79 The ARC noted the ALRC's recommendations that open standing be adopted,¹¹⁵ but it concluded that some restrictions on standing provide a means for 'managing unmeritorious applications', and that reviews under the *ADJR Act* relate to decisions made in a particular case.¹¹⁶ Further, the ARC noted that the Government has not taken up the ALRC's recommendation to adopt an open standing test.¹¹⁷

18.80 Since the ARC's review, the rules of standing have been significantly relaxed in the United Kingdom. The Supreme Court of the United Kingdom noted that the traditional standing rules did not always serve the rule of law, because government officials and their agencies could make unlawful decisions without necessarily affecting a particular person (which is traditionally required for a person to have standing to commence an application for judicial review). The Court reasoned that the need to maintain the rule of law meant that what should be regarded as a sufficient interest to support standing could vary.¹¹⁸ This more relaxed approach to standing was confirmed by the United Kingdom in 2012, when it held there could be cases where 'any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court'.¹¹⁹

18.81 PIAC submitted that the threat of an adverse costs order is a practical restriction on access to the courts.¹²⁰ The ALRC has previously stated:

liberalising the laws of standing and intervention will be of limited value if commencing or participating in litigation is too expensive. On the other hand, increasing the range of potential litigants may lead to extra demands for legal aid and other forms of assistance. Accordingly, any changes to the laws of standing and intervention must be developed as part of the package of reforms for improving the accessibility and effectiveness of the legal system.¹²¹

114 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report 78 (1996) Rec 2.

115 Administrative Review Council, 'Federal Judicial Review in Australia', above n 30, [8.10].

116 *Ibid* [8.21].

117 *Ibid* [8.19].

118 *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [170]. This decision was handed down on 12 October 2011.

119 *Walton v Scottish Ministers* [2012] UKSC 44, [94]. This decision was handed down on 17 October 2012. These cases suggest that the law on standing in Australia relies on principles that have been reformed in the jurisdiction from which they were drawn: Matthew Groves, 'Standing in Administrative Law—Money Talks and Public Interest Takes a Walk' (paper Presented to the Victorian Chapter of the Australian Institute of Administrative Law, Melbourne, March 2015).

120 Public Interest Advocacy Centre, *Submission 55*.

121 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report 78 (1996) [2.21].

Justifications for limits on judicial review

18.82 Stakeholders expressed concerns about current restrictions on access to the courts. They emphasised that restrictions should only be imposed in exceptional circumstances.

18.83 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.¹²²

18.84 The ARC stated that limits on judicial review are justified where judicial review:

- would pose a risk to personal safety, such as interim orders designed to protect against security threats, or programs designed to protect witnesses;
- relates to decisions about representatives of the diplomatic or consular community;
- relates to decisions about the management of the national economy, which do not directly affect individual interests, and are most appropriately resolved in the High Court (for example, decisions of the Treasurer to make payments from consolidated revenue);
- is strongly connected with constitutional considerations;
- relates to the deployment or discipline of defence force members;
- relates to national security decisions, particularly where sensitive information is involved, which may be exposed as a result of increased litigation.¹²³

18.85 The Refugee Advice and Casework Service submitted that restrictions on access to judicial review should require ‘a heavy burden of proof to justify encroachment upon a principle so central to the rule of law’.¹²⁴ PIAC submitted that any limits on judicial review should be ‘strict, limited and exceptional, closely tied to legitimate purpose and justifiable on public interest grounds’.¹²⁵ The Human Rights Law Centre submitted that where ‘powers are invasive or infringe upon rights and freedoms, there should be a proportionate availability of judicial review’.¹²⁶

122 Simon Young, *Privative Clauses: Politics, Legality and the Constitutional Dimension*, in Groves, above n 84, 277.

123 Administrative Review Council, ‘Federal Judicial Review in Australia’, above n 30, [5.110], [5.118].

124 Refugee Advice and Casework Service, *Submission 30*.

125 Public Interest Advocacy Centre, *Submission 55*.

126 Human Rights Law Centre, *Submission 39*.

Conclusions

18.86 There is a strong presumption that the Parliament does not intend to restrict access to the courts, unless it does so by explicit statement or necessary implication. This presumption applies in relation to attempts to restrict or exclude judicial review of administrative action. Additionally, s 75(v) of the *Constitution* guarantees an ‘entrenched minimum provision of judicial review’.¹²⁷ However, the *ADJR Act*, and other legislation provide for judicial review that is more accessible and broader in ambit than review available under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*. Thus, while access to the courts cannot be excluded, limits can be, and are, placed on access to the courts.

18.87 In 2012, the ARC completed a major review of federal judicial review. It recommended that the following limits on judicial review under sch 1 of the *ADJR Act* should be removed:

- decisions under div 1, pt 7.4 of the *Corporations Act*, and decisions giving effect to the government’s foreign investment policy under the *Banking (Foreign Exchange) Regulations 1959* (Cth) on the basis that it is not a sufficient justification to exclude review because the decision considers the national interest;
- decisions of the Fair Work Ombudsman and Fair Work Building Industry Inspectorate, on the basis that the decisions of these bodies are similar to decisions made by a number of other regulatory bodies, whose decisions are subject to review under the *ADJR Act*;
- the findings of the Inspector-General of Intelligence and Security, on the basis that the findings of an accountability body ought to be subject to review; and
- decisions under div 105 of the *Criminal Code*, on the basis that there is no court involvement in the making of preventative detention orders.

18.88 Further, the ARC recommended that the blanket exemption for all ASIO decisions be reviewed.

18.89 The ALRC considers that the Government should further consider these recommendations.

18.90 In relation to the ARC’s recommendations relating to reviews of counter-terrorism and national security laws, such a task would fall within the role of the INSLM, who reviews the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis.

18.91 An area of particular concern—as evidenced by parliamentary committee materials, submissions and other commentary—relates to limits on access to the courts in migration legislation. The key justification advanced for these limits is that they seek to reduce the volume and cost of litigation, and prevent abuse of process by applicants.

¹²⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

The ARC and the Legal and Constitutional Affairs Committee both stated that case management measures and assistance for applicants were a more appropriate measure to achieve these goals.

18.92 Schedule 1 para (pa) of the *ADJR Act* excludes judicial review of the exercise of a number of ministerial powers of direction and determination under the *Maritime Powers Act*. This has been justified on the basis that highly complex and sensitive operational issues should not be subject to judicial review. The Government may consider reviewing this restriction on access to the courts, particularly in light of criticism by both rights scrutiny committees of the Parliament—the Scrutiny of Bills Committee and the Human Rights Committee.

18.93 Finally, the Government should give further consideration to the ALRC's recommendation to introduce open standing in public law proceedings, included in its 1996 report on standing in public law proceedings. In the alternative, the Government should give further consideration to the ARC's recommendation that a provision modelled on s 27(2) of the *AAT Act* be introduced to clearly give representative organisations standing to make an application for judicial review under the *ADJR Act*.

