NOT MAKING A DIFFERENCE: QUEENSLAND'S EXTENSION OF STATUTORY REVIEW

Justice Catherine Holmes*

May I say immediately I accept absolutely no responsibility for adhering to any of the views I express here should the questions I discuss come before me for decision at first instance or on appeal.

I am going to talk about the attempt at expanding the scope of judicial review in s 4(b) of the *Judicial Review Act 1991* (Qld). It has been a signal failure in the sense that no-one has ever made a successful application under it; in fact, all but one of the first-instance cases I will talk about involved summary dismissal using the Court's power to do so where there is no reasonable basis for the review application. I am perhaps in part responsible for this sad state of affairs, so the least I can do is discuss how it has come about.

The *Judicial Review Act 1991* is very much along the lines of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act). It has these differences: it contains pt 5, which preserves the Court's common law jurisdiction but simplifies the way in which remedies are to be granted, substituting prerogative orders and injunctions for the old writs; it permits review of decisions made by the Governor-in-Council, although it provides for the relevant Minister to be named as defendant; and it contains, in s 4(b), an extension of the decisions which may be reviewed beyond those which are made 'under an enactment':

> **4 Meaning of *decision to which this Act applies***
>
> In this Act —
>
> ***decision to which this Act applies*** means —
>
> (a) a decision of an administrative character made,
>
> proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or
>
> (b) a decision of an administrative character made, or
>
> proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part) —
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> (i) out of amounts appropriated by Parliament; or
>
> (ii) from a tax, charge, fee or levy authorised by or under an enactment.

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The availability of review turns on two elements: the identity of the decision-maker and the making of the decision under a publicly funded non-statutory program or scheme.

Section 4(b) is unique to Queensland. Tasmania and the Australian Capital Territory also adopted the Commonwealth model, but neither contains any equivalent to s 4(b) — although the Tasmanian legislation came nine years after the Queensland Act, so they had the opportunity to consider it.

I should elaborate on the section's reach. 'State authority' is defined as meaning an authority or body, whether or not it is incorporated, established by or under an enactment. The provision is supplemented by s 9 of the Judicial Review Act, which extends a reference in the Act to the exercise of the power conferred by an enactment to the exercise of a power or function of the kind described in s 4(b). The effect of that is to make almost all of the grounds of review in the Act available in an application brought under s 4(b), although they may not be particularly apposite. Thus the ground that the making of the decision was an improper exercise of the power conferred is incorporated, with all its sub-grounds of taking irrelevant considerations into account, failing to take relevant considerations into account, unreasonableness and so on.

The compass of s 4(b) is expanded by s 21 of the Judicial Review Act so that review under it is available in respect of conduct for the purpose of making a decision to which it applies, whilst s 22 extends its application to a failure to decide by a person with a duty to do so.

The background to the enactment of s 4(b)

The history of s 4(b) begins, as so much of the jurisprudence in this area also does, in a Commonwealth setting. In 1989, the Administrative Review Council (the ARC), with Professor Cheryl Saunders at its helm, completed a review of the AD(JR) Act.[1] It noted that there were many decisions made by Commonwealth officers which were not made under an enactment and which were not covered by the Act. Such decisions were reviewable in the High Court under s 75(v) of the *Constitution* and in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth). Among other things, the ARC recommended that the types of decisions to which the Act applied ought to be expanded to include a decision of an administrative character made or proposed to be made by an officer of the Commonwealth under a non-statutory scheme or program, the funds for which were authorised by a parliamentary appropriation.[2] The idea was that the source of funding gave such decisions a public interest character. The review gave an example of what might be covered, which was employment and training schemes. The ARC's aim was to align the non-statutory decisions for which it was proposing review under the AD(JR) Act with those for which review was available under the prerogative writs and, by incorporating them in the AD(JR) Act, to provide greater simplicity as to procedure, the grounds for review and the remedies available.

The ARC did not recommend any provision the equivalent of s 9 of the Judicial Review Act so that those grounds of review which referred to decisions being made under an enactment — that is, all of the improper exercise of power grounds — would continue to remain inaccessible for non-statutory decisions. That seems to have come out of a concern that the kinds of informal documents likely to be involved in non-statutory schemes or programs should not be elevated to the status of enactments or regarded as having a binding character.

Interestingly, in light of the later decision in *Griffith University v Tang*[3] (*Tang*) the Australian National University, noting that most of its decisions about enrolment of students, allocating academic grades and the termination of admission to degrees and so on were not made

under legislation and would become amenable to review under this proposal, opposed bringing such decisions within the compass of the AD(JR) Act. Other opposition came from the Commonwealth departments and agencies concerned about the effect on public sector personnel decisions; concern was also expressed about the prospect of challenges to individual steps within the decision-making process. And, as it happened, the ARC recommendation was not acted on either then or when it was repeated in a 1998 report.[4]

In Queensland, the 1989 report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry), because of certain failures of government accountability, had contained a section concerned with administrative review. It proposed the adoption of a simple form of machinery for applications for judicial review and the setting up of the Electoral and Administrative Review Commission (EARC) to report on that matter among many others. The EARC was duly set up and provided a report,[5] an appendix to which was a draft Judicial Review Bill. The report noted that, at common law, non-statutory decisions affecting rights or interests had been set aside on the ground of error of law. In particular, it cited *R v Criminal Injuries Compensation Board; Ex parte Lain*[6] (*Lain*), which concerned the availability of certiorari to the decisions of a non-statutory scheme for compensating victims of crime.

The EARC's thinking was a little more expansive than the ARC's. Its draft, which was adopted in the Act, extends to decisions of local government authorities. The thinking was that any scheme or program funded by rates, a decision as to which might have an adverse effect on a citizen's interests, should be within the compass of the provision.

It is noteworthy that the EARC also considered including in the definition of 'decision to which this Act applies' the words 'a decision of an administrative character otherwise operating in law to determine a question affecting the rights, interests or legitimate expectations of any person', which, it acknowledged, was a variant of what is contained in the *Administrative Law Act 1978* (Vic). The EARC dismissed it as too expansive. Its concern was that such an extended definition could encompass decisions on tendering processes, entering of contracts and decisions relating to the state's rights to manage and control its own property. It said:

> [Those were] powers not materially different to the powers of most adult citizens ie to enter contracts, to manage and control one's own property. They [were] not powers conferred by Parliament for the benefit of citizens or to regulate the affairs of citizens …[7]

There was no compelling case for them to be brought within the scope of statutory judicial review. Counsel for Griffith University in *Tang*, now the Hon Justice Keane of the High Court, recited precisely that passage in the course of his submissions.

Unlike the ARC's efforts, the EARC's recommendations were adopted and we have s 4(b) in its present form. The Explanatory Notes for the Judicial Review Bill 1991 do not shed much further light on statutory intent, but they do reiterate the example, as something which would be capable of review, of a scheme operated by a municipal council funded by rates which had an adverse effect on the interests of a citizen. The Bill was very much as the EARC had drafted it, which makes its report a particularly significant extrinsic source in construing the Act.

But judicial consideration of s 4(b) has been a disappointment to academic commentators. Indeed, I had no idea how much of a disappointment it has been until I read in preparation for this article. The reality is that very little concerning s 4(b) has come before the court at first instance and there has been next to nothing at appellate level. I can literally count on one hand the number of decisions of any substance[8] made under the section and they are

so few as to permit an outline of them. In none of them was there any issue about the decision-maker meeting the statutory description or the source of relevant funding. They either fell at the hurdle of establishing a 'non-statutory scheme or program' or the grounds of review were not made out.

Cases considering s 4(b)

The two earliest cases fall in the latter category. The first was *Anghel v Minister for Transport (No 1).*[9] The Minister for Transport approved the construction of a railway line which was partly funded through State funds appropriated by Parliament. The applicants for review were residents who said that their properties would be affected. Justice Derrington held that the rail project was a scheme within the meaning of the section, drawing a distinction between a scheme, which could mean a single project or enterprise, and a program, which suggested a repetition of events. Section 4(b) applied, but none of the Judicial Review Act grounds of review were made out.

Macedab Pty Ltd v Director-General, Department of the Premier, Economic and Trade Developments[10] (*Macedab*) was decided about nine months later. The government had approved a policy of purchases, on compassionate grounds, of land affected by development. It was for the respondent Director-General to decide which cases met the conditions for acquisition. The State refused to buy the applicant's property. There was no argument about the application of s 4(b). Again, though, the grounds of review were found not to be made out. An appeal was dismissed.[11] Tantalisingly, in their judgment, the members of the Court of Appeal said that, on the hearing, they had had some interest in the width of the power to review the decisions of government officers under s 4(b) and s 9. They had received supplementary submissions from the respondent on the point but had decided against examination of the issue because of the concession that review was available. At the end of the judgment, though, the observation was made that it was not surprising that the decisions of the kind had been included by the legislature as subject to judicial review; *Lain* was cited as involving decisions of a comparable kind.

The remaining cases turned on what constituted a 'non-statutory scheme or program', most of them focusing on the scheme or program aspect. The first is *Wide Bay Helicopter Rescue Service Incorporated v Minister for Emergency Services*[12] (*Wide Bay Helicopter Rescue*). The applicant had lobbied the government to engage it to run a helicopter rescue service in the Hervey Bay – Fraser Island Area. The government, however, decided to vary its agreement with an existing provider of a helicopter rescue service so that it expanded to an area a bit further north, with a helicopter flying out of Bundaberg. The applicant for review characterised the relevant decision as a decision to place a rescue helicopter service in Bundaberg.

Justice Williams held that there was no decision of the kind from the contract variation, but, even if there were, it was not a decision within s 4(b). His Honour made the observation that, if the decision had been to make government funds available to the provider of a rescue service in a relevant region, it might have been within s 4(b). That observation has caused concern in subsequent commentary[13] as possibly suggesting that the scheme or program in question must be about delivery of funds as opposed to involving funds from a particular source. I think the better view is that his Honour was just giving an example of something that might fall within s 4(b).

In *Mikitis v Director-General Department of Justice and Attorney-General*[14] staff members of the Office of the Director of Public Prosecutions sought review of a decision by the Director-General of Justice to change the office layout in the Cairns office to an open-plan one. One can sympathise with their reaction — who among us does not want a door and a

little privacy? However, they were unsuccessful. Cabinet had set up a Government Office Accommodation Committee, the role of which was to formulate guidelines for planning office accommodation for government agencies. Under its guidelines, which the Director-General had to apply, the applicants were not important enough to qualify for individual offices. The applicants argued that the scheme in question was one established by Cabinet minute for provision of office accommodation to government employees. The office refurbishment was undertaken pursuant to that scheme and, as part of it, the decision about office allocations was made pursuant to the guidelines. Justice Margaret Wilson held that the Cabinet minute which set up the committee did not establish a scheme or program. She accepted that the decision was made under the guidelines, but they were neither a scheme nor part of a scheme.

Then we come to my judgment in *Bituminous Products Pty Ltd v General Manager (Road System and Engineering) Department of Main Roads*[15] (*Bituminous Products*). The facts, I fear, are as dull as the name of the case suggests. Section 11 of the *Transport Infrastructure Act 1994* (Qld) required the Director-General of the Department of Main Roads to develop roads implementation programs and prescribed their content: projects, policies and financial provision for road work. The Department had a manual which set out standards specifications for road construction, one of which was that the proportion of waste oil in pre-coating material was not to exceed 20 per cent. It had also developed a list of approved pre-coating agents, which included the applicant's, until the list was revised and the applicant's product was removed from it because it contained too much waste oil. That was the decision of which review was sought, and the question was whether it was made under a non-statutory scheme or program. The applicant had two arguments. The first argument was that the process for developing lists of products and formulating specifications was a scheme or program embodied in the manual of standards specifications, and the decision to restrict approved products was made in the course of the program of identifying products to be used. The alternative submission was that the decision was made pursuant to the roads implementation program, which was said to be a non-statutory program.

I made a number of comments about what constituted a scheme or program for the purposes of s 4(b). I repeat them here, not through immodesty but because there is so little else about what this section means. Also, this part of the judgment was cited with apparent approval by the Court of Appeal in a later case, *JJ Richards & Sons Pty Ltd v Bowen Shire Council*[16] (*JJ Richards*), so it has some respectability. Looking at dictionary definitions of 'program' and 'scheme', I thought both connoted a need for some planned action. I made the general observation that, the harder it was to identify a discrete program or scheme, the less likely it was that one existed, and that one had to be careful not to dissect a program so as to confer the status of program on any of its internal arrangements which themselves appeared structured or organised. I also thought the emphasis on public funding in the provisions suggested that a useful, but not necessarily essential, identifier of a scheme or program was a specific appropriation or a specific statutory levy for its purposes, that being consistent with the ARC recommendation, on which the EARC relied, and its rationale that the public interest character of a decision related to the fact that it came from a parliamentary appropriation specifically for the scheme or program.

Applying those considerations, I did not think that the development specifications and products lists for carrying out road works constituted a program or scheme, and I held that the 'non-statutory' component was not made out. The roads implementation program itself was required by statute; its minimum content was prescribed by statute; its purpose was to implement strategies developed in accordance with statute; and the Chief Executive Officer had statutory powers to further its aims. This aspect of the decision was criticised in a 2011 submission to the ARC by Professor Billings and Professor Cassimatis from the TC Beirne School of Law at the University of Queensland. Billings and Cassimatis argued that it took

too restrictive an approach to the question of whether a program was statutory or non-statutory.[17]

The applicant in *Bituminous Products* had a second string to its bow, which was to argue that the decision was reviewable under s 4(a). Unfortunately for it, before my decision was handed down, judgment was given in *Tang* and I held that, because the applicant could not point to existing rights or obligations affected by the decision or rights which might be acquired through the making of a different decision, it could not bring itself within s 4(a).

The respondent in *Tang*, of course, was a postgraduate student excluded from a PhD program at Griffith University. The majority (Gleeson CJ; Gummow, Callinan and Heydon JJ) held that the university's actions were authorised by the *Griffith University Act 1998* (Qld), but its decision was not 'made under' that Act in the sense which would make it reviewable under the Judicial Review Act. The university was not exercising a unilateral power to affect Ms Tang's rights and obligations. There was instead a consensual relationship between her and the university which had been brought to an end by its decision to exclude her — a decision made under the general law.

The critical passage of the joint judgment of Gummow, Callinan and Heydon JJ is as follows:

> The determination of whether a decision is 'made … under an enactment' involves two criteria: the first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter, or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both those criteria are met.[18]

The Court went on to say that it was not necessary that the decision affect or alter existing rights or obligations; it would suffice that the enactment required or authorised decisions from which new rights or obligations would arise. The legal rights affected did not have to arise from the enactment; it would suffice if they derived from the general law or other statute.

The respondent in *Tang*, as I have already observed, confined her application to one under s 4(a). She did not argue s 4(b), although it was suggested she might subsequently seek to rely on it. That provision received only passing reference in the majority judgments. It did feature in the dissenting judgment of Kirby J. His Honour observed that the fact that there existed an alternative wider ambit of the Act's operation in s 4(b) constituted another argument against the adoption of a narrow interpretation of the phrase 'under an enactment'. I have, with respect, some difficulty with the logic of that argument; one might say instead that the existence of s 4(b) suggests a distinct and confined sphere of operation for s 4(a).

I will return to *Tang*, but first I will finish my summary of decisions which did concern s 4(b). In *JJ Richards*, the relevant decisions were the respondent Council's decisions to terminate a tender process and to institute a new one. The Court of Appeal held that the relevant source of power was not statute but the power of legal persons to enter commercial relationships, so that the application, insofar as it was made under s 4(a), failed on the *Tang* basis.[19] There was an alternative, last-minute argument that the decisions fell within s 4(b). The Court held that there was no 'non-statutory scheme or program', referring in this context to *Bituminous Products.*

The history, then, of s 4(b) as a mechanism for review is one of unmitigated failure. Why is it so? Professor Cassimatis and Professor Billings lay part of the blame, in the most tactful language possible, on the way courts have construed the section. They argue that, although in the light of the original ARC recommendation the section should be seen as balancing an intention to expand statutory review in accordance with that available under s 75(v) of the

Constitution while avoiding the uncertainty connected with the prerogative writs, the words 'non-statutory scheme or program' have not been interpreted in a way that would permit that to occur.[20]

I have already referred to their criticism, in their submission to the ARC's 2012 review, of my approach in *Bituminous Products* to what amounted to 'a non-statutory' program. They do not elaborate on that criticism in their submission, but I infer that they would contemplate a narrower view of the converse; in other words, what is a 'statutory' program. Presumably they would argue that the program must be explicitly established by an Act rather than be required and its content prescribed by statute. That is a debate that may still be held somewhere at some time; my decision was not appealed, so it is no better than persuasive. But, assuming a more liberal approach to what is 'non-statutory', there is still the requirement that the decision must be made under a 'scheme or program', and I do not think that it has been the interpretation of those terms that has been the stumbling block.

Section 75(v) turns on the identity of the decision-maker as a Commonwealth officer. Section 4(b) is similar to the extent that it identifies the decision-maker by status, but it also contains a second pivot: the making of the decision under a publicly funded non-statutory program or scheme. With the best will in the world towards a liberal reading, those words must be given some content. Once they were incorporated into s 4(b), they imposed an additional limit on the section's application which has no equivalent in the constitutional provision. I would argue that, rather than adopting restrictive construction, this is the reason why, if the EARC's intentions were to match s 75(v) review, they were foiled.

Professor Billings and Professor Cassimatis have also suggested that the underuse of s 4(b) may be attributable to legal advisers' failure to recognise its potential and they cite two decisions — *Blizzard v O'Sullivan*[21] (*Blizzard*) and *Concord Data Solutions Pty Ltd v Director-General of Department of Education*[22] (*Concord Data Solutions*) — as instances in which reliance was placed on s 4(a) but s 4(b) might have been used. Professor Aronson and Professor Groves also refer to those two cases in their text, *Judicial Review of Administrative Action*,[23] and they suggest that s 4(b) might provide a way around the statements in *Tang* that the AD(JR) Act provides no coverage of decisions to award a contract or decisions under a contract. But I am not so sure about that.

Construction of s 4(b) has never got very far. It stalled at the non-statutory scheme or program point. There is also the preposition 'under', which has yet to receive any judicial consideration. This is where I think that we have to think about *Tang*. *Tang* caused alarm and despondency because of the concern as to what was embraced by 'legal rights and obligations'. Justice Kirby certainly thought that the expression as used in the joint judgment did not extend to the affecting of interests[24] and some commentators have shared that view.[25] Others have thought that a reference in the joint judgment to the decision-maker's obligations expanded the coverage of the section under this construction.[26] Justice Keane, who was counsel for Griffith University, has expressed the view that it extends to interests capable of legal protection.[27] However, whatever the effect of *Tang* in that regard, the question of what is protected is not, I think, of concern in the application of s 4(b).

First, the court in *Tang* construed s 4(a) consistently with the way in which it considered that the equivalent provision of the AD(JR) Act should be construed, acknowledging that that might lead to a more restricted form of judicial review.[28] This was because of s 16 of the Judicial Review Act, which provides that, if a provision of the AD(JR) Act expresses an idea in particular words and a provision of the Judicial Review Act seems to express the same idea in different words, the ideas were not to be taken to be different merely because of that. The impact of that mode of construction in the joint judgment is apparent. In particular, their Honours said that the character of the AD(JR) Act as a law of the Commonwealth conferring

federal jurisdiction supported the construction they had given to the phrase 'decision … under an enactment' because of the constitutional requirement that there be a 'matter' — that is to say, 'some immediate right, duty or liability to be established by the court'. While the Judicial Review Act did not have the constitutional underpinning relevant to interpretation of the AD(JR) Act, s 16(1) had linked the two so as effectively to make that a necessary sequence of reasoning.

Now, that is not the case for s 4(b). As the provision has no equivalent in the federal Act, there is no common idea between the two pieces of legislation to be construed consistently by force of s 16 of the State Act. Secondly, there are indications that the range of interests covered is meant to be much wider. The reference in the EARC report, and also in *Macedab,* to *Lain* as the common law equivalent of the sort of review contemplated by s 4(b) makes that clear. You will recall that in *Lain* certiorari was said to be available in respect of interests well short of legally enforceable rights, even where the decision was merely a step in a process which could ultimately affect legal rights or liabilities.[29] There is also the fact that the Explanatory Notes for the Judicial Review Bill 1991 gave the example, as something which would be capable of review, of a scheme which had an adverse effect on the interests of a citizen. If the ARC's recommendation that the AD(JR) Act permits review of decisions made under non-statutory programs had been acted on so that s 4(b) had a federal equivalent, I might now be talking about the effect of the constitutional requirement that there be a 'matter' on s 4(b). But we have been spared that. And that does, in my view, make for a broader coverage in this respect for s 4(b). While I could not see that the removal of the applicant's name from the approved products list in *Bituminous Products* met the *Tang* criteria, I do think that the decision may have met the *Lain* description, although that was not something I had to decide.

But *Tang* is relevant to consideration of whether a decision is made '*under* a non-statutory scheme or program'. In the joint judgment, the observation was made that the expression 'decision made … under an enactment' used in the AD(JR) Act and its state equivalents directed attention away from the decision-maker's identity to the decision-maker's source of power. Section 4(b), as it seems to me, is concerned with both those things: the source of power as well as the identity of the decision-maker. One has a dual hurdle, then, although the second is not so hard to meet. One must look, under s 4(b), at whether the program or scheme is the source of the decision-maker's power to decide, and it is hard to go past the reasoning that a decision made exercising powers available under the general law, such as a tender arrangement or contract, will not meet that description.

Professor Michael Taggart has written of judges' egregious tendencies to try to exclude tendering and contract decision-making from statutory judicial review,[30] and I may be joining that guilty group. But it would be consistent with the purpose of common law review, as Keane J has described it, to subject to judicial scrutiny decisions by which the executive affects the interests of individuals, as opposed to those in which the executive exercises rights available to all, so that commercial decisions would not fall within the compass of s 4(b). And it seems to me that this would be an operation of the provision as the EARC intended. You will recall that its report rejected a broader definition of 'decision' because of its concern that it would affect 'powers not materially different to the powers of most adult citizens ie to enter contracts, to manage and control one's own property'.

If I am right about that, the two cases the academic commentators have referred to — *Blizzard* and *Concord Data Solutions* — would not have qualified for review under s 4(b). Both of those cases were decisions of Thomas J, which were made in 1993 — well in advance of *Tang. Blizzard* concerned the dismissal of a senior police officer who was employed under a contract. Referring to *Australian National University v Burns*,[31] Thomas J held that that was an exercise of the Police Commissioner's rights pursuant to contract, not a

unilateral exercise of power under the *Police Service Administration Act 1990* (Qld). *Concord Data Solutions* concerned the Director-General's decision to appoint someone other than the applicant as the preferred supplier of computer software. There was a State Purchasing Policy which was said to contain rules for government procurement. Justice Thomas held that the policy did not amount to an enactment and the Director-General had in any case made his decision exercising the government's prerogative power to enter into a contract.

If it is correct to say that the decision must derive its effect from the scheme or program, not the general law, neither of these cases would have succeeded under s 4(b). *Wide Bay Helicopter Rescue,* which involved the government's exercise of its contractual powers, was similarly doomed to failure on that basis alone.

Similarly, you will recall that in *JJ Richards* the Council's decisions were to terminate a tender process and institute a new one. The Court of Appeal might, I think, have used exactly the same reasoning as that which caused it to reject the application of s 4(a) and hold that, if the decision was made pursuant to a power to enter commercial relationships, it was not made under a 'non-statutory scheme or program'. In dealing with the s 4(b) argument on the basis that there was no scheme or program, the judgment added the observation that it would be a misconstruction of s 4(b) to suppose that it encompassed *any* decision by a local government authority discharging its functions.[32] Now this was a judgment of the Court and Keane J was the presiding judge, so it is conceivable that that observation hints at possible application of at least part of the *Tang* reasoning to s 4(b) cases.

The general lack of consequence of s 4(b) led Professor Groves to say that the provision should not be replicated in the AD(JR) Act[33] — a view which the ARC cited in 2012 when it revisited the question of whether judicial review should be available for non-statutory decisions. It moved away from its earlier recommendation, noting the uncertainty about which judicial review principles could apply to non-statutory decisions and the burden that review would place on the agencies administering non-statutory schemes. Instead, it proposed that the AD(JR) Act be amended to enable anyone who otherwise would be able to initiate a proceeding in the High Court under s 75(v) of the *Constitution* to apply for an order of review under the AD(JR) Act.

Conclusions

Why has the attempt in the form taken by s 4(b) to permit review of non-statutory decisions had so little success? I think the problem lies in finding the formula which will allow a proper balance, which will not bring the machinery of government grinding to a halt but also does not stifle the prospect of appropriate accountability; that does not permit every minor action along the way to an outcome to be held up to scrutiny but affords a mechanism for ensuring proper process. It is just harder than everyone thought. I do wonder whether the incorporation of the words 'under a non-statutory scheme or program', which in themselves have a narrowing effect, were really necessary. It may be that the EARC should have stuck with its third definition — 'a decision of an administrative character … operating in law to determine a question affecting the rights, interests or legitimate expectations of any person' — which was close to the Victorian definition of 'decision'. It could have incorporated the identity of the decision-maker qualification. The concern about application to contract and tendering processes may not have been realised; my understanding is that the definition of 'decision' in the Victorian Act has been construed as excluding a decision to exercise rights under contract[34] — again, perhaps, an exhibition of those tendencies which Professor Taggart deplores.

I do not mean to suggest that s 4(b) is unusable in its present form. It is just that, if I were assessing it as I would an applicant for bail, on its previous history I would say that its prospects for future satisfactory performance are not good.

Does it matter much? Professor Aronson suggests[35] that s 4(b) was not really needed in the state context. The ARC had proposed statutory judicial review of non-statutory decision-making in a context in which the Federal Court had no inherent jurisdiction and no other form of judicial review was possible. The state superior courts, in contrast, had inherent jurisdiction to review non-statutory public power.

And it is true that many of these decisions could be reviewed using the common law jurisdiction preserved by pt 5 of the Judicial Review Act. But it is a pity that applicants should have lost the advantage of reasons and of a codified and clear procedure with readily understood grounds of review and orders — in short, the straightforwardness which was intended to be at the heart of the Judicial Review Act.

Endnotes

1 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review Act): the Ambit of the Act* (Report No 32, 1989).
2 Ibid, recommendation 1.
3 (2005) 221 CLR 99.
4 Administrative Review Council, *The Contracting Out of Government Services Report* (Report No 42, 1998) recommendation 22.
5 Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions* (Brisbane, December 1990).
6 [1967] 2 QB 864.
7 Electoral and Administrative Review Commission, above n 5.
8 In *Reid v Commissioner of Police* (1994) QAR 404 (White J) and *Krajniw v Flegg* [2012] QSC 392 (Martin J), [2013] QCA 233 (application for extension of time to appeal), there was simply no evidence of anything resembling a 'scheme or program'.
9 [1995] 1 Qd R 465.
10 Unreported, Supreme Court of Queensland, Demack J, 14 September 1994.
11 *Macedab Pty Ltd v Director General of Department of Premier, E&T Development* [1995] QCA 230.
12 (1999) 5 QAR 1.
13 Peter Billings and Anthony E Cassimatis, 'Twenty-one Years of the Judicial Review Act 1991' (2013) 32 *University of Queensland Law Journal* 65, 74.
14 (1999) 5 QAR 123.
15 [2005] 2 Qd R 344.
16 [2008] 2 Qd R 342.
17 Peter Billings and Anthony E Cassimatis, Submission No 6 to the Administrative Review Council, *Judicial Review in Australia Consultation Paper*, 20 June 2011.
18 *Griffith University v Tang* (2005) 221 CLR 99, 130–1.
19 Ibid [22].
20 Billings and Cassimatis, above n 13, 73.
21 [1994] 1 Qd R 112.
22 [1994] 1 Qd R 343.
23 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) 28.
24 *Griffith University v Tang* (2005) 221 CLR 99 [102],[154].
25 Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 *Public Law Review* 22.
26 See, for example, Billings and Cassimatis, above n 13, 71–2. For a contrary view see the judgment of Edmonds J in *Guss v Deputy Commissioner of Taxation* (2006) 152 FCR 88, [41].
27 Patrick A Keane, 'Judicial Review: the Courts and the Academy' (2008) 82 *Australian Law Journal* 623, 630; Chief Justice The Hon P A Keane, 'Democracy, Participation and Administrative Law' (Paper presented at the 4th National Lecture on Administrative Law at the Australian Institute of Administrative Law National Conference, Canberra, 21 July 2011).
28 *Griffith University v Tang* (2005) 221 CLR 99, 105.
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30 Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 21.

31 [1982] FCA 207.
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34 *Monash University v Berg* [1984] VR 384; *Szwarc v Melbourne City Council* (1990) 70 LGRA 162.
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