

VICTORIAN ADMINISTRATIVE LAW UPDATE

By Justice Emilios Kyrou, Supreme Court of Victoria

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Introduction

- 1 This paper deals with five issues that are relevant to Victorian administrative law.
- 2 The first is the types of judicial review cases that come before the Supreme Court of Victoria.
- 3 The second is whether inadequate reasons constitute a discrete ground of judicial review.
- 4 The third is the availability of certiorari to quash a decision of a private body.
- 5 The fourth is the obligation of a judge, in circumstances where the judge has observed a self-represented litigant in court and has become concerned about his or her capacity to conduct the case, to inform the self-represented litigant of those concerns and to hear his or her response before deciding whether to refer to the Victorian Civil and Administrative Tribunal ('VCAT') the question of whether a guardian or administrator should be appointed.
- 6 The fifth is whether the *Administrative Law Act 1978* (Vic) ('ALA') should be reformed.

Judicial review cases before the Supreme Court of Victoria

- 7 Judicial review by the Supreme Court of Victoria is available either in the Court's inherent jurisdiction under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) ('Rules') or pursuant to the statutory mechanism established by the ALA.

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8 Judicial review has traditionally been seen as involving a direct review by the Supreme Court of the legality of an administrative decision as part of the Court's supervisory jurisdiction. However, according to the High Court in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue of the State of Victoria*,¹ a statutory appeal on a question of law is 'in the nature of judicial review.'² Accordingly, at present, a judicial review proceeding in the Supreme Court is just as likely to arise from what is essentially a private dispute that has been elevated to the Court following a challenge to a decision made by VCAT, a specialist tribunal, or a lower court, as it is from direct scrutiny of administrative action in the traditional sense.

9 In the 2007 and 2008 calendar years, there were 138 judicial review decisions in the trial division and 26 in the Court of Appeal. The bodies whose decisions were most frequently the subject of judicial review applications were the VCAT (in 70 such applications, or 43 per cent), a lower court (in 36 applications, or 22 per cent), or a medical panel making injury assessments under the *Accident Compensation Act 1985* (Vic) and the *Wrongs Act 1958* (Vic) (in 23 applications, or 14 per cent). Appeals from the VCAT predominantly involved large commercial disputes, often relating to building, planning or insurance issues.

10 Judicial review applications had a success rate of 45 per cent in this period.

11 The frequency and relative success with which various grounds of judicial review were argued by applicants in the 2007 and 2008 calendar years are set out below:

- Error of law (comprising both jurisdictional error and error of law on the face of the record) which did not fall under any of the other grounds referred to below: this was raised in 80 cases and was successful in 30, representing a success rate of 38 percent.

¹ (2001) 207 CLR 72.

² (2001) 207 CLR 72, 79 [15]. Kirby J agreed generally with the joint reasons of Gaudron, Gummow, Hayne and Callinan JJ: at 87 [40].

- Failure to take into account relevant considerations: this was raised in 60 cases and was successful in 19, representing a success rate of 32 percent.
- Breach of the hearing rule of natural justice: this was raised in 52 cases and was successful in 16, representing a success rate of 31 percent.
- Ultra vires: this was raised in 42 cases and was successful in 14, representing a success rate of 33 percent.
- Inadequate reasons: this was raised in 31 cases and was successful in 16, representing a success rate of 52 percent.
- Taking into account irrelevant considerations: this was raised in 29 cases and was successful in 13, representing a success rate of 45 percent.
- No evidence: this was raised in 21 cases and was successful in five, representing a success rate of 24 percent.
- Failure to follow mandatory statutory procedures: this was raised in 13 cases and was successful in one, representing a success rate of eight percent.
- Bias: this was raised in 11 cases and was successful in four, representing a success rate of 36 percent.
- *Wednesbury* unreasonableness: this was raised in six cases and was successful in two, representing a success rate of 33 percent.
- Improper purpose: this was raised in six cases and was successful in one, representing a success rate of 17 percent.
- Invalid delegation of power: this was raised in four cases and was unsuccessful in all of them.
- Failure to exercise jurisdiction: this was raised in three cases and was successful in one, representing a success rate of 33 percent.

12 The existence of an adequate alternative remedy was the factor that most often enlivened discretionary considerations as to whether to grant judicial review remedies. It arose in 10 cases and resulted in a refusal of relief in six.

Inadequacy of reasons as a discrete ground of judicial review

13 At common law, administrative decision-makers are not obliged to provide reasons for their decisions.³ However, a decision-maker will often provide reasons despite not being required to do so. Further, s 8(1) of the *ALA* provides that a body that is a tribunal within the meaning of that Act must, if requested to do so by a person affected by a decision made by it, furnish that person with a statement of its reasons for the decision.⁴

14 As already indicated, the adequacy of reasons has been a prominent area of review. In the 2007 and 2008 calendar years, the point was argued in 18 per cent of judicial review cases and was established in just over half of those cases. Notably, it was raised in 75 per cent of applications for review of decisions of medical panels.

15 At present, there is uncertainty as to whether inadequacy of reasons is a discrete ground of judicial review when those reasons are provided voluntarily or pursuant to s 8 of the *ALA*, as opposed to reasons provided pursuant to a specific statutory obligation such as that imposed on the VCAT by s 117 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*').⁵

16 Between 1992 and September 2008, with a lone exception, all decisions of single judges of the Supreme Court of Victoria expressly or implicitly accepted that inadequate reasons constituted an error of law and a discrete ground of judicial review.⁶ In *Vegco Pty Ltd v Gibbons*,⁷ I questioned whether inadequacy of reasons

³ *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 662, 665, 670, 675-6.

⁴ I discuss the meaning of 'tribunal' under the *ALA* in more detail later in this paper.

⁵ A failure by the VCAT to provide reasons for its decision that comply with s 117 of the *VCAT Act* has been held to be a vitiating error of law: *Victoria v Turner* [2009] VSC 66, [240].

⁶ The cases included *State Electricity Commission v Commissioner for Equal Opportunity* [1992] 1 VR 79, 87-8; *Pyle v Nisselle* [2000] VSC 398, [32]-[33]; *Kamener v Griffin* [2004] VSC 235, [57]-[64]; *Clarke v National Mutual Life Insurance Ltd* [2007] VSC 341, [67]-[68]; *Moyston Court Fisheries Ltd v Malios* [2007] VSC 518, [83]-[88]; *Davidson v Fish* [2008] VSC 32, [6], [12]-[13], [19]; *Collins v Nave* [2008] VSC 85, [45]; *Robert Bosch (Aust) Pty Ltd v Barton* [2008] VSC 227, [32]; *Treacy v Newlands* [2008] VSC 395, [8]-[12], [29]-[32]. The exception was *Brambles Industries Ltd v Nisselle* [2005] VSC 82, [21].

⁷ [2008] VSC 363.

constitutes a separate ground of review.⁸ However, I did not have to decide the issue in that case. The issue was then raised squarely before me in *Sherlock v Lloyd*.⁹ In that case, I concluded that inadequacy of reasons given pursuant to a request under s 8 of the *ALA* is not, in itself, an error of law on the face of the record and does not constitute a ground of review.¹⁰ I also noted that any reasons given, whether adequate or not, may well disclose a jurisdictional error or an error of law on the face of the record.¹¹

17 *Sherlock* has been considered in three subsequent decisions of single judges in the trial division of the Supreme Court of Victoria. In *Kuek v Victoria Legal Aid*,¹² Beach J granted relief on other grounds, but expressed agreement with the analysis and conclusion in *Sherlock*.¹³ By contrast, in *Western Health v Gallichio*¹⁴ and *Santos v Wadren Pty Ltd*,¹⁵ Pagone J and Smith J, respectively, declined to follow *Sherlock* and held that inadequate reasons can constitute a discrete error of law.¹⁶

18 The conflict in the authorities essentially revolves around whether s 8(4) of the *ALA* exhaustively sets out the remedies available for inadequate reasons. Section 8(4) states:

The Supreme Court, upon being satisfied by the person making the request that a reasonable time has elapsed without any ... statement of reasons for the decision having been furnished or that the only statement furnished is not adequate to enable a Court to see whether the decision does or does not involve any error of law, may order the tribunal to furnish, within a time specified in the order, a statement or further statement of its reasons and if the order is not complied with the Court, in addition to or in lieu of any order to enforce compliance by the tribunal ... , may make any such order as might have been made if error of law had appeared on the face of the record.

8 [2008] VSC 363, [29]-[30].

9 [2008] VSC 450 (*'Sherlock'*).

10 *Sherlock* [2008] VSC 450, [20], [25], [32].

11 *Sherlock* [2008] VSC 450, [21], [24].

12 [2009] VSC 43.

13 [2009] VSC 43, [30].

14 [2009] VSC 134 (*'Western Health'*).

15 [2009] VSC 303.

16 *Western Health* [2009] VSC 134, [17]-[23]; *Santos v Wadren Pty Ltd* [2009] VSC 303, [46]-[78]. See also *Melbourne Health v Lloyd* [2009] VSC 370, [13] (Pagone J).

19 The *Sherlock* approach relies upon the following reasoning:¹⁷

- (a) At common law, an administrative decision-maker is not obliged to provide reasons for a decision.
- (b) If a decision-maker who is not legally obliged to provide reasons for a decision refuses to provide reasons, an affected person cannot obtain an order compelling the provision of reasons.
- (c) If such a decision-maker chooses to provide reasons (whether or not they are provided after a request for reasons has been made), the inadequacy of those reasons cannot, in and of itself, be a ground of review of the decision. Nor can an order be obtained for the delivery of further reasons.
- (d) However, if a decision-maker who is not legally obliged to provide reasons chooses to do so, and the reasons (whether adequate or inadequate) disclose that the decision-maker made a jurisdictional error, that error can be a ground for review of the decision.
- (e) Where the reasons of a body that is subject to the *ALA* disclose an error of law that is not a jurisdictional error, that error can be a ground for review of the decision on the basis of error of law on the face of the record, whether or not the reasons were also inadequate and even though they were provided in the absence of a legal obligation compelling the body to provide them.¹⁸
- (f) If a body that is subject to the *ALA* provides inadequate reasons for a decision in response to a request under s 8 of that Act but the reasons do not disclose any legal error (whether jurisdictional or not), the inadequacy of the reasons is not in and of itself an error of law on the face of the record that affords a ground for review of the decision independently of the remedies set out in

¹⁷ [2008] VSC 450, [20]-[38].

¹⁸ This is because s 10 of the *ALA* provides that reasons for a decision of a tribunal or inferior court, whether or not given pursuant to a request or order under s 8 of the *ALA*, form part of the record.

s 8(4) of the *ALA*. This is because that sub-section sets out a self-contained statutory regime for dealing with inadequate reasons.

- (g) Pursuant to s 8(4) of the *ALA*, where the initial reasons given are inadequate, the only available remedy is an order for the provision of further reasons. It is only where the further reasons that are provided are inadequate or where no further reasons are provided pursuant to the order, that the Court can quash the decision on the basis of an error of law on the face of the record.

20 The alternative and more widely held view relies upon the following reasoning:¹⁹

- (a) In conferring a statutory right to obtain reasons for decisions made by bodies that are subject to the *ALA*, s 8(1) of that Act operates in and upon the statutes and general law otherwise governing these bodies.
- (b) Where the body fails to comply with the obligation in s 8(1) of the *ALA*, an order under s 8(4) of that Act is not the only remedy that is available. This is because the *ALA* was intended to supplement and extend the rights at common law and not to provide an exclusive code.²⁰
- (c) Accordingly, where, in response to a request under s 8(1) of the *ALA*, a body that is subject to that Act fails to provide reasons or provides reasons that are inadequate at law, its conduct can be challenged in a proceeding commenced under Order 56 of the Rules.
- (d) In any event, at common law, a substantial failure to state reasons for a decision constitutes an error of law.²¹

21 This conflict in the first instance authorities is causing considerable uncertainty at present.²² However, an appeal to the Court of Appeal from my decision in *Sherlock*

¹⁹ See *Western Health* [2009] VSC 134, [17]-[23].

²⁰ *State Electricity Commission v Commissioner for Equal Opportunity* [1992] 1 VR 79, 87.

²¹ *Dornan v Riordan* (1990) 24 FCR 564, 573.

²² See Christos Mantziaris 'The Legal Consequence of Inadequate Reasons' (Paper presented at the New South Wales Bar Association, Sydney, 17 June 2009) 13-15.

will be heard on 17 November 2009 and this is likely to result in an authoritative decision on the issue.

Availability of certiorari to quash a decision of a private body

- 22 Ever since *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*,²³ the question of when certiorari can apply to quash a decision of a private body exercising powers of a governmental nature has given rise to conceptual and practical difficulties.
- 23 In the last few years, the issue has arisen in the context of the uniform legislation that contains mechanisms to protect progress payments owing to sub-contractors in the building industry. The New South Wales Act is the *Building and Construction Industry Security of Payment Act 1999* (NSW). The Victorian Act is the *Building and Construction Industry Security of Payment Act 2002* (Vic). Similar legislation exists in other Australian jurisdictions.²⁴ Under the uniform legislation, questions about the amounts owed to sub-contractors can be referred to private adjudicators selected by an authorised nominating authority.²⁵ The determinations of the private adjudicators are enforceable in accordance with the legislation. Not surprisingly, those persons who have been dissatisfied with adjudicators' determinations have sought to quash them.
- 24 In *Brodyn Pty Ltd v Davenport*,²⁶ the New South Wales Court of Appeal said in obiter that '[t]here is a real question whether an adjudicator is properly considered a tribunal exercising governmental powers'²⁷ and that 'it is by no means clear that an adjudicator is a tribunal exercising governmental powers, to which the remedy in the nature of certiorari lies.'²⁸

²³ [1987] QB 815 ('Datafin').

²⁴ See *Building and Construction Industry Payments Act 2004* (Qld); *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act 2004* (NT).

²⁵ Under the Victorian Act, a nominating authority is authorised to nominate adjudicators by the Building Commission: *Building and Construction Industry Security of Payment Act 2002* (Vic) s 42.

²⁶ (2004) 61 NSWLR 421 ('Brodyn').

²⁷ (2004) 61 NSWLR 421, 438 [46].

²⁸ (2004) 61 NSWLR 421, 443 [58].

- 25 In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*,²⁹ Vickery J of the Supreme Court of Victoria comprehensively reviewed this issue and concluded that the remedy in the nature of certiorari lies to quash a determination of an adjudicator because an adjudicator is a statutory arbitrator rather than a private body.³⁰ This was because the appointment of an adjudicator and the exercise of the adjudicator's powers have their source in the relevant Act rather than in contract.³¹ His Honour went on to decide that, even if he was wrong to conclude that an adjudicator is not a private body, the adjudicator's determination would nevertheless be susceptible to the remedy in the nature of certiorari on the basis that the adjudicator performs functions of a public nature.³²
- 26 In arriving at his primary conclusion that an adjudicator is a statutory arbitrator, his Honour relied upon the following features of the legislation:³³
- (a) an adjudication application must be made to an authorised nominating authority;
 - (b) the nominating authority which selects and appoints the adjudicators is authorised by the Building Commission;
 - (c) it is the duty of an authorised nominating authority to which an adjudication application is made, to refer the application to an adjudicator as soon as practicable;
 - (d) following an adjudication determination, the respondent is required to pay any adjudicated amount;
 - (e) an unpaid claimant has a statutory entitlement to suspend the carrying out of construction work under the construction contract or to suspend supplying related goods and services under the construction contract;

²⁹ [2009] VSC 426 (*'Grocon'*).

³⁰ [2009] VSC 426, [65].

³¹ *Grocon* [2009] VSC 426, [57], [78]-[80].

³² *Grocon* [2009] VSC 426, [81].

³³ *Grocon* [2009] VSC 426, [61]-[64].

- (f) an unpaid claimant may recover as a debt due to that person in any court of competent jurisdiction the unpaid portion of the amount payable following the delivery of a payment claim if there has been an adjudication;
- (g) the Act confers on a claimant a statutory assignment of monies which may otherwise be payable by a principal to the respondent under a construction contract together with a lien over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent;
- (h) the above features constitute ‘a singular statutory mechanism for resolution of ... disputes as to payment claims made under the Act’ and ‘[t]here is ... no contracting out of the requirements of the Act or any of the procedures established under the Act’.³⁴

27 In *Grocon*, Vickery J reviewed landmark cases such as *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd*,³⁵ *Ridge v Baldwin*³⁶ and *O’Reilly v Mackman*³⁷ in relation to the meaning of the expression ‘tribunals exercising governmental powers’, as used by the High Court in *Craig v South Australia*.³⁸ His Honour concluded that the expression ‘may be taken to refer to any statutory tribunal or other body of persons which has the legal authority to determine questions affecting the common law or statutory rights or obligations of persons or individuals.’³⁹

28 His Honour held that adjudicators are tribunals exercising governmental powers because they exercise ‘statutory power in a quasi judicial capacity in furtherance of one of the proper functions of government, undertaken within the legislative

³⁴ *Grocon* [2009] VSC 426, [61].

³⁵ [1924] 1 KB 171, 205.

³⁶ [1964] AC 40, 74-9.

³⁷ [1983] 2 AC 237, 279.

³⁸ (1995) 184 CLR 163, 176.

³⁹ *Grocon* [2009] VSC 426, [48]. See also *Byrne v Marles* [2007] VSC 63, [65]. Vickery J also said that “[g]overnmental power” may be defined in common usage as power exercised by the State which enables it to carry out its proper functions’: at [41] (citations omitted).

framework provided for.⁴⁰ The relevant proper function of government was identified by his Honour to be the provision of a mechanism to resolve disputes within the building industry.⁴¹ His Honour regarded as significant 'the fact that the determinations of an adjudicator ... are the subject of direct statutory enforcement procedures which have the force of law'.⁴² Accordingly, the determinations of adjudicators were held to be subject to orders in the nature of the prerogative writs.

29 *Grocon*, if followed in other jurisdictions in preference to *Brodyn*, has the potential to spawn frequent applications to quash the determinations of adjudicators. It should be noted that, in applying the principles discussed above to the determinations before his Honour, Vickery J ultimately dismissed the proceeding on the basis that the plaintiff had failed to establish any ground for judicial review.⁴³

Natural justice where a self-represented litigant may be suffering a mental illness

30 In *Bahonko v Moorfields Community*,⁴⁴ at the commencement of a trial in the County Court, the judge was persuaded by the defendant to refer to the VCAT the question of whether the self-represented plaintiff required a guardian or administrator on the basis of opinions expressed in a psychiatrist's report, without giving the plaintiff an opportunity to make any submission on the matter. This occurred despite the plaintiff's attempts to object. The Court of Appeal held that this was a 'plain breach of natural justice'.⁴⁵

31 The Court said that the judge should have informed the plaintiff of his concerns about her mental capacity and then 'given her an opportunity to respond to his perceptions'.⁴⁶ Interestingly, the Court added that the right to be heard will be displaced where 'the psychological condition of a litigant is so acute as to make it

⁴⁰ *Grocon* [2009] VSC 426, [79].

⁴¹ *Grocon* [2009] VSC 426, [77].

⁴² *Grocon* [2009] VSC 426, [80].

⁴³ His Honour also drew attention to the desirability of consistency in relation to uniform legislation and said that amendments to the Victoria Act which complied with s 85 of the *Constitution Act 1975* (Vic) would be required to achieve consistency: *Grocon* [2009] VSC 246, [99]-[101].

⁴⁴ [2008] VSCA 6 ('*Bahonko*').

⁴⁵ *Bahonko* [2008] VSCA 6, [27].

⁴⁶ *Bahonko* [2008] VSCA 6, [27].

pointless to afford the litigant the opportunity to be heard.’⁴⁷ Finally, the Court noted that, although ‘stridency and discourtesy are no longer especially unusual amongst self-represented litigants, ... without more they are seldom a sufficient reason for a judge to refuse to listen.’⁴⁸

32 I applied *Bahonko* in a recent case involving a self-represented plaintiff.⁴⁹ *Bahonko* is an interesting reminder that the rules of natural justice apply, not only to the executive branch of government and administrative tribunals, but to all levels of the judicial hierarchy.

Review of the *Administrative Law Act*

33 The *ALA* was enacted in 1978. It simplified the erstwhile procedures for obtaining judicial review remedies in the form of the prerogative writs. It also removed some of the risks associated with the traditional procedures, such as being left with no remedy if the wrong prerogative writ was sought. Further, it negated some ouster clauses, provided a right to seek reasons for tribunal decisions and gave new life to the remedy of certiorari for error of law on the face of the record by providing that the record of tribunals and inferior courts included their reasons.⁵⁰

34 It did not take long, however, for commentators to criticise the Act and to call for its reform. A common theme in the criticisms was that the scope of the Act was constrained by the definitions of ‘tribunal’ and ‘decision’, and by its reliance on the common law grounds of judicial review. After some years of practical experience, it was also said that the very mischief that the Act sought to redress, namely the complexity and technicality of the procedures for judicial review, also bedevilled the Act itself.⁵¹

⁴⁷ *Bahonko* [2008] VSCA 6, [26].

⁴⁸ *Bahonko* [2008] VSCA 6, [28].

⁴⁹ *Slaveski v Victoria* [2009] VSC 423, [76].

⁵⁰ *ALA* ss 12, 8, 10.

⁵¹ The main articles and papers published before or during 1994 are listed in the bibliography to Peter Bayne’s report (see below n 52).

35 In 1994, Peter Bayne prepared a report entitled 'The Reform of Judicial Review in Victoria' for the Victorian Attorney-General's Law Reform Advisory Council.⁵² In that report, Mr Bayne recommended the enactment of a *Judicial Review Act* for Victoria with some of the features of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* ('ADJRA') as well as additional enhancements.

36 I understand that no major published paper or report on the *ALA* has been prepared since 1994. In their most recent edition of *Judicial Review of Administrative Action*, Aronson, Dyer and Groves devoted just over two pages to the *ALA*. They said that '[t]he Act's scope is flawed in substance because its judicial review mechanisms are limited to "decisions" of "tribunals"'. They also said that the Act's initial advantage of procedural simplicity is no longer strong because the traditional prerogative writ procedures have been replaced by the 'procedurally flexible' Order 56 procedure.⁵³

37 Consistently with these conclusions, at present, few judicial review proceedings are commenced in Victoria pursuant to the *ALA* compared to the Order 56 procedure. In the 2007 and 2008 calendar years, 93 judicial review proceedings were commenced under either the *ALA* or Order 56. Of these proceedings, 79 (or 85 per cent) were commenced under Order 56, while only 14 (or 15 per cent) were commenced under the *ALA*. The main reasons why Order 56 is preferred are:

- (a) Order 56 provides a limitation period of 60 days compared to the 30 days applicable under the *ALA*. Moreover, the 60-day limitation period in Order 56 can be extended in special circumstances, whereas the limitation period under the *ALA* cannot be extended. It is often too late to bring an application under the *ALA* by the time a decision is made to apply for judicial review.
- (b) The procedure for commencing an application for judicial review under Order 56 is simpler than the procedure under the *ALA*. The procedure under

⁵² Peter Bayne, *The Reform of Judicial Review in Victoria: A Report to the Attorney-General's Law Reform Advisory Council* (1994). Following consultation, the report was published by the Council: see Peter Bayne, *Expert Report 5: Judicial Review in Victoria* (1999).

⁵³ M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 26-8.

Order 56 involves the filing of an originating motion and attendance at a directions hearing, whereas the procedure under the *ALA* usually involves an initial oral application made *ex parte* before an Associate Justice, the making of an order nisi for review and a directions hearing on the first return of the order nisi.

(c) There is a perception in the legal profession that the requirements of the *ALA* are technical and inflexible, and that non-compliance with the Act's provisions could prove fatal to an application for judicial review.

38 Of course, the perception that the *ALA* is less user-friendly and flexible than Order 56 is ironic, given that the original rationale of the *ALA* was to free judicial review from the technical and rigid procedures that constrained applications for judicial review at common law.

39 In my opinion, the apparent sidelining of the *ALA* warrants a fresh and detailed analysis of the Act that includes consideration of whether the Act should be amended or replaced by new legislation. This issue could be considered in light of the current state of judicial review in Victoria and the experience in other jurisdictions that have adopted *ADJRA*-type legislation.⁵⁴

40 The only current review of the *ALA* of which I am aware is the 'Reforming Judicial Review in Victoria' project being undertaken by Dr Matthew Groves of Monash University. Dr Groves has received funding from the Legal Services Board to investigate 'why the [*ALA*] is hardly ever used and whether it should be reformed or replaced' by legislation that adopts 'the federal model for judicial review'.⁵⁵ He expects to complete the project by the end of this year.

41 Inevitably, any review of the *ALA* will examine the criticisms that have been levelled at the Act and express a view on whether they are justified. For completeness,

⁵⁴ See *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas).

⁵⁵ Legal Services Board, *Project Grants Awarded in 2008-09* <<http://www.lsb.vic.gov.au/documents/LSBProjectGrantsAwarded2008-09.pdf>>.

I summarise below some of the main criticisms that have been made by commentators over the years.

The ALA is limited in scope

42 Under the *ALA*, '[a]ny person affected by a decision of a tribunal' may apply to the Supreme Court for review.⁵⁶ 'Tribunal' is defined by the Act as:

a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.⁵⁷

43 As it will not always be clear whether a particular body is required to observe the rules of natural justice, there is often uncertainty about whether the body is subject to judicial review under the *ALA*. Ascertaining whether a particular body is subject to those rules will often involve a difficult legal and factual inquiry into, among other things, the body's functions and powers, and the legislation under which the body exercises those functions and powers. Further, a particular body may be bound by the rules of natural justice in relation to some of its activities but not others.

44 In addition to the frequent uncertainty attending the issue of whether a body is a 'tribunal' for the purposes of the *ALA*, the Act also imposes limits upon the bodies that are capable of being a 'tribunal'. As noted earlier, embedded in the definition of 'tribunal' is the word 'decision', which is defined in the *ALA* as:

a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision ...⁵⁸

45 In *Monash University v Berg*,⁵⁹ the Full Court distinguished between decisions that operate by law and those that operate by contract of the parties, and held that the award of a private arbitrator was an example of the latter. It concluded that such an

⁵⁶ *ALA* s 3.

⁵⁷ *ALA* s 2.

⁵⁸ *ALA* s 2.

⁵⁹ [1984] VR 383 ('*Berg*').

arbitrator was not a 'tribunal' for the purposes of the *ALA*.⁶⁰ As a result of *Berg*, the *ALA* has been construed as being confined to 'public or semi-public' tribunals or authorities.⁶¹ It has also been held that the *ALA* does not apply to the pre-decisional conduct of a tribunal and doubts have been expressed about the extent to which the *ALA* applies to decisions of a preliminary nature which have no operative legal effect of their own.⁶²

46 Given the limitations in the meanings of the expressions 'tribunal' and 'decision' in the *ALA*, a private body which exercises governmental power and whose decisions are subject to the remedy in the nature of certiorari in accordance with the *Datafin* principle might not be subject to the *ALA*.

The *ALA* does not affect common law grounds of review or remedies

47 The *ALA* neither codifies the common law grounds of judicial review nor establishes its own remedies. In both these respects, it can be contrasted to the *ADJRA*. As a result, applications for review under the *ALA* are attended by the same technicalities and limitations that detract from the common law grounds of review and remedies.⁶³

Obligation to provide reasons created by the *ALA* is limited

48 The obligation to provide reasons under s 8 of the *ALA* only attaches to a 'tribunal' as defined in the Act.⁶⁴ Further, the *ALA* does not specify what the statement of reasons must contain, or what is a reasonable time for the furnishing of such a statement.

⁶⁰ *Berg* [1984] VR 383, 388-9.

⁶¹ *Dominik v Eutrope* [1984] VR 636, 638.

⁶² *A B v Lewis* [1980] VR 151, 153; *Nicol v A-G (Vic)* [1982] VR 353, 361; *Freeman v Medical Practitioners Board of Victoria* (2004) 21 VAR 8, 11-12 [12]-[13]. Cf *Shire of Sherbrooke v F L Byrne Pty Ltd* [1987] VR 353, 357-8; *El Alam v Council of the City of Northcote* [1996] 2 VR 672, 675-8; *Masters v McCubbery* [1996] 1 VR 635, 649, 658-9.

⁶³ *ALA* s 7; *Berg* [1984] VR 383, 388-9. The *ALA* also refers to the remedy of quo warranto, which has now been abolished in Victoria: r 38.04(1) of the Rules. Rule 38.04(2) provides that, where a person acts in an office in which he or she is not entitled to act and, but for r 38.04(1), an information in the nature of quo warranto would lie against him or her, the Court may grant an injunction restraining the person from so acting and declare the office to be vacant.

⁶⁴ *Footscray Football Club Ltd v Commissioner of Pay-roll Tax* [1983] 1 VR 505, 512.

Practical difficulties with the procedure for seeking review under the ALA

- 49 Under s 3 of the *ALA*, judicial review is sought by applying for an order calling on the tribunal or its members ‘and also any party interested in maintaining the decision’ to show cause why the decision should not be reviewed. Section 4(1) of the Act provides that the application must be made within 30 days after the giving of notification of the decision or its reasons, whichever is later.
- 50 These requirements are inflexible and mandatory. If an applicant fails to name as respondents all people who are interested in maintaining the decision, the order nisi will be discharged.⁶⁵ Further, if an application is not made within the 30-day time limit, it cannot be brought at all.⁶⁶ As I have mentioned above, the ALA makes no provision for an extension of the time limit, even where there are exceptional circumstances. This is unusual in modern legislation of a procedural nature.
- 51 In light of these perceived shortcomings of the *ALA*, the first question that arises is whether, in 2009, the *ALA* is an effective mechanism for judicial review or has the Act outlived its usefulness. If the Act has outlived its usefulness, the next question that arises is whether any other statutory model – existing or novel – will provide a more desirable alternative. These questions are worthy of serious consideration.

⁶⁵ *Charalambous v Carideo* [1988] VR 604, 605-7.

⁶⁶ *Quality Packaging Service Pty Ltd v City of Brunswick* [1990] VR 829, 832.